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CALIFORNIA REPORTER

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SECOND SERIES

40 Cal.2d 65

MADRUGA v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY.

L. A. 22511.

Supreme Court of California, in Bank.

Dec. 17, 1952.

Petition by minority owner of vessel for writ of prohibition directing Superior Court in and for County of San Diego to refrain from further proceedings upon complaint of majority owners of vessel for partition and sale of vessel and distribution of proceeds thereof to all co-owners, on ground that respondent had no jurisdiction of subject matter. The Supreme Court, Shenk, J., held that respondent was competent to decree ownership interests, sale of vessel, and distribution of proceeds, where granting of relief did not conflict with federal maritime policy that majority owners determine use and employment of vessel.

Peremptory writ denied; alternative writ discharged.

1. Admiralty ⇐2

Statute providing that federal District Court shall have original jurisdiction, exclusive of state courts, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled, clarifies intent to preserve state's concurrent jurisdiction where a remedy is provided under state law which is available to plaintiffs. 28 U.S.C.A. § 1333; U.S.C.A. Const. art. 3, § 2.

2. Admiralty ⇐ 2

Under statute providing that federal District Court shall have original jurisdiction, exclusive of state courts, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled, any competent court having jurisdiction of parties is authorized to entertain civil action for enforcement of right conferred by maritime law, where adequate relief might be given in the action. 28 U.S.C.A. § 1333; U.S.C.A. Const. art. 3, § 2.

3. Admiralty ⇐2

Under statute providing that federal District Court shall have original jurisdiction, exclusive of state courts, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled, state court was competent to decree ownership interests, sale of vessel, and distribution of proceeds of such sale, where granting of relief did not conflict with federal maritime policy that majority owners determine use and employment of vessel. Code Civ. Proc. § 752a et seq.; 28 U.S.C.A. § 1333; U.S.C.A. Const. art. 3, § 2.

Levenson, Levenson & Block and Eli H. Levenson, San Diego, for petitioner.

Luce, Forward, Kunzel & Scripps, San Diego, for respondent.

SHENK, Justice.

Co-owners representing eighty-five per cent of the interest in the Oil Screw Vessel Liberty, Official No. 256,332, docked at the City of San Diego, filed in the superior court in San Diego County a complaint for partition by sale of the vessel and distribution of the proceeds to all the co-owners. Manuel S. Madruga, the owner of the remaining fifteen per cent interest, named as defendant in the complaint, filed a demurrer stating among other grounds that the superior court had no jurisdiction of the subject matter and that exclusive jurisdiction was in the federal court. The respondent court overruled the demurrer and announced that it would proceed by requiring the defendant to answer the complaint.

Thereupon the minority owner and defendant in the partition proceeding applied for the writ of prohibition directing the respondent court to refrain from further proceedings. The alternative writ issued. The jurisdictional question is submitted on the petition and the demurrer thereto.

The action in the respondent court is one for partition by sale of the vessel as personal property and for distribution of the proceeds to the several co-owners in accordance with their stated individual interests, pursuant to section 752a et seq. of the Code of Civil Procedure. It is alleged that there are no liens or encumbrances against the vessel. Partnership and accounting problems are not involved.

It is the petitioner's position that the jurisdictional question has been determined favorably to his contention by this court's decision in Fischer v. Carey, 1916, 173 Cal. 185, 159 P. 577, L.R.A.1917A, 1100. The respondent seeks to distinguish that case as one involving minority owners and contends that the state has concurrent jurisdiction with the federal court by virtue of the saving clause in the federal judicial Code.

Section 2 of Article III of the United States Constitution provides that the judicial power of the United States courts shall extend "to all Cases of admiralty and maritime Jurisdiction". The Act of Sept. 24, 1789, sec. 9, c. 20, 1 Stat. at L. 73, 77, Jud. Code, § 24 (3), 28 U.S.Code, § 41 (3), provided that the United States District courts should have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it". By decision this saving clause has been deemed to refer to the existing right to proceed against parties in personam, as in contract or tort. See North Pac. Steamship Co. v. Ind. Acc. Comm., 1917, 174 Cal. 346, 163 P. 199, workmen's compensation; Higgins v. Eva, 1928, 204 Cal. 231, 267 P. 1081, action for proportionate share of cost of salvaging and repairing the vessel; United States of Mexico v. Rask, 1931, 118 Cal.App. 21, 4 P.2d 981, lien for repairs. But it has been said that the right to proceed in rem is the distinctive remedy of admiralty and that neither Congress nor the state can confer jurisdiction upon the state courts to proceed in rem. See Benedict on Admiralty, p. 33 et seq. It has been held that the proceeding to partition (licitation or sale) is one in rem, although also in personam by the necessity of requiring all co-owners to be joined. Tucci v. Arbusto, D.C.S.D.N.Y. 56 F.2d 666.

Section 41 (3) of the Judicial Code was subsequently repealed and in 1948 section 1333, 28 U.S.C. was substituted. In 1949 Congress amended section 1333, 63 Stat. 101, to provide that the district courts have original jurisdiction exclusive of the state courts of any civil case of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled." Thus at this time there is no necessity to resolve the question whether the reservation of the original section referred only to remedies known to the common law. The question is whether there is now available to co-owners of a vessel a partition proceeding in the state courts.

In Fischer v. Carey, supra, 173 Cal. 185, 159 P. 577, L.R.A.1917A, 1100, decided in 1916, it was concluded that the state court did not have concurrent jurisdiction in a partition proceeding commenced by minority co-owners. There the minority owners sought an accounting, the appointment of a receiver to operate the vessel, the sale of the vessel and a division of the proceeds. The trial court appointed a receiver to take possession of and to operate the vessel, and to preserve her and her earnings until the further order of the court. On the appeal the defendants' contention that the controversy was cognizable exclusively in the federal district court prevailed. This court held that on the facts equitable relief by way of accounting was merely incidental to the principal relief sought, namely, the sale of the ship and a distribution of the proceeds; that it was essentially a proceeding in rem and thereby invaded the exclusive admiralty jurisdiction of the federal court. It was declared that admiralty had the sole power to say when and under what circumstances a vessel should be sold. It was pointed out

that the federal policy controlling the exercise of that jurisdiction was to keep the vessel in employment and to that end permit the majority to determine the use or employment of the ship, since the remedy by stipulation and bond was given to the dissenting minority; that in admiralty usually partition was granted in a controversy between equal owners, but denied on the application of minority owners. In treating of a possible refusal of the majority to employ the vessel the court pointed to language in The Seneca, Fed.Cas.No. 12,670, 3 Wall. Jr. 395, involving equal owners, declaring that since the minority could not compel the majority to employ the vessel, the majority should not be permitted to keep the vessel idle to the injury of the minority and to the public detriment, hence the ship could be valued and sold. Reference was also made to Story on Partnership, p. 611 et seq., which was quoted to the effect that the general maritime law authorized a sale in admiralty in all cases where by reason of disagreement among the co-owners, the ship could not be employed whether or not there was an equality in the dissenting interest. After an extensive review of decisional and text authority, it was said that the many declarations respecting the power in admiralty, whether on application of majority, equal or minority owners, did not preclude a determination that jurisdiction resided in admiralty to entertain cases respecting sale, but that such declarations were to be taken as specifying when and how, inconformity with applicable policy and existing remedies the jurisdiction would be exercised. See and cf. 48 Am. Jur. p. 78, § 108.

Decisional law that admiralty has jurisdiction in partition by the sale of a vessel does not necessarily determine that the State does not have concurrent jurisdiction when the remedy therefor exists. On the contrary there is authority to the effect that the state has concurrent jurisdiction in equity to partition a vessel by sale when there is disagreement among the co-owners as to how the ship should be employed. The leading case, Andrews v. Betts, 1876, 8 Hun, N.Y., 322, and others following it were treated in Fischer v. Carey, supra, 173 Cal. 185 at page 192, 159 P. 577, L.R.A. 1917A, 1100 et seq. In Andrews v. Betts unequal owners sought partition and sale of a propeller operated under acts of Congress on the Hudson River. It was decided that concurrent state jurisdiction existed under state equity powers (as distinct from any common law remedy) to decree partition and sale. That case was rejected in Fischer v. Carey because the common law provided no such remedy and partition in equity was therefore not a remedy reserved to suitors by the federal statute.

[1–3] The answer here is resolved by the 1949 amendment to the Judicial Code saving to suitors all other remedies to which they are "otherwise entitled." The amendment clarifies the intent to preserve the state concurrent jurisdiction where a remedy is provided under state law which is available to the plaintiffs. In Jordine v. Walling, 3 Cir., 1950, 185 F.2d 662, it was recognized that amended section 1333 authorized state courts to entertain suits by seamen for maintenance and cure. It was pointed out that section 1333 was amended to conform with the decisions, as in Andrews v. Betts, to the effect that any competent court having jurisdiction of the parties was authorized to entertain a civil action for the enforcement of a right conferred by the maritime law where adequate relief might be given in the action. It follows that the state court is competent to decree ownership interests, sale of a vessel, and distribution of the proceeds, at least where the granting of the relief does not conflict with the federal maritime policy that the majority owners determine the use and employment of the vessel. Therefore the respondent court has power to proceed on the petition of the majority owners here.

The peremptory writ is denied and the alternative writ is discharged.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, J., concurs in the judgment.

40 Cal.2d 43

CALIFORNIA TOLL BRIDGE AUTHORITY et al. v. KUCHEL.

Sac. 6319.

Supreme Court of California, in Bank.

Dec. 11, 1952.

Rehearing Denied Jan. 8, 1953.

The California Toll Bridge Authority, a public corporation, and another sought writ of mandate to compel Controller of the State of California to audit and approve a claim for printing costs in connection with Authority's resolutions to issue bonds to finance construction for additional approaches to the San Francisco-Oakland Bay Bridge, and the City and County of San Francisco, a municipal corporation, intervened. The Supreme Court, Shenk, J., held that California Toll Bridge Authority had no power under the Streets and Highways Code to authorize bonds to finance construction of additional approaches to the San Francisco-Oakland Bay Bridge.

Application for peremptory writ denied and alternative writ discharged.

1. Bridges ⇐7

General power of California Toll Bridge Authority to provide for "additional transportation facilities" under the Streets and Highways Code, did not include approaches to the San Francisco-Oakland Bay Bridge. Streets and Highways Code, §§ 30000–30506.

2. Statutes ⇐181(1)

The cardinal rule of statutory construction must accord to statutory language the legislative intention.

3. Statutes ⇐181(1)

In construction of a statute, legislative intention controls.

4. Statutes ⇐184

Where the legislature has clearly set forth the purpose of an act and has enacted a plan or design for its accomplishment, implemental portions of act must be construed so as to achieve the objective.

5. Bridges ⇐7

The California Toll Bridge Authority may exercise under the Streets and Highways Code only such additional powers as are necessary for due and efficient administration of powers expressly granted or as may fairly be implied from granted powers. Streets and Highways Code, §§ 30000–30506.

6. Bridges ⇐7

Since the California Toll Bridge Authority was created by and derives its powers from the legislature, the Authority does not have rights which are superior to legislative will. Streets and Highways Code, §§ 30000–30506.

7. Statutes ⇐220

Fact that both enabling and validation enactments were requested, to validate resolutions of the California Toll Bridge Authority for issuance of bonds to finance construction of additional approaches to the San Francisco-Oakland Bay Bridge, presumably at the instance of the Authority, and were rejected, was persuasive that Authority's power to issue such bonds was not deemed included within the Streets and Highways Code and was not deemed desirable for inclusion. Streets and Highways Code, §§ 30000–30506.

8. Bridges ⇐7

California Toll Bridge Authority had no power under the Streets and Highways Code to authorize bonds to finance construction of additional approaches to the San Francisco Oakland Bay Bridge. Streets and Highways Code, §§ 30000–30506.

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., and Robert E. Reed, Sacramento, for petitioners.

John W. Collier, City Atty., Daniel J. McNamara, Deputy City Atty., Oakland, Thomas M. Carlson, City Atty., Richmond, Fred C. Hutchinson, City Atty., Berkeley, J. P. Clark, City Atty., and J. Frank Coakley, Dist. Atty., Oakland, as amici curiæ on behalf of petitioners.

Ralph I. McCarthy and Lloyd C. Graybill, Sacramento, for respondent.

Dion R. Holm, City Atty., A. Dal Thomson, Public Utilities Counsel, Walker Peddicord and William F. Bourne, Deputy City Attys., San Francisco, for intervener.

SHENK, Presiding Justice.

The California Toll Bridge Authority seeks a writ of mandate to compel the respondent State Controller to audit and approve a claim for printing costs in connection with the Authority's resolutions to issue bonds to finance the construction of additional approaches to the San Francisco-Oakland Bay Bridge. The Director of the Department of Public Works is also a petitioner. An alternative writ issued. The respondent filed a demurrer and an answer to the petition. The City and County of San Francisco intervened by way of demurrer and answer to oppose the granting of the writ. The City's petition in intervention also shows that on June 17th, 1952, it filed in the Superior Court a complaint to enjoin the Authority from issuing and selling bonds for the construction of additional approaches. The petitioners have interposed a demurrer to the City's petition. Other Bay cities and counties have filed briefs in support of the petitioners' application for the writ.

Mandamus lies to compel performance of official duty in connection with the issuance of duly authorized bonds of the Authority. §§ 1085, 1086, Code Civ.Proc.; California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P.2d 425. The injunction action brought by the city is not an adequate remedy to the same end. That action looks to the enjoining of the bond issue. The city claims the appropriateness and adequacy of that action merely for the purpose of trying factual issues, if any such issues are necessary to be determined.

As noted, the respondents and the intervenor filed both demurrers and answers. The demurrers admit the alleged facts and place in issue the existence of the statutory power of the Authority to issue the bonds here in question. The answers purport to raise factual issues by questioning the nature of the proposed constructions as "additional approaches." If the Authority does not have the power invoked by it under existing statutes, the questions raised by the answers become immaterial.

The demurrers also necessarily admit the salient historical facts.

The California Toll Bridge Authority Act was adopted in 1929, Stats. 1929, p. 1489, and amendments, now §§ 30000–30506 of the Streets and Highways Code, Stats. 1947, ch. 176, p. 702. That general act declares the state policy (§ 30001) to acquire and own all toll bridges situated upon or along any of the highways of the State, and ultimately to eliminate all toll charges. Thereby the California Toll Bridge Authority was created to carry out the legislative objective. The Authority was vested with the general power to construct "toll bridges or other highway crossings", to issue bonds to provide for the cost of construction, and to retire the bonds from bridge revenues. §§ 30000–30506, Streets and Highways Code.

By Statutes of 1933, chapter 5, p. 11, the legislature made appropriations to the State Department of Public Works from the State Highway Fund of annual sums up to an aggregate of $6,600,000 for the acquisition and construction of approaches to the proposed San Francisco-Oakland Bay Bridge. By Statutes of 1933, chapter 9, p. 16, the Department of Public Works was authorized and directed to construct or cause to be constructed designated approaches to the Bay Bridge. The enactment described generally specified approaches to be constructed from the Westerly and the Easterly ends of the Bay Bridge. These were to be connected with the streets and highways when the Bridge was ready for use. The construction of "said approaches" was to begin on the sale of the first block of bonds issued for the construction of the Bridge under the 1929 act. The department was charged with the permanent duty to maintain and operate the bridge and approaches as a primary state highway. The "cost of constructing the said approaches and of maintaining and operating the said toll bridge and approaches" was required to be paid by the Department of Public Works out of funds made available for such purpose other than the proceeds of bonds issued by the Authority for the construction of the bridge, and other than the tolls and revenues received from the use and operation of the bridge, so long

as any bonds or other obligations issued by the Authority for bridge construction remained outstanding and unpaid. The department was authorized and directed to make expenditures for the operation and maintenance of "said bridge and approaches" from moneys accruing in the State highway maintenance fund available for the widening, resurfacing and reconstruction of state highways, or any other fund made available for such purposes. At the same session of the legislature, Stats. 1933, ch. 24, p. 58, it was provided that when all bonds issued by the Authority for the construction of the bridge have been fully redeemed, paid and retired, the Authority should continue to fix and collect tolls on the Bay Bridge until all moneys appropriated by the State and expended from the State Highway Fund for the acquisition and construction "of the highway approaches" have been fully repaid to the State.

The bridge and approaches were completed and opened to public traffic on November 12, 1936. In the 1947 codification, Stats. 1947, ch. 176, p. 702, chapters 9 and 24 of the 1933 statutes, insofar as they remained applicable, were included in the Streets and Highways Code as Sections 30600–30608. Section 30605 provides that the cost of "constructing the approaches and of maintaining and operating the toll bridge and approaches" be paid by the department of public works out of funds made available other than the proceeds of bonds issued for the construction of the toll bridge and other than the tolls and revenues as long as any construction bonds are outstanding and unpaid, except that in a proceeding for refunding or retiring outstanding construction bonds the Authority may provide for the cost of operation of the Bridge and any additional bridge or other crossing from tolls and revenues. § 30222 applied all the benefits of the law to refunding bonds.

Section 30606 provides that the department of public works shall make expenditures "for the operation and maintenance of the toll bridge and approaches" from the State Highway Fund, except that when thereafter the Authority provides for the payment of the cost of the operation of the bridge and any additional bridge or other highway crossing, from the tolls and revenues of the bridge and additional bridge or other crossing, the expenditure shall be made only for the purpose of the physical maintenance of the bridge and additional bridge or other crossing.

Section 30607 provides that after all bonds have been paid and retired, the Authority shall continue to fix and collect tolls on the bridge until all money that has been appropriated by the State and expended from the state highway fund "for the acquisition and construction of the highway approaches leading to and upon the toll bridge at both the Alameda County and San Francisco ends thereof has been fully repaid to the State" and credited to the State Highway Fund. Reimbursement is provided to be made from surplus net revenues after all bond obligations have been fully redeemed and the bonds retired

Section 30608 states that in any proceeding after July 17, 1951, for the issue of new bonds for the purpose of refunding or retiring bonds outstanding, there be included bonds in an amount sufficient to repay to the State all money appropriated and expended from the State Highway Fund for "the acquisition and construction of the highway approaches leading to and upon the toll bridge as described" in Chapter 9 of the 1933 Statutes, but not to exceed the sum of $6,600,000, repayment to be made to the State from the proceeds of the bonds and credited to the State Highway Fund.

The construction bonds issued by the Authority were refunded prior to 1951, that is, in 1944. On November 1, 1951, there remained outstanding and unpaid refunding bonds in the principal sum of $6,863,000. In that month by resolution and by subsequent supplementary resolution the Authority authorized the creation and issuance of bonds not to exceed $80,000,000 in Series A, B and C, with a final maturity date of March 1, 1973. Series A aggregating $21,000,000 provides for the call and redemption of the outstanding bonds and interest, for reimbursement to the State of the designated $6,600,000 advanced from the State Highway Fund for the construction of the approaches, and for the payment of ex-

penses of the issuance and sale of the Series A bonds and the redemption of the outstanding bonds. No question is raised concerning the validity of Series A bonds. They have been issued and sold. The State has been reimbursed for the advances from the State Highway Fund.

Each of the proposed B and C Series is in the principal sum of $25,000,000. They are to be secured by tolls in addition to the tolls collected for the operation of the bridge and necessarily the tolls collected for the retirement of the Series A bonds. Proceeds from the sale of Series B are to be applied to the construction of proposed approaches on the east or Alameda side of San Francisco Bay. Proceeds from the sale of Series C are to be applied to the construction of proposed approaches on the west or San Francisco side of the Bay.

The proposed approaches for the Alameda side are all located within a ten mile radius of the Toll Plaza in Alameda county and are described as:

(1) Webster Street Tube, including connections from East Shore Highway in Oakland to Atlantic Avenue in Alameda, being a portion of State Highway Route 226;

(2) Addition of third level to the existing distribution structure of the Bridge, being a portion of State Highway Route 5;

(3) East Shore Freeway from Fallon Street in Oakland to the existing El Cerrito overhead, being a portion of State Highway Route 69;

(4) MacArthur Highway from the existing distribution structure to Wellesley Avenue in Oakland, being a portion of State Highway Route 5.

The proposed approaches on the San Francisco side are to be located within a ten mile radius of the Fifth Street Ramp and are described as:

(1) Bay Shore Highway from the existing Bridge to the south city limits of San Francisco, being a portion of State Highway Route 68, together with the 13th Street connection therefrom to Mission Street, being a portion of State Highway Route 2;

(2) Connection at or near First Street from the Bridge to the Embarcadero and extending therefrom in a northerly and westerly direction from such connection to Lombard Street and Van Ness Avenue, being a portion of State Highway Route 224.

The cost of completing the described approaches to freeway status is estimated at $168,000,000. State Highway funds to the extent of $45,000,000 have already been spent or budgeted for expenditure on or before July, 1953, and an additional $73,000,000 is contemplated to be provided from State Highway funds which, together with the proceeds from the sale of the proposed Series B and C bonds, will be sufficient to complete the approaches on both sides of the Bay.

The demurrers necessarily admit the alleged desirability of constructing the proposed improvements to integrate and extend the existing system of approaches and thereby afford the maximum convenience of access to and egress from the bridge. The admitted facts disclose the general nature and location of the proposed constructions. With one possible exception—the addition of a third level to the east distribution structure, a portion of State Highway Route 5—the proposed constructions are extensions or improvements to the Bay Bridge approaches. It must therefore be apparent that they are not essential to provide access to or egress from the Bridge. Essential approaches exist for those purposes. Admittedly the proposed constructions simply integrate, extend and add to an existing system of approaches.

The petitioners necessarily concede that the 1933 special act, chapter 9, provided for the specific approaches which have been constructed, and that the codification of the 1933 act, sections 30600–30608 of the Streets and Highways Code, also applies to the existing approaches. They also concede that the cost of the original approaches was to be met by the department of public works from funds made available for that purpose other than the proceeds of the construction bonds. But they contend that there is nothing in the 1933 statute as codified which limits or restricts

the construction of additional approaches to be paid for from the proceeds of the additional bonds authorized by the Authority for the purpose and which are contemplated to be retired from bridge tolls. They invoke the general powers conferred upon the Authority pursuant to sections 30000–30506 of the Streets and Highways Code. Thus the claimed unrestricted effect of the provisions is said to proceed from the general definition of "Toll Bridge" to include "approaches" § 30004, and the general authority to provide for enlargements or extensions of toll bridges or to change the structure or design thereof to afford new or greater facilities and provide for the issuance of additional bonds in connection therewith. §§ 30224–30232. It is also contended that the 1933 special acts became obsolete when the Reconstruction Finance Corporation which had purchased the original bonds and urged the 1933 special enactments, see California Toll Bridge Authority v. Kelly, supra, 218 Cal. 7, 21 P.2d 425, had been repaid in 1939, and the bonds refunded in 1944 and 1951.

The deciding factor is that neither in the original statutory provisions nor in the codified sections was power vested in the Authority to issue bonds for the construction of the approaches to the San Francisco-Oakland Bay Bridge. When the legislature in 1933 amended the general 1929 statute to add the definition of "toll bridge" as inclusive of "approaches" Stats. 1933, ch. 10, p. 20, 22, now section 30004, Streets and Highways Code, it also enacted Chapter 9, Stats. 1933, p. 16, which dealt specifically with the San Francisco-Oakland Bay Bridge approaches. Chapter 9, insofar as applicable by reason of completion of the approaches, was carried into the 1947 codification, §§ 30600–30608 Streets and Highways Code, after the Reconstruction Finance Corporation had been repaid and the bonds refunded in 1944. Section 30600 defines "toll bridge" to mean "that certain bridge across San Francisco Bay known as the San Francisco-Oakland Bay Bridge and the approaches thereto."

[1] The general power to provide for "additional transportation facilities" does not include approaches. The definition of "additional transportation facilities" refers to passenger carrying means and equipment, §§ 30005–30006, such as the railroad facilities which were added after the completion of the Bay Bridge. Provision that the construction bonds should not be a debt of the state but should be retired from revenues collected from the operation of the Bridge does not negative state obligation for improvements to existing approaches after completion and as public convenience may require. The specific provisions hereinabove noted which make charges on the department of public works and on the State Highway Fund for the construction and financing of the approaches, suggest the state obligation after completion of the designated approaches and reimbursement from tolls to the State Highway Fund for advances in aid of construction. The provision that the cost of construction including the construction of the approaches should not be an obligation of the state is complied with by the repayment from the 1951 refunding bond sale proceeds of contributions from the State Highway Fund. § 30608; see In re California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 298 P. 485; California Toll Bridge Authority v. Kelly, supra, 218 Cal. 7, 21 P.2d 425.

Whatever may be the effect of the general powers of the Authority in connection with the construction of "toll bridges and other highway crossings" (and approaches), as designated in the codification of the general act, § 30000–30506, including the financing of the cost thereof, it is certain that the construction and financing of the San Francisco–Oakland Bay Bridge approaches are still subject to the special legislative provisions as codified. §§ 30600–30608.

The legislative history may not be overlooked. That history discloses a statutory framework by which the Authority was empowered to issue bonds for the construction of the Bay Bridge, and by which separate and specified means were provided to supply funds for the cost of construction of described approaches to the

Bay Bridge on both sides of the Bay. Power was not given to issue bonds for the construction of the approaches. and any such power otherwise implied under the general act was divested by the special enactments of 1933. Nor can we read from either the general or the special statutory provisions the power, after the Bay Bridge has been constructed and completed with "said" or "the" specified approaches, to issue bonds for "additional approaches", at least separately and apart from the exercise of any granted power to enlarge, extend or add to the existing Bay Bridge structure or Bay Bridge crossing.

[2–6] It is not questioned that the cardinal rule of statutory construction must accord to language the legislative intention; that such legislative intention controls, indeed, it is the law itself; that where the legislature has clearly set forth the purpose of the acts and has enacted a plan or design for its accomplishment, the implemental portions of the act must be construed so as to achieve the objective, and that the Authority may exercise only such additional powers as are necessary for the due and efficient administration of the powers expressly granted or as may fairly be implied from the granted powers. Dept. of Motor Vehicle v. Industrial Accident Comm., 14 Cal.2d 189, 195, 93 P.2d 131; Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 802, 810, 151 P.2d 505, 157 A.L.R. 324, citing cases; People v. Centr-O-Mart, 34 Cal.2d 702, 704, 214 P.2d 378. Since the Authority was created by and derives its powers from the Legislature, it does not have rights which are superior to the legislative will. Cf. California Emp. etc. Comm. v. Payne, 31 Cal.2d 210, 215, 187 P.2d 702. The power sought to be exercised by the Authority cannot be read into the statutes. In fact the necessary implication is a denial of that power. The general power may not supply it when the special statute denies it. And in any event section 30605 prevents the issuance of additional bonds so long as the refunding bonds, Series A, remain outstanding. The court may not overlook the effect and force of the statutory provisions merely because the 1933 statute, chapter 9, was enacted at the suggestion of the Reconstruction Finance Corporation which has been repaid for its investment.

[7] It is within the power of the legislature to enact desirable changes. The record shows that the existence of the Authority's power to authorize the B and C series of bonds was deemed doubtful. The subject-matter of legislation to authorize them was included in the call for the First Extraordinary Session in 1952 (Senate Journal 1st Ex. Sess. 1952, p. 2). Bills to that end were submitted to the legislature together with the opinion of the Legislative Counsel (Op. Legis. Counsel No. 752, Feb. 8, 1952), advising that the Authority did not have the power without statutory amendment to finance the proposed additional approaches by the issuance of bonds. Enabling legislation was given extensive consideration by both houses but the bills failed of final passage. Finally the legislature was requested to enact legislation to validate the B and C Bond series. The requested validation also failed of passage.[1] The fact that both enabling and validation enactments were requested, presumably at the instance of the Authority, and were rejected, is persuasive that the power now sought to be exercised was not deemed included within the existing statutes and was not deemed desirable for inclusion.

[8] It necessarily follows from the foregoing that the California Toll Bridge Authority was and is without power to authorize the B and C Series of Bonds and that power to that end must come from the legislature. This conclusion renders un-

1. The parties make the following references to the legislative record: Senate Bills 14 and 21: Senate Final History, 1st Ex. Sess.1952, pp. 48, 50. Assembly Bill 30: Senate Journal 1st Ex.Sess. Apr. 2, 1952, p. 209. Assembly Bill 33: Assembly Final History 1st Ex.Sess.1952, p. 87; Assembly Journal, 1st Ex.Sess. April 2, 1952, p. 583. Assembly Bills 18, 19, 1st Ex.Sess.1952; Assembly Journal, 1st Ex. Sess. Mar. 19, 1952, p. 197; Assembly Journal 1st Ex.Sess. Mar. 25, 1952, p. 259; Senate Journal, 1st Ex.Sess. Apr. 2, 1952, p. 213.

necessary the determination or discussion of other questions in this proceeding.

The application for the peremptory writ of mandate is denied and the alternative writ is discharged.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



40 Cal.2d 55

PROVIDENCE BAPTIST CHURCH OF SAN FRANCISCO et al. v. SUPERIOR COURT in and for CITY AND COUNTY OF SAN FRANCISCO.

S. F. 18648.

Supreme Court of California, in Bank.

Dec. 12, 1952.

Rehearing Denied Jan. 8, 1953.

Proceedings to prohibit a superior court from proceeding through a referee to hold election relating to discharge of pastor of church. The Supreme Court, Carter, J., held that court has jurisdiction of controversies arising in religious bodies, so long as civil or property rights are involved, even though some ecclesiastical matters may be incidentally involved.

Writ denied and alternative writ discharged.

Prior opinion 243 P.2d 112.

1. Religious Societies ⇐27(3)

Where court has jurisdiction to decide whether procedure established by usage, custom, rules and regulations of church, congregational in form, have been followed with respect to purported discharge of pastor, jurisdiction to determine what those usages and regulations were is necessarily included.

2. Appeal and Error ⇐107

In church controversy involving question of propriety of dismissal of pastor, order appointing referee to conduct an election of church members to determine whether services of pastor should be dispensed with was not appealable, but appeal might be taken from final judgment after reference.

3. Prohibition ⇐3(1)

Prohibition will not issue when there is another adequate remedy.

4. Prohibition ⇐9

Generally, a writ of prohibition issues only to prevent the commission of a future act, and not to undo an act already performed.

5. Prohibition ⇐3(5)

A remedy in the ordinary course of law by an appeal from a judgment at end of trial is not adequate when court has no jurisdiction to proceed with the action and no appeal is available before final judgment, and prohibition may, in proper circumstances, be obtained to prevent further proceedings.

6. Prohibition ⇐3(5)

Although appeal might be taken from final judgment in church controversy in which referee was appointed to conduct election of members to determine whether pastor should be dismissed, when basic objections were to jurisdiction to make the interlocutory judgment of reference, and reference had not been carried out, remedy by appeal from final judgment was not adequate, and prohibition was proper remedy to be pursued by pastor.

7. Religious Societies ⇐24

When civil or property rights are involved, the courts will entertain jurisdiction of controversies arising in religious bodies, even though some ecclesiastical matters are incidentally involved.

8. Religious Societies ⇐27(3)

Controversy in religious society, as to propriety of discharge of pastor, sufficiently involved property rights of the society to warrant assumption of jurisdiction by court, since question of who should receive the emoluments of office was present, even though some ecclesiastical matters were incidentally involved.

9. Religious Societies ⇐27(1)

A religious society incorporated under the non-profit corporation law may, as to its directors, require an accounting to be

made by its pastor insofar as church property and funds are concerned. Corporations Code, §§ 9301, 9500, 9600–9611.

10. Religious Societies ⇐1

A church is of the "congregational" type when each local group is in charge of all its affairs through majority vote of all its members, and when there is no human control from above.

See publication Words and Phrases, for other judicial constructions and definitions of "Congregational".

11. Religious Societies ⇐27(3)

Where religious society has no tribunal but the congregation, a court may determine whether a meeting at which pastor was removed was properly conducted according to the usage, contracts and rules of society, or according to pertinent principles of law where civil and property rights, such as the emoluments of the position, are involved, and in so doing, the court is not interfering with any ecclesiastical function.

12. Declaratory Judgment ⇐96
Prohibition ⇐5(3)

Where declaratory judgment action of church corporation against its pastor involved question of whether property and funds of church were being handled in accordance with by-laws and rules of church corporation and whether discharge of pastor was in accord with church custom and usage with respect to such position, matters were such as were cognizable by court, and prohibition against proceeding with action would be denied.

Edward D. Mabson, San Francisco, for petitioners.

Joseph E. Isaacs, Alan H. Critcher, Delany, Fishgold & Minudri and Joseph A. Murray, San Francisco, for respondent.

CARTER, Justice.

Prohibition is sought to restrain further proceedings by respondent court in an action pending therein in which Providence Baptist Church of San Francisco, a nonprofit corporation, and the trustees of the corporation are plaintiffs and F. B. Banks, the pastor of the church, is defendant.

The action is one for declaratory relief in which it was asserted by plaintiffs that defendant had been regularly and properly discharged as pastor of the church but refused to vacate the position and surrender documents and funds of the church. Issue was joined by defendant asserting that he is the pastor of the church and rightfully holding his position.

The action was tried for ten days before the court without a jury. Findings were made in which it was stated that the plaintiff church is a non-profit corporation duly organized and the trustees named were in 1950 the duly elected trustees of the corporation; that prior to October 1, 1950, defendant was the pastor and spiritual leader of the church but that a resolution removing him, to become effective on October 1, 1950, had been adopted by the trustees on September 15, 1950, and, at a meeting of the members of the congregation and corporation on September 16, 1950, a resolution had been adopted purporting to remove defendant as pastor as of October 1, 1950; that in spite of the resolutions defendant refused to vacate the position; that defendant and the secretary of the corporation have in their possession funds of the church and defendant has made no report thereof except on September 6, 1950, and two years prior thereto; that defendant has in his possession records of the corporation showing its assets but refuses to deliver them to the trustees; that certain described real property is owned by the corporation; that defendant claims but has no interest therein; that defendant organized the church on June 6, 1943 and it was incorporated on July 26, 1945, and defendant was pastor from the beginning; that a "full, free and fair" election cannot be conducted by defendant or the officers of the church and it is to its members' best interest that an election be held under the supervision of a court appointed referee to determine whether defendant shall be removed as pastor; that the articles of the corporation do not specify the number of trustees, but that there were three originally; that the only election of directors ever held was on August 21, 1950, when plaintiffs trustees (three of them) were

elected and on September 9, 1950, when two more were elected; that no by-laws have been adopted; that the commencement of the action was authorized by the trustees but the "church" employed no counsel to defend the action; that defendant is the pastor and spiritual leader of the church; and finally, that a controversy exists and the court has jurisdiction.

In its interlocutory judgment the court declared the matters so found and further declared: That the resolutions purporting to remove defendant as pastor did not do so; that the trustees are entitled to the funds and records of the corporation; that a named referee is appointed to hold an election among all the members after due notice to determine whether defendant should be removed as pastor and a named referee is appointed to take an account to ascertain what defendant owes the corporation; and reserving jurisdiction to make such further orders as might be necessary when the referee's reports were in.

Defendant's counsel filed notice of appeal from the interlocutory judgment on behalf of defendant and purportedly on behalf of the corporation, although as seen from the findings the corporation was a plaintiff in the action and represented by other counsel and the action was duly instituted by the duly elected trustees of the corporation. That appeal was dismissed by the District Court of Appeal, First District, Division One, on October 22, 1951, on the grounds that the judgment was interlocutory and hence not appealable. See Erickson v. Boothe, 35 Cal.2d 108, 216 P.2d 454; Lacey v. Bertone, 33 Cal.2d 649, 203 P.2d 755; Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11; Western Gulf Oil Co. v. Title Ins. etc. Co., 77 Cal.App.2d 217, 175 P.2d 56.

The petition for prohibition names the corporation and defendant as petitioners and is verified by defendant and Irene Parker who asserts that she is the secretary of the corporation. Counsel represents himself as attorney for defendant and the corporation. Inasmuch as he was not counsel for the corporation in the main action (because the corporation was one of the plaintiffs in that action and he represented the defendant, and no substitution of attorneys appears) we will treat the petitioner here as being defendant in the action.

[1] In his petition, petitioner alleges the procedural events that have transpired and then proceeds with many factual allegations such as: The existence of the corporation; that the church is a local independent entity owing no allegiance to any higher authority; that there are three directors of the corporation, of which petitioner is one and Irene Parker and Robert Fite are the others; that the form of the church is not congregational in that the members have no voice in its government, since deacons are appointed by the pastor and they in turn choose and remove the pastor. The return to the petition asserts that the church has a congregational government. All of those things were presumably determined at the trial of the action and we do not have a transcript of the proceedings. Implicit in the findings and interlocutory judgment is the conclusion that the church is congregational in form and the members select the officers including the pastor. Under such circumstances if it is decided, as it is later herein, that the court has jurisdiction to determine whether the church has followed the procedure established by its usage, custom, rules and regulations in respect to the pastor's position, then the court had jurisdiction to decide rightly or wrongly what those usages and regulations were and the judicial process should not be halted by prohibition. We take, therefore, the facts as appearing in the interlocutory judgment and findings.

[2–4] Preliminarily we have the question of whether a writ of prohibition is the appropriate remedy. Assuming that a jurisdictional question is presented (whether a court may adjudicate the issues presented which arise out of a church controversy), there is no appeal from the judgment entered because it is interlocutory and no appeal lies from the order appointing a referee, see Fallon v. Brittan, 84 Cal. 511, 24 P. 381; Gates v. Walker, 35 Cal. 289; 22 Cal.Jur. 701, there still remains the question of whether an appeal from the final judgment after the reference is adequate,

for of course an appeal lies from it. Prohibition will not issue when there is another adequate remedy. City of San Diego v. Superior Court, 36 Cal.2d 483, 224 P.2d 685. There is still to be had the reference by the referee to take an account and conduct an election, his report to the court, and its adjudication thereon. Petitioner claims as reasons why he will be injured by having those things done and an appeal thereafter taken, that he might lose the election and be removed from his position. There is a serious obstacle to a review of the interlocutory judgment by the writ which petitioner requests because there is nothing there to prohibit. The interlocutory judgment has been rendered and the referee appointed. In general, a writ of prohibition issues only to prevent the commission of a future act and not to undo an act already performed. Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107; 21 Cal. Jur. 581–3. However, here things remain to be done, that is, the carrying out of the references and the adjudication thereon. If there is no jurisdiction to conduct the election there was none to make the interlocutory judgment. Hence the basic objections are to that judgment. While we do not have a transcript of the trial proceedings leading to judgment yet we do have the findings and judgment.

[5, 6] It is the general rule "that the remedy in the ordinary course of law by an appeal from the judgment at the end of the trial is not adequate when the court has no jurisdiction to proceed with the action and no appeal is available before final judgment. Tomales Bay, etc., Corp. v. Superior Court, 35 Cal.2d 389 [392], 217 P.2d 968." City of San Diego v. Superior Court, supra, 36 Cal.2d 483, 485, 224 P.2d 685, 686. While here a partial trial has been had there remain things to be done which would be injurious to petitioner. "Where an order is not appealable, but is reviewable only upon appeal from a subsequent judgment, various factors, such as expense of proceeding with a trial and prejudice resulting from delay, may operate to make that remedy inadequate." Phelan v. Superior Court, 35 Cal. 2d 363, 370, 217 P.2d 951, 955. We hold therefore that petitioner's remedy by appeal from the final judgment is not adequate. Hence prohibition is the proper remedy.

[7, 8] We come, therefore, to the merits of the jurisdictional question. As long as civil or property rights are involved, the courts will entertain jurisdiction of controversies in religious bodies although some ecclesiastical matters are incidentally involved. Rosicrucian Fellowship v. Rosicrucian Church, 39 Cal.2d 121, 245 P.2d 481. That there are civil and property rights present is apparent from the findings and judgment. The real property of the organization and funds collected are involved. Necessarily involved in the determination of who shall be pastor is the question of who shall receive the emoluments of the office, which presents a problem involving civil and property rights.

[9] Here we have a religious group incorporated under the non-profit corporation law. Such a corporation may be formed for religious purposes. Corp.Code, § 9200. We may assume that the members of the corporation are members of the church, as such corporations contemplate membership, see Corp.Code, §§ 9301, 9600–9611, and that its powers are exercised by a board of directors. See Corp.Code, § 9500. Insofar as the church property and funds are concerned, we can see no reason why the corporation, through its directors, cannot require an accounting to be made by the pastor. See Bouldin v. Alexander, 103 U.S. 330, 26 L.Ed. 308.

[10, 11] With respect to the pastor's compensation and, necessarily incidental thereto, who shall receive it and who shall hold the position, a somewhat different question is presented. The court found that both the directors and members had passed resolutions removing defendant; that these resolutions were not effective; and that a fair election among the members could not be held under the auspices of either the directors or defendant. These findings indicate that the members may exercise the power of removal. So far as appears from the findings and judgment, there are no church tribunals which determine these

questions. Apparently the church is the congregational type in which its affairs are controlled by the members. That type exists "where each local group is in charge of all its affairs through majority vote of its members and there is no control from above." Rosicrucian Fellowship v. Rosicrucian Church, supra, 39 Cal.2d 121, 245 P.2d 481, 488. Although there are cases seemingly to the contrary, see 76 C.J.S., Religious Societies, § 89, it has been held that where a religious society has no tribunal but the congregation, a court may determine whether the meeting at which a pastor was removed was properly conducted according to the usage, contracts and rules of the society, or according to pertinent principles of law where civil and property rights, such as the emoluments of the position, are involved, and that in so doing the court is not interfering with any ecclesiastical function. See Dyer v. Superior Court, 94 Cal.App. 260, 271 P. 113; Longmeyer v. Payne, Mo.App., 205 S.W.2d 263; Jennings v. Scarborough, 56 N.J.L. 401, 28 A. 559; Evangelical Lutheran St. Paul's Congregation v. Hass, 177 Wis. 23, 187 N.W. 677; Runkel v. Winemiller, 4 Har. & McH., Md., 429, 1 Am.Dec. 411. In the Dyer case, the court was concerned with whether the trial court had jurisdiction to decide what group in a church had the authority to discharge the pastor and, upon so determining, to ascertain whether the proceedings for the discharge followed the established procedure. The court held that jurisdiction existed, stating, 94 Cal.App. at page 268, 271 P. at page 117: "With this understanding of the church government it becomes apparent that the respondent court not only has jurisdiction to construe the provisions of the constitution which we have been considering, but also has jurisdiction to determine that the Los Angeles Association of Congregational Churches and Ministers has withdrawn its fellowship from the petitioner, and the effect of such action, as to whether it is final and conclusive, as well as its effect upon the petitioner. * * * It is proper, however, to call attention to the fact that our Supreme Court has definitely aligned itself with those authorities which hold that the civil authorities cannot disregard the decisions of the church tribunals. * * * It also seems meet to say, in order to avoid subsequent possible confusion, that Watson v. Jones, supra [13 Wall. 679, 80 U.S. 679, 726, 20 L.Ed. 666], also quotes with approval from authorities to the effect that the supervisory power of the civil tribunals may not be invoked when the only property involved is the loss of clerical office and the salary incident thereto. Having determined that the respondent court has the authority to determine what the ecclesiastical tribunal decided, it also follows that it has the jurisdiction to determine whether one who has been deprived of the fellowship of the Los Angeles Association of Congregational Churches and Ministers can or cannot act or claim to act as pastor of one of the units constituting the Los Angeles Association."

In Maxwell v. Brougher, 99 Cal.App.2d 824, 222 P.2d 910, the court was considering the jurisdiction of the court to determine the manner in which the members and officers were to proceed in hearing and disposing of charges against the pastor. Jurisdiction was denied but on the ground that the decision of a church tribunal on ecclesiastical matters is final rather than whether the church had followed its rules. No consideration was given to the emoluments of the position. Here we have no such question. No church tribunal has properly and finally acted. We are holding that the court may determine whether the rules of the society have been followed and if they have not what will be the resulting effect on civil and property rights.

[12] Generally a court will decide whether a meeting was properly called or conducted when civil or property rights are involved. Trett v. Lambeth, Mo.App., 195 S.W.2d 524. In regard to the conduct of an election by the congregation or other church body or its officers under a court decree it has been said: "We do not mean that an election can never be called. If—for instance—a complaint should be filed stating that by force, threats, etc., the desire of the majority could not be ascer-

tained, then a court could properly decree a clear election—not to decide the result of a pending case, but as granting the relief prayed, i.e., a clear election." Elston v. Wilborn, 208 Ark. 377, 186 S.W.2d 662, 664, 158 A.L.R. 179. See Mazaika v. Krauczunas, 229 Pa. 47, 77 A. 1102, 31 L.R.A.,N.S., 686. An analogous principle is expressed in referring to shareholders meetings in an ordinary corporation: "The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made and direct such other relief as may be just and proper." Corp.Code, § 2238. That section is made applicable to nonprofit corporations. Corp.Code, § 9002. While we may not be dealing with the officer of a corporation in the strict sense (the pastor of a church is involved) the situation is similar and we see no reason why an election cannot be conducted where, as appears, a fair and proper election cannot be conducted by the church and the election previously held was irregular and of no effect. In other words the appropriate body of the church is assisted in acting within its proper sphere, according to its rules and regulations, to protect civil and property rights. If the problem was whether the pastor was preaching a theology contrary to the denominational doctrine or conducting religious services in a manner out of harmony with the ritual of the church, it would clearly not be within the province of a court to interfere, and the controversy would have to be settled by the church tribunals. But where, as here, the question presented is whether the property and funds of the church are being handled in accordance with the by-laws and rules of the church corporation or such by-laws and rules are being properly observed by the governing body of the church, those aggrieved may seek redress through court action.

The petition for the writ of prohibition is denied and the alternative writ is discharged.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

Because, in my opinion, prohibition is not the proper remedy, I concur in the judgment denying the petition for the writ and discharging the alternative writ.

The principal objections in this proceeding are to the interlocutory judgment, which is not appealable. In effect, Banks seeks, and the majority permit, the writ to be used as a method of appeal from that judgment. As stated in the opinion, "There is a serious obstacle to a review of the interlocutory judgment by the writ which petitioner requests because there is nothing there to prohibit." However, despite this difficulty, the basic issue is decided upon the merits without the benefit of any record on appeal or transcript of the evidence. Lacking these essentials to an adequate review of the judgment, the majority are forced to assume most of the relevant facts and imply much of the remainder from the limited, and confusing, findings made by the trial court. It is impossible, from the few facts which appear, to determine whether the issue is correctly decided upon the merits. It well may be that the record, which is not before this court, would disclose judicial interference with denominational doctrine.

The petitioner has not alleged any reasons why he will be injured by awaiting the final judgment, from which he may appeal. The trial has been completed and little remains to be done before a final adjudication. For this reason, the general rule of inadequacy of an appeal after trial when the court has no jurisdiction to proceed with the action is not here applicable. The expenditure of time and money alone is not sufficient to render the remedy by appeal inadequate. Jollie v. Superior Court, 38 Cal.2d 52, 56, 237 P.2d 641. Apparently, the delay and expense to carry the action to final judgment will be negligible in comparison to that already incurred.

The real purpose of the present proceeding is to review a judgment from which no appeal lies, rather than to prevent the court from hearing and determining an action of which it does not have jurisdiction. The final judgment, from which an appeal

will lie, obviously will be based upon issues of law and fact already determined by the interlocutory judgment. There is no showing that the petitioner will be prejudiced by waiting his proper remedy by appeal. If that procedure were followed, this court would then have before it a record upon which to review the judgment.

Rehearing denied; EDMONDS, J., dissenting.



114 Cal.App.2d 750

BARTEL v. ASSOCIATED DENTAL SUPPLY CO.

No. 15273.

District Court of Appeal, First District, Division 1, California.

Dec. 16, 1952.

Hearing Denied Feb. 11, 1953.

Action by landlord against tenant, a dental supply company, for rent and attorney's fees under a written lease. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Bray, J., held that provisions of the lease as to tenant's right to cancel or obtain the rent reduction was sufficiently ambiguous that parol evidence was properly admitted to determine the true intention of the parties.

Affirmed.

1. Evidence ⇐448, 461(1)

If language of an instrument is clear and explicit, intention of the parties must be ascertained from the writing alone, and parol evidence is admissible only where language is doubtful, uncertain or ambiguous on its face.

2. Evidence ⇐448

Unless a court can to a certainty and with sureness by a mere reading of the document determine which is the correct interpretation, extrinsic evidence becomes admissible as an aid to interpretation.

3. Landlord and Tenant ⇐37

A lease must be construed in its entirety.

4. Evidence ⇐450(5)

Where extrinsic evidence is offered to explain inconsistent provisions in a contract, the courts will not strain to find a clear meaning in an ambiguous document and, having done so, exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.

5. Evidence ⇐461(1)

When language used in a contract is fairly susceptible of one of two constructions extrinsic evidence may be considered, not to vary or modify the terms, but to aid the court in ascertaining the true intent of the parties and not to show that parties meant something other than what they said but to show what they meant by what they said.

6. Contracts ⇐169

Where any doubt exists as to purport of parties' dealings as expressed in their contract, the court will look to the circumstances surrounding its execution, including the object, nature and subject matter as well as to subsequent acts or declarations of the parties shedding light upon their mutual intention at time of contracting.

7. Contracts ⇐170(1)

A construction given contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.

8. Evidence ⇐450(4)

Where lease contract provided that lessee had right to cancel on six months' notice or at its option should become entitled to a reduction of rent if lessee's business declined due to certain causes named, sufficient ambiguity existed that, in lessor's suit for rent, parol evidence was properly admitted to determine whether lessee's rights to either cancel or obtain rent reduction were limited to the named causes.

Alfred S. Humphreys, Herbert Chamberlin, San Francisco, for appellant.

Marvin Handler, Dana, Bledsoe & Smith, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment against it in the sum of $17,650 for rent and attorney's fees under a written lease.

Contentions of The Parties.

No attack is made on the sufficiency of the evidence to support the findings and judgment, *if* parol evidence was admissible. Plaintiff contended and the trial court found that paragraph 33 of the lease was ambiguous and uncertain, and therefore parol evidence was admissible to show that the parties intended by it that the right of defendant lessee to *either* cancel *or* obtain a reduction of rent was conditional as limited in the second part of that paragraph. Defendant contended that the paragraph was neither ambiguous nor uncertain and that it provided that defendant had a right to cancel, with or without cause, *or* a right to reduced rent if the second part conditions should exist.

The questioned paragraph follows:

"From and after January 1st, 1949, the Lessee is granted *the right to cancel this lease upon six months' written notice or at its option shall become entitled to a reduction of rent* to be agreed upon mutually between the parties hereto *in the event that* the business of Lessee has declined to a degree that it would be impossible to pay the rent herein provided, due to any or all of the following causes or reasons; viz.:

"Competition of the Federal, State, or other Governmental authorities in the field of dentistry by health insurance or any other media directly affecting the practice of dentistry or in the event of a material decline in general business conditions or a major national financial or business depression or recession." (Italics added.)

[1–3] Generally, the rule is that "If the language of the instrument is clear and explicit the intention of the parties must be ascertained from the writing alone", and "Parol evidence is admissible only where the language used is doubtful, uncertain or ambiguous and only then in cases where the doubt appears upon the face of the contract." Eastern-Columbia v. System Auto Parks, 100 Cal.App.2d 541, 545, 224 P.2d 37, 40. Unless a court can "to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation * * * extrinsic evidence becomes admissible as an aid to interpretation * * *." MacIntyre v. Angel, 109 Cal.App.2d 425, 429, 240 P.2d 1047, 1050. With this latter rule in mind, let us examine the clause in question. Possibly a cursory reading of it might support defendant's contention that because of the "or," the lessee was given an absolute right to cancel while the right to reduced rent was conditional. But a more thoughtful study of it, in view of the other provisions of the lease, particularly the provision for a five-year term (the lease must be construed in its entirety, Cummins v. Bank of America, 17 Cal.2d 846, 849, 112 P.2d 593), prevents one from determining "to a certainty and with sureness" what is meant. On the very face of it, it does not appear reasonable that parties would contract that after January 1, 1949 (three years after the beginning of the lease) the lessee, with or without reason, could cancel, but his right to an undetermined reduction in rental should be conditional.

[4] The difference of the meaning sought to be given by the parties to the paragraph amounts, in effect, to the question of whether or not there should have been a comma between the words "notice" and "or." That very fact shows the uncertainty of the paragraph's provisions. A matter as important as a lease of business property at $650 per month should not be determined by a court from the writing alone as to whether a comma was intended or not. Such a determination could be only a guess. It might be pointed out here, that defendant itself, in its notice of cancellation and in its original answer in this case, interpreted its right of cancellation as being dependent upon the conditions set forth in the second portion of the paragraph. In applying the parol evidence rule the

courts are showing less rigidity than formerly. As well said by Mr. Justice Dooling in Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 561–562, 147 P.2d 84, 88, "* * * where extrinsic evidence is offered to explain inconsistent provisions in a contract courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists * * *." Mr. Presiding Justice Peters said in Wells v. Wells, 74 Cal.App.2d 449, 169 P.2d 23, 27: "Much can be said in support of the rule that parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is also admissible to show that what appears to be a perfectly clear agreement, in fact meant something entirely different to the parties." See also Jegen v. Berger, 77 Cal.App.2d 1, 7, 174 P.2d 489.

[5–7] In Barham v. Barham, 33 Cal.2d 416, at pages 422–423, 202 P.2d 289, at page 293, Mr. Justice Spence succinctly sums up the rules concerning the interpretation of agreements: "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties [citation], not to show that 'the parties meant something other *than* what they said' but to show 'what they meant *by* what they said.' [Citation.] Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement [citation]—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting.' [Citation.] To this latter point, it is said that 'a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.' [Citations.]"

[8] In our case, "In line with these rules designed to aid the court in the performance of its duty to make 'the language used by the parties serve, rather than subvert, their mutual intention, [citation]'" the trial court admitted evidence to show what the parties meant *by* what they said. Barham v. Barham, supra, at 33 Cal.2d at page 423, 202 P.2d at page 293.

In our case the language of the lease is fairly susceptible of either of the constructions contended for and hence extrinsic evidence was properly resorted to in order to determine the intention of the parties.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



114 Cal.App.2d 767

PAINE et ux. v. SMITH et al. (two cases).

Civ. 19259.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1952

Hearing Denied Feb. 11, 1953.

Action for damages to plaintiff when deed to realty was obtained from them by fraud of defendants. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered judgment for plaintiffs against defendants, and defendants appealed. The plaintiffs appealed from that part of the judgment which did not include the wives of the defendants. The District Court of Appeal, Drapeau, J., held that the transfer of landowner's royalty interest in oil is the transfer of the security, and must be in compliance with provision of Corporations Code requiring previous issuance of permit by commissioner of corporations.

Judgment affirmed.

1. Licenses ⇐18½(17)

The transfer of a landowner's royalty interest in oil is the transfer of a security

as to which the permit from the commissioner of corporations, required by statute, must be procured. Corporations Code, § 25008.

2. Fraud ⇐58(1)

In actions for damages on account of fraud whereby plaintiffs had transferred realty to defendants in consideration of transfer of defendants' royalty interest in oil, wherein it appeared that transfer of royalty interest was void because of noncompliance with provision of corporations code requiring permit of commissioner before conveyance of a security, record supported finding that wives of defendants were not parties to the fraud. Corporations Code, § 25008.

Andrew J. Copp, Jr., and H. Dexter McKay, Los Angeles, for plaintiff-appellants.

Roy C. Kaiser, Los Angeles, for defendant-respondents.

DRAPEAU, Justice.

The parties to this action entered into a written agreement whereby defendants, parties of the first part in the agreement, conveyed to plaintiffs, parties of the second part, 10% from the net recovery of oil from producing wells on property in which defendants owned a leasehold interest, 33⅓% of the net recovery from the first new well drilled on said property, and 2% from all additional wells drilled thereon.

As consideration for this conveyance plaintiffs granted (in the same writing) to defendants improved real property in the city of Los Angeles.

The trial court found that the agreement as it applied to defendants was a conveyance of a security as defined in section 25008 of the Corporations Code; that it had been issued without the permit by the Commissioner of Corporations required by law, and was therefore void and valueless; that the deed of the real property from plaintiffs to defendants had therefore been secured by fraud, to the damage of plaintiffs in the sum of $12,000.

Defendants appeal from the judgment which followed the findings, upon the ground that the agreement was not a security as defined by our Corporations Code.

Plaintiffs appeal from that part of the judgment which does not include the wives of defendants, Everett O. Smith and J. E. Mitchell.

[1] Defendants' appeal may be summarily disposed of: "It is settled that the transfer of a landowner's royalty interest [in oil] is the transfer of a security." Morello v. Metzenbaum, 25 Cal.2d 494, 154 P.2d 670, 672; and see cases there cited.

[2] Defendants' argument that because the parties entered into a partnership agreement, as further provided in the contract, and thereby relieved defendants from the provisions of the corporate securities act, is without merit.

Plaintiffs' argument that defendants' wives should have been found parties to the fraud fails because that question was one of fact for the trial judge.

It is in testimony that the wives never took any part in handling defendants' leasehold interest, or in the negotiations leading up to the agreement, and had no knowledge of the transaction, other than to sign the agreement at the request of their husbands. As was said in Engle v. Farrell, 75 Cal.App.2d 612, 171 P.2d 588, cited by plaintiffs, an appellate court does not review such conclusions.

The record supports the finding of no fraud as to the wives.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, Justice.

I dissent. In my opinion the document in question is not a "security."

Hearing denied; SCHAUER, J., dissenting.

114 Cal.App.2d 769

GIDRE v. HOUK.

Civ. 8148.

District Court of Appeal, Third District, California.

Dec. 17, 1952.

Action upon an open book account to recover balance allegedly due on money loaned from time to time. The Superior Court, Merced County, R. R. Sischo, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, J., held that evidence was not so inherently improbable on its face as to be insufficient to support recovery.

Affirmed.

1. Contracts ⇐350(3)
Joint Adventures ⇐5(2)

In action upon an open book account to recover balance alleged due on money loaned from time to time pursuant to written agreement, wherein sole defense was abandonment of written contract and substitution of joint adventure, evidence was insufficient to require finding of abandonment and substitution of joint adventure on theory that plaintiff's evidence was so inherently improbable on its face as to be insufficient to support recovery for plaintiff.

2. Appeal and Error ⇐1012(1)

To warrant an appellate court in determining there is no substantial evidence because of inherent improbability, there must exist a physical impossibility of the evidence being true or a state of facts requiring neither assumption nor inference to convince an ordinary mind of the falsity thereof.

D. Oliver Germino, Los Banos, for appellant.

Linneman, Burgess, Telles & Van Atta, Dos Palos, for respondent.

VAN DYKE, Justice.

Plaintiff and respondent brought this action upon an open book account to recover a balance due for money loaned from time to time to defendant and appellant. Appellant denied the allegations of indebtedness and as an affirmative defense alleged that the relations between himself and respondent had been that of joint adventurers, with nothing remaining due from either to the other. The court found that, pursuant to a written agreement between the parties, respondent had advanced moneys from time to time to appellant in connection with the farming by appellant of certain land; that there remained unpaid at the time of trial the total sum of $21,477, for which judgment was given. The court found to be untrue all of the allegations of the affirmative defense. The sole contention on appeal is that the evidence does not support the findings.

Appellant contended and testified that although the parties began operating under the written agreement yet this agreement was mutually abandoned and a joint enterprise initiated to take its place; that under the conditions of the joint enterprise agreement no profits had been made and that by its terms each party was to bear his own losses. Respondent, however, testified that all of the advances had been made under the written agreement. Concededly, that agreement called for repayment and respondent had never gotten back the balance for which judgment was given. Respondent further testified that the written agreement had never been abandoned. Appellant did not deny that he had received all of the money with which the respondent had charged him and he did not claim that he had paid back sums greater than the credits allowed by respondent save as to a small amount which the judgment adjusted.

[1, 2] It thus appears clearly from the record that the issue of abandonment of the written agreement and substitution of a joint venture agreement therefor, the only real defense tendered by appellant in his evidence, was the subject of conflicting testimony. However, appellant claims that, although there is an apparent conflict, yet the conflict is not real because testimony of the respondent is so inherently improbable that on its face it must be held insufficient to support the findings. In support of this contention he discusses the following matters: The record shows that respondent ad-

vanced moneys to appellant from time to time pursuant to the terms of the written agreement until mid-April, 1948; that no more advances were made until about three months thereafter when advances were resumed. Concerning this, appellant testified that the lapse was caused by the intervening inability of respondent to make further advances as called for by his agreement and appellant points to testimony of respondent wherein he was asked on cross-examination if it was not a fact that when he resumed making advances the moneys he loaned appellant were all in fact money belonging to appellant and owed to him by respondent as returns on produce shipped from lands other than the lands referred to in the written agreement. Respondent answered that question "Yes", but on redirect examination it appeared that he had not understood the question or was mistaken in his testimony and he proceeded to show, not only the specific dates and specific amounts of subsequent loans, but the very sources from which he obtained the moneys so loaned, showing that none of them were the funds of appellant; he concluded with the statement that although certain sums of money from the sale of these products on other lands were received by him for appellant they were also credited to appellant and did not form any part of the unpaid balance claimed by him under the written agreement. This re-established the conflict which apparently had been at least minimized by respondent's answer to the cross-examiner's question. Next, appellant, in support of his charge of abandonment, points out the following question and answer while respondent was under cross-examination: "Q. * * * Isn't it a fact that after April of 1948 you ran out of money and couldn't finance this crop according to this agreement and this very acreage that is mentioned in this agreement was turned over by you to Kelly Bambauer? A. I never ran out of money, but the Erreca transaction was turned over to Bambauer." However, this statement that would support a finding the written agreement had been abandoned was changed by later testimony that the dealings with Bambauer had nothing to do with respondent and did not affect the written agreement in any way. The trial court could accept this explanation and did. "To warrant it (an appellate court) in determining there is no substantial evidence because of inherent improbability, there must exist either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story." Adams v. Allen, 94 Cal.App.2d 941, 943, 211 P.2d 923, 924. We think the record discloses that the claim of appellant that the testimony of respondent was inherently improbable signally fails to meet the tests imposed under the foregoing statement of the rule.

The judgment is affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.



In re DUKE'S ESTATE.

LOGAN v. SHELBY et al.*

Civ. 4528.

District Court of Appeal, Fourth District, California.

Dec. 16, 1952.

Rehearing Denied Jan. 9, 1953.

Hearing Granted Feb. 11, 1953.

Petition by surviving husband to revoke his wife's will because no provision was made for him. The Superior Court, San Diego County, Dean Sherry, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Griffin, J., held that since deceased had known petitioner long prior to execution of the will and had discussed with him shortly after execution of the will their contemplated marriage which was to take place as soon as deceased obtained a final divorce decree from another, provision of will intentionally omitting to provide for her former husband and for any person who might after the date of the will become her heir by reason of marriage

* Subsequent opinion 261 P.2d 235.

showed an intention on the part of deceased not to make provision for petitioner.

Affirmed.

1. Wills ⇐191

Affidavit filed in District Court of Appeal in will contest established that decedent had been acquainted with her surviving husband long prior to execution of will in which she intentionally omitted to provide for her former husband or for any person who might become her heir by reason of marriage, and established that deceased and her surviving husband had, shortly after execution of will, discussed their contemplated marriage which was to take place as soon as deceased obtained final divorce decree from another. Probate Code, § 70.

2. Wills ⇐191

Where deceased had known her surviving husband long prior to execution of will and had shortly after execution of will discussed with him their contemplated marriage which was to take place as soon as deceased obtained final divorce decree from another, provision of will intentionally omitting to provide for deceased's former husband and for any person who might after the date of the will become deceased's heir by reason of marriage showed intention on part of deceased not to make provision for surviving husband. Probate Code, § 70.

Riley & Ferguson, John M. Riley, and David H. Thompson, San Diego, for appellant.

Russell G. Taliaferro, Escondido, for respondents.

GRIFFIN, Justice.

The deceased, Sallie Leftwich Duke, also known as Sallie L. Logan, left a will in which she included a provision intentionally omitting to provide for her former husband, and also "for * * * any person * * * who may after the date of this will become my heir * * * by reason of marriage. * * *"

Appellant filed a petition to revoke the will based upon the ground that he was the surviving husband. He alleges that the will was executed before their marriage; and that no provision was made for him by marriage contract or by the will, nor was "he mentioned in said will in such a way as to show an intention not to make provision" for him. He relies on Probate Code, § 70, which provides:

> "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The case was brought before the court upon stipulated facts which the court included in its findings. It found that the appellant "was in such a way mentioned therein as to show an intention on the part of the testatrix not to make provision for him", and that appellant "was identified in said will by reason of being within that designated classification which shows on its face that it necessarily was then the intention of the testatrix that said (appellant) * * * should take no part of her estate."

The point raised by appellant on this appeal is that the stipulated facts do not show that at the time of making the will the testatrix knew appellant or ever contemplated marriage to him; that the will does not mention him by name or by contemplated relationship, or by a classification which shows on its face that it necessarily was then the intention of the testatrix to include therein a subsequently acquired husband. In support of this contention he cites such cases as In re Estate of Rozen-Goldenberg, 1 Cal.App.2d 631, 37 P.2d 132; In re Estate of Axcelrod, 23 Cal.2d 761, 147 P.2d 1; In re Estate of Kurtz, 190 Cal. 146, 210 P. 959; and In re Estate of Turney, 101 Cal.App.2d 720, 226 P.2d 80.

The stipulated facts, at the time of the trial, were:

> "That the decedent * * * was divorced from Carl L. Duke on April

29, 1949; that a final decree of divorce was obtained on May 1st, 1950; that the decedent and contestant herein, Harry G. Logan, were validly married on May 3rd, 1950, and that they lived together as husband and wife until the date of decedent's death; that the decedent died on November 21st, 1951, * * * and that at the time of the decedent's death she was then validly married to contestant Harry G. Logan; that the decedent executed a valid will on May 14th, 1949, and that such will has been duly admitted to probate * * * that all of the property passing under said will was the separate property of decedent."

The will in question contains the following language:

"Fourth: I have, except as otherwise specifically provided in this will, intentionally and with full knowledge, omitted to provide for my former husband, Carl L. Duke, and for any child or children, relatives or heirs who may be living at the time of my death, including any person or persons who may after the date of this will become my heir or heirs by reason of marriage or otherwise."

"Fifth: If any person who is or claims under or through, a devisee, legatee or beneficiary under this will, or any person who if I died intestate, would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly, contest this will or attack, oppose or seek to impair or invalidate any provision thereof or conspire or cooperate with anyone attempting to do any of the acts or things aforesaid, then I do hereby bequeath to such person the sum of one dollar ($1.00) only."

In Re Estate of Rozen-Goldenberg, supra, a widow made a will wherein she provided for her daughter and for her grandchildren in case of the daughter's death, and stated that with full knowledge she had omitted to provide for her heirs living at the time of her demise. More than two years thereafter she met, for the first time, the man whom she afterward married. The court held such subsequent marriage operated to revoke the will as to the husband under Probate Code, § 70, in the absence of a marriage contract or a provision for the surviving spouse. The will was voided because the evidence showed that the testatrix first met the respondent more than two years after making the will and they were not married until six months later.

In Re Estate of Kurtz, supra, relied upon by respondent, the testator was engaged to marry the contestant at the time the will was made. The court held that this evidence was admissible to show who the testator intended to include in the phrase classifying those who would take or not take under the will, and said that accordingly the will was not revoked by reason of the subsequent marriage. The court, in the Rozen-Goldenberg case, differentiated the facts stated in Re Estate of Kurtz, supra, and remarked that the Kurtz case was not authority in that case "for the reason that a person, unknown to testatrix at the time of the execution of the will and subsequently married to her, could not have been included among those whom testatrix intended to refer to in her will." [1 Cal.App.2d 631, 37 P.2d 133.]

[1] Respondents moved this court, in support of the judgment, to take additional evidence on that subject. In support of the motion they presented an affidavit showing that in truth and in fact Sallie Leftwich Duke had been well acquainted with contestant for more than nine years before their marriage and that these parties discussed, as early as July, 1949, their contemplated marriage which was to take place as soon as the final decree was obtained, in the presence of two witnesses who would be willing to testify to such fact. No counter-affidavits were filed. This court granted the motion and ordered that evidence be taken on that subject unless the parties agreed to submit the matter on affidavits. On December 11, 1952, the parties stipulated that the court may consider the affidavits therewith filed which, in substance, are similar to the one

filed in support of the motion. No counter-affidavits were filed. It was further stipulated that upon filing the affidavits the court may consider the cause submitted for decision. This court finds that the allegations of the affidavits are true. The findings are amended accordingly.

[2] It now clearly appears that the testatrix, at the time she made the will, did intend to disinherit her "former husband", Mr. Duke, and did intentionally omit to provide by will for contestant or any person who might, after the date of the will, become her heir by reason of a subsequent marriage.

The findings and conclusions are now amply supported by the evidence.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



EATWELL et al. v. BECK et al.*

Civ. 19032.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1952.

Rehearing Denied Jan. 5, 1953.

Hearing Granted Feb. 11, 1953.

Action by purchasers of motel against vendors for fraud and deceit because of alleged misrepresentation as to monthly income of the motel. The Superior Court, Los Angeles County, Clarke E. Stephens, J., granted defendants' motion for nonsuit, and from the consequent judgment, plaintiffs appealed. The District Court of Appeals, Doran, J., held that the evidence established a prima facie case.

Reversed and remanded.

Fraud ⚖58(2)

In action by purchasers of motel against vendors for fraud and deceit because of alleged misrepresentation as to monthly income of motel, evidence established prima facie case.

* Subsequent opinion 257 P.2d 643.

Emmett E. Patten, Glen A. Duke, Monrovia, for appellants.

W. T. Stockman and Victor Bewley, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment following the granting of a motion for a nonsuit.

The action is entitled "Complaint for fraud and deceit". In substance the complaint alleges misrepresentation by defendants relating to the sale to plaintiffs of a motel for the sum of $43,000. Plaintiffs paid $7,000 cash and the balance was to be paid in installments. The alleged fraud refers to the monthly income which, it is alleged, was misrepresented.

The answer is a general and special denial. The defendants Thomas allege laches on the part of plaintiff.

As recited in appellants' brief, "After plaintiffs' evidence was introduced, defendants moved for nonsuit; plaintiffs moved to reopen the case to amend the complaint and for leave to submit evidence to complete proof. Plaintiffs' motion was denied and the nonsuit was granted by the court."

It is contended on appeal "That there is sufficient evidence to entitle appellant to have the case submitted to the trier of facts; that therefore the granting of the judgment of nonsuit is error.

> "That the trial court abused its discretion when it refused to permit plaintiffs to reopen their case, amend the complaint and supply the deficiency in their proof; as the granting of the nonsuit will bar plaintiffs from further action to obtain the relief to which they are entitled."

The record supports both of appellants contentions. It would serve no useful purpose to quote from the many decisions on the subject of nonsuits. Nor is it necessary to recite in detail any of the evidence submitted by plaintiff. It is sufficient to note, in the light of the law governing such situations, that plaintiff established a prima facie case. The motion for a nonsuit therefore should have been denied.

"That the trial court abused its discretion when it refused to permit plaintiffs to reopen their case, amend the complaint and supply the deficiency in their proof; as the granting of the nonsuit will bar plaintiffs from further action to obtain the relief to which they are entitled" there can be no question. The issue was purely technical and the administration of justice, as such, supports appellants' contention in this regard.

The judgment is reversed and cause remanded.

WHITE, P. J., and DRAPEAU, J., concur.



114 Cal.App.2d 728

GRANT et al. v. SCOTT.

Civ. 15147.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1952.

Rehearing Denied Jan. 14, 1953.

Hearing Denied Feb. 11, 1953.

Action by passenger, host driver, and owner of overtaken automobile against driver of overtaking automobile for injuries to persons and property allegedly resulting from overtaking driver's negligence when the automobiles collided after overtaking automobile had passed over crest of hill. Overtaking driver filed cross-action against owner and host driver for injuries to his person and property. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment on verdicts that both plaintiffs and cross-complainant take nothing, and plaintiffs appealed. The District Court of Appeal, Jones, J. pro tem., held that the verdicts constituted a holding that the accident was unavoidable, and, therefore, that such findings were not inconsistent.

Judgment affirmed.

1. Appeal and Error ⇐931(1), 1010(1)

Where evidence is conflicting and is challenged as being insufficient to support finding of trier of fact, the appellate court will view the evidence in light most favorable to respondent, will not weigh the evidence, will indulge in all intendments which favor sustaining of the finding, and will not disturb the finding if there is substantial evidence in support thereof.

2. Appeal and Error ⇐1002

In action by passenger, host driver, and owner of overtaken automobile against driver of overtaking automobile for injuries to persons and property allegedly resulting from collision, wherein overtaking driver filed cross-action against owner and host driver for his injuries to person and property, where jury rendered verdicts that both plaintiffs and defendant take nothing, any doubt arising from the conflicts in the evidence upon issue of due care would be resolved as a matter of fact and the verdicts would be upheld.

3. Automobiles ⇐247

In action by passenger, host driver, and owner of overtaken automobile against driver of overtaking automobile for injuries to persons and property allegedly resulting from overtaking driver's negligence when the automobiles collided after overtaking automobile had passed over crest of hill, wherein overtaking driver filed cross-action against owner and host driver for injuries to person and property, where jury rendered verdicts that both plaintiffs and cross-complainant take nothing, jury was in effect holding that the accident was unavoidable, and, therefore, the findings were not inconsistent.

Joseph A. Brown, San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

JONES, Justice pro tem.

This is an action arising out of a collision between two automobiles on Highway 101 near San Rafael in Marin County. One car was owned and driven by the respondent, Scott, and the other was owned by Leon Grant. At the time of the accident the Grant car was being driven by Melvin Lee Grant, son of the owner, and with his

father's permission. Miss Goodin, later Mrs. McCamey, was riding as a passenger in the Grant car. She and the young Mr. Grant had been to a dance at the Marin Town and Country Club and were returning to San Francisco. Mr. Scott, a teacher in Marin College, was also on his way to San Francisco, and riding with him was a young man named Norman Brown, who at the time of the trial was with the Air Corps in Alaska and was not available as a witness. The accident occurred between 2 o'clock and 2:30 o'clock in the morning at a point on the highway southerly from the crest of a hill near the Corte Madera intersection. Both cars were practically demolished and Miss Goodin and young Grant severely injured. Scott was also injured but not so seriously as the others.

The evidence is in conflict as to just how far from the crest of the hill impact took place. Grant places it at about 200 yards distant, while Scott fixed the point as much closer to the hill top. From the record it appears that at the point where the highway passes over the crest there is a curve in it. For some distance either way the highway consists of four lanes, two for southbound and two for northbound traffic.

According to Scott, he was driving southerly toward San Francisco in his own right hand or outer lane of the highway at about forty-five or fifty miles per hour with his headlights on low beam. Immediately after he cleared the crest of the hill his headlights picked up the Grant car some ten or fourteen feet distant from him. He immediately applied his brakes and swerved to the left but was unable to avoid striking the Grant car. The right front of his car struck the left rear of the Grant car turning it over.

Scott testified that when he first saw the Grant car it was without lights and was stopped to the right of the middle line of the right-hand lane of the highway, and that there was no other traffic on the highway to afford illumination. The driver of the Grant car testified that both the rear light and the headlights were on when they were struck, and both he and his passenger testified that their car was in motion and proceeding at the rate of about twenty miles per hour.

Mr. Barclay of the Highway Patrol testified that the point of impact was "In the curved lane, yes the outside lane." Scott testified:

"Q. Were you going down hill when you hit— A. I hit them downhill. It was parked just below the crest.

"Q. Going downhill? A. Very slightly downhill.

"Q. Not enough to interfere with your headlights showing objects between 14 and 15 feet away? A. Yes.

"Q. You think it reduced your ability to see cars ahead? A. Yes. * *

"Q. If you were not going over the crest of the hill you wouldn't have seen this car 15 feet away? A. I think so. * * *

"Q. Your testimony is it was stopped in the same lane of traffic you were in, however slightly to the right of that lane of— A. Very slightly to the right.

"Q. Could you determine whether there were any lights on the rear of the car at that time? A. There were no lights on the rear of the car."

The testimony of Scott places the Grant car where the beam of his headlights could not pick it up because of the curved highway and its declivity from the crest of the hill.

The complaint against Scott is in three separate counts, and all counts charge him with negligence in the operation of his automobile. In the first count, Leon Grant, the owner, seeks to recover for the loss of his car; in the second count, the son seeks redress for his injuries; and in the third count, Mrs. McCamey seeks to recover damages for the injuries which she sustained. In his answers to the respective counts of the complaint Scott denied the allegations of negligence, and as an affirmative defense to counts one and two he alleged contributory negligence on the part of the driver and the owner of the Grant car. He also filed a cross-action against the owner and operator of the

Grant car charging negligence and asking $2,500 for his injuries plus additional sums for the loss of his car. The answer to the cross-complaint denies the allegations of negligence, and affirmatively recharges Scott with negligence.

In its instructions the court stated to the jury that, "If you find that none of the parties was negligent, then none may recover."

The jury evidently followed this instruction for it returned verdicts awarding no damages to any of the plaintiffs, and none to Scott. The verdicts are:

"We, the Jury in the above entitled cause, find that plaintiff Yvonne Goodin McCamey should take nothing against defendant, James Coleman Scott."

"We, the Jury in the above entitled cause, find that the plaintiff and cross-defendant, Melvin Lee Grant, should take nothing against defendant and cross-complainant James Coleman Scott, and that defendant and cross-complainant James Coleman Scott should take nothing against the plaintiff and cross-defendant Melvin Lee Grant."

"We, the Jury in the above entitled cause, find that plaintiff and cross-defendant Leon Grant take nothing against defendant and cross-complainant James Coleman Scott and that defendant and cross-complainant James Coleman Scott take nothing against the plaintiff and cross-defendant, Leon Grant."

It is argued, and urged as a ground for reversal, that these verdicts are inconsistent. It is also contended that the evidence is insufficient to sustain the verdicts.

[1] When the evidence is conflicting and is challenged as being insufficient to support the finding of the jury or other trier of fact as is said in Re Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, 425: "It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is susbstantial evidence in the record in support thereof." Citing California Employment Comm. v. Betthesda Foundation, 54 Cal.App.2d 348, 350, 128 P. 2d 874, and People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558. And in determining whether the facts which the record in the case discloses are of sufficient substantiality with respect to the care exercised by the defendant so as to remove it from the realm of negligence, it is said in Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848, 851, that, "Standards of care are typically relative; rules of law are basically absolute. Hence, in regard to negligence, any attempt to screen factual conduct into legal classifications through a sieve of absolute law will be impracticable whenever the related circumstances admit of materially conflicting inferences. In other words, the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law."

[2] In accordance with the foregoing authority any doubt arising from the conflicts in the evidence upon the issue of due care must be resolved as a matter of fact and the verdicts upheld.

[3] When a jury has determined upon substantial facts that none of the parties involved in an automobile collision case were negligent in failing to exercise due care and that no recovery is to be had by any one, such determination is in effect a holding that the accident was unavoidable. Parker v. Womack, 37 Cal.2d 116, 121, 230 P.2d 823. Under such circumstances the findings are that all parties were using that care required of a reasonable and prudent person and no basis exists for the contention that the findings are inconsistent.

Those portions of the judgment appealed from are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

114 Cal.App.2d 799

In re DERN'S ESTATE.

FORD v. CAWTHON.

Civ. 4490.

District Court of Appeal, Fourth District, California.

Dec. 18, 1952.

Probate proceedings wherein testatrix's son and person named in the will both filed petition for probate of the will and for letters of administration with will annexed. The Superior Court of Orange County, Raymond Thompson, J., granted letters of administration with will annexed to the son, and the legatee appealed. The District Court of Appeal, Mussell, J., held that testatrix's statement in will that she wanted legatee to care for her funeral did not constitute appointment of the legatee as executrix.

Order affirmed.

1. Executors and Administrators ⇐15

An executor nominated by will has right to act unless there is some express provision of the law disqualifying him.

2. Executors and Administrators ⇐14

Statement of deceased in her holographic will that she wanted named person to care for her funeral did not constitute an appointment of the named person as executrix in view of fact that named person was not directed by the will to pay the debts or expenses of administration or to serve as executrix.

3. Trial ⇐394(1)

Findings of fact may be included in the order or decree and are not required to be in a separate document.

James C. Webb, Long Beach, for appellant.

Lyle M. Stevens, Long Beach, for respondent.

MUSSELL, Justice.

Mabel Dern died testate in Orange county on March 20, 1952. Her holographic will, admitted to probate herein, is in words and figures as follows:

"I, Mabel Dern, being of sound mind and memory of 14184 Graham St. of Barber City, Westminster, Calif thereby revoking any and all wills made by me before this

"First all my just debts be paid then I want Georgia to have my home and all furnishing in the house then I want Georgia to care for my funeral.

"June 16, 1951 Mabel Dern"

Georgia Lee Ford, granddaughter of decedent, filed a petition for probate of said will and for the issuance of letters testamentary to her. This petition was noticed for hearing on April 18, 1952. On April 7th Louis C. Cawthon, a son of decedent, filed a petition for probate of the same will and for letters of administration with will annexed. Both petitions for probate were heard on April 18, 1952.

The trial court found in its order admitting the will to probate that the allegations of the petition filed by Louis C. Cawthon were true and appointed him as administrator with the will annexed.

Georgia Lee Ford appeals from the order claiming that the court erred in failing to appoint her as executrix, in denying her petition for probate of will and in failing to make written findings of fact and conclusions of law.

[1, 2] Appellant argues that she was designated in the will to act as executrix and that it was the duty of the court to appoint her as such. Undoubtedly, an executor nominated by will has the right to act unless there is some express provision of law disqualifying him. Estate of Wellings, 192 Cal. 506, 510, 221 P. 628. However, in the instant case the will named no person to act as executor or executrix and the trial court so found. The wish of the decedent expressed in the words "I want Georgia to care for my funeral" does not constitute the appointment of appellant as executrix. She is not directed by the will to pay the debts or expenses of administration or to serve as executrix. The words "care for", as used in the will, are synonymous with expressions "to attend

to" and "to provide for" and do not impose duty on the appellant to pay funeral expenses. There is no direction in the will that appellant take charge of decedent's estate and pay expenses as was the case of Estate of Henderson, 196 Cal. 623, 238 P. 938 and Estate of Parker, 202 Cal. 138, 259 P. 431, relied upon by appellant to support her contention that "in regard to the naming of an executor, the testator's desires will be respected, even though they are not expressed with directness, but are reasonably deducible from the language of the will."

In Estate of Clary, 98 Cal.App.2d 524, 526, 220 P.2d 754, 756, it is said:

"Whether a writing purporting to be the last will of a decedent has with sufficient clarity designated a specific person to act as executor of his will must be determined by familiar rules for the interpretation of such documents. A holographic will must be perused for the purpose of determining the intention of the testator. In order to ascertain such intention, the document must be read in view of the circumstances under which it was written, the words must be given their ordinary grammatical sense and all parts of the writing must be considered in relation to one another. Estate of Peabody, 154 Cal. 173, 175, 97 P. 184.

"The appointment of an executor 'according to tenor' is not regarded with favor. While the decision of any case must be based upon its own facts, unless the court can conclude from the words of the testator that the latter intended for his devisee to take charge of the estate, collect its assets, pay its debts and perform the usual functions of an executor, it is error to appoint such devisee. Estate of Berg, 3 Coff.Prob. 259."

[3] The contention that the trial court failed to make written findings of fact and conclusions of law is without merit. Findings of fact may be included in the order or decree and are not required to be in a separate document. Estate of Rosland, 76 Cal.App.2d 709, 711, 173 P.2d 830. The trial court, in its order, found on the issues presented.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



114 Cal.App.2d 754

GROMEEKO v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 15520.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1952.

Prohibition proceeding by husband to restrain the Supreme Court, in a divorce proceeding, from nullifying order continuing hearing on husband's motion to set aside pendente lite order requiring him to pay his wife monthly support, counsel fees, and costs, from requiring husband to make payments under pendente lite order, or from hearing wife's motions to have husband held in contempt for failure to make support payments, to obtain further costs and counsel fees, and to stay proceedings until arrears in support money has been paid. The District Court of Appeal, Dooling, J., held that petition for prohibition would be treated as one for mandamus, and that a peremptory writ of mandate would be issued directing the Superior Court to hear and decide the motion to vacate the support order before hearing wife's motion to have husband adjudged guilty of contempt for failure to comply with the support order.

Peremptory writ of mandate issued.

1. Divorce ⇐218, 229

Where, in divorce proceeding by wife and upon condition that support payments stop pending hearing, the Superior Court granted wife continuance in hearing upon husband's motion to set aside pendente lite

order requiring husband to pay wife monthly support, counsel fees, and costs, and, thereafter, annulled the pendente lite order, the order stopping support payments pending hearing of motion to vacate the support order was still in effect after reversal of order annulling the pendente lite order, and a hearing on the motion to vacate was still pending.

2. Mandamus ⇐48, 154(1)

In prohibition proceeding by husband to restrain the Superior Court from nullifying order continuing hearing on husband's motion to set aside pendente lite order requiring husband to pay wife monthly support, counsel fees, and costs, the District Court of Appeals would treat the petition for prohibition as one for mandamus and would issue a peremptory writ of mandate directing the Trial Court to hear and decide the motion to vacate the support order before hearing wife's motion to have husband adjudged guilty of contempt for failure to comply with support order.

3. Prohibition ⇐5(3)

The District Court of Appeal would not prohibit the Superior Court, in a divorce proceeding, from hearing wife's motion for additional counsel fees and costs before hearing husband's motion to vacate the pendente lite order requiring husband to pay monthly support, counsel fees, and costs, since husband could show the Nevada divorce decree between the parties as his defense to the motion.

Abraham Glicksberg and W. L. A. Calder, San Francisco, for petitioner.

Hyman & Hyman, San Francisco, for respondent.

DOOLING, Justice.

Petitioner was sued for divorce, and an accounting of properties, his wife alleging among other things as cruelty that he fraudulently obtained a Nevada divorce decree from her. By an order of April 21, 1950 the court ordered petitioner to pay $150 monthly for support, $300 on account of counsel fees and $20 on account of costs, after petitioner had withdrawn his objection to the jurisdiction of the court on the ground that plaintiff was no longer his wife. However on August 18, 1950 petitioner gave notice of motion to set aside the pendente lite order of April 21, 1950 upon the same ground of lack of jurisdiction. When this motion came up for hearing on August 20, 1950 the wife's attorney moved for continuance. The court gave her the choice either to proceed or to accept as condition of continuance that further payments by petitioner be suspended. The wife chose the latter and the following minute order was made on August 30, 1950: "In this action, the Court, after argument by respective counsel, ordered motion for continuance granted until October 10, 1950, at 10:00 o'clock a. m. *on condition that support payments stop pending hearing of said motion.*" (Emphasis ours.) After a demurrer to the original complaint had been sustained, the wife on October 10 filed an amended complaint in which she expressly asked annulment of the Nevada decree on the ground of fraud by the husband, lack of Nevada domicile, invalidity of appointment of the attorney who represented her in the Nevada trial, etc. At the hearing to set aside the pendente lite order the court sustained objections to questions of the wife intended to substantiate these allegations, as being an attack on the Nevada decree which were not permitted as part of that hearing, and by an order signed October 17, 1950 annulled the pendente lite order of April 21, 1950. On appeal of the wife Division One of this court on March 28, 1952 reversed the order of October 17, 1950 on the ground that a showing of the invalidity of the Nevada divorce decree should have been permitted on the hearing of the motion to set aside the pendente lite order, Gromeeko v. Gromeeko, 110 Cal.App.2d 117, 242 P.2d 41, where a more complete statement of the above facts is found. Hearing in the Supreme Court was denied.

After the remittitur had come down the wife on June 2, 1952 caused an order to show cause in contempt to issue for petitioner's alleged failure to comply with the

provision of the order of April 21, 1950 for payment of $150 support money per month and noticed a renewal of motion and further motion for costs and counsel fees pendente lite and thereafter on June 19, 1952 moved for stay of proceedings until petitioner had paid the arrears in said support money stated to amount to $3300 plus interest. On June 9, 1952 petitioner had moved for rehearing of his motion to set aside the order of April 21, 1950, remanded by the District Court. On July 1st petitioner filed objection to the entertaining of any of the motions of the wife until his motion to set aside the original pendente lite order had been decided on the ground that until such time the court was without jurisdiction to take any action which required the existence of marriage and because until the determination of his motion the condition in the continuance order of August 30, 1950 "that support payments stop pending hearing of this motion" was valid and in force.

All matters mentioned were continued until August 4, 1952. After each party had argued the precedence of its motions the judge indicated that he considered the original order of April 21, 1950 in full force and effect and that if not restrained he would rule so on August 15 on the wife's motion.

We issued an alternative writ of prohibition restraining the Superior Court from any action nullifying the order of August 30, 1950 or requiring defendant to make payments under the order of April 21, 1950 or hearing the pending motions of the wife until further order of this court and to show cause why it should not be so restrained absolutely.

Petitioner's argument is that the reversal by the District Court of Appeal brought the proceedings back in the same position as if the order of October 17 granting the motion to set aside the pendente lite order had not been made, that the matter should proceed further with the recognition of all rights of the parties as they stood prior to the decision reversed and that the temporary stay of support payment was to continue "pending hearing" that is until decision of the motion to set aside.

[1] We entertain no doubt that the order stopping payments pending hearing of the motion to vacate the support order, properly construed, is still in effect. Its purpose was expressed by the judge who made it to be to suspend the enforcement of the support order until he had ruled on the motion to vacate it, but even giving the stay order the narrowest possible construction it is perfectly clear that the *hearing* on the motion to vacate is still *pending* as a result of the reversal and remand of the previous order by the other division of this court. Odlum v. Duffy, 35 Cal.2d 562, 564, 219 P.2d 785.

[2] However, says respondent, the court had jurisdiction to make the original support order. See Gromeeko v. Gromeeko, supra, where the court said, 110 Cal.App.2d at page 120, 242 P.2d at page 43: "Plaintiff proved the marriage. That shifted to Andrew the burden of showing what, if anything, prevented that marriage ceremony from establishing the relationship of husband and wife between these parties, or what, if anything, later occurred to terminate that relationship. Bernheimer v. Bernheimer, 103 Cal.App.2d 643, 230 P.2d 17; Thomas v. Thomas, 66 Cal.App.2d 818, 153 P.2d 389; Bancroft v. Bancroft, 9 Cal. App.2d 464, 50 P.2d 465. Andrew did not meet that burden. Upon that hearing there was presented to the court no evidence whatsoever concerning the Nevada divorce decree or any of its incidents." From this respondent argues that because under the evidence then produced the court had jurisdiction to make the original support order it has continuing jurisdiction to interpret the order staying its enforcement and hence prohibition will not lie. The argument is persuasive but the point need not be decided. Since the interpretation put on the stay order by the trial judge seems clearly erroneous and would constitute in our view a clear abuse of discretion we may treat the petition for prohibition as one for mandamus and correct the court's threatened action by the latter writ. Simmons v. Superior Court, 96 Cal.App.2d 119, 214 P.2d 844, 19 A.L.R.2d 288.

[3] Petitioner also asks us to prohibit the trial court from hearing the motion for additional counsel fees and costs before hearing the motion to vacate. We see no reason to do so. On that motion petitioner can make his showing in defense based on the Nevada decree and if respondent satisfies the court of its prima facie invalidity the court will be empowered to make such order for counsel fees and costs to prosecute the litigation as it may deem justified.

A peremptory writ of mandate will issue directing the trial court to hear and decide the motion to vacate the support order of April 21, 1950 before hearing the respondent's order to show cause why petitioner should not be adjudged guilty of contempt for failure to comply with that order.

NOURSE, P. J., and GOODELL, J., concur.



114 Cal.App.2d 630

ABOUDARA v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15156.

District Court of Appeal, First District, Division 2, California.

Dec. 11, 1952.

Action for injuries to a passenger in defendant city's bus as the result of being thrown to the floor when the bus was stopped suddenly to avoid striking an automobile which stopped suddenly in front of the bus. From a judgment of the Superior Court, City and County of San Francisco, George W. Schonfeld, J., for defendant, plaintiff appealed. The District Court of Appeal, Jones, J. pro tem., held that whether the bus driver acted in a reasonably prudent manner for his passengers' safety in stopping the bus suddenly was a fact question for the trial court and that the evidence supported his finding that the bus driver was not negligent.

Judgment affirmed.

1. Appeal and Error ⇐991

Whether driver of city bus acted in reasonably prudent manner for his passengers' safety in stopping bus suddenly to avoid striking automobile, which stopped suddenly in front of bus, was a fact question for trial court in action for resulting injuries to bus passenger thrown to floor of bus.

2. Appeal and Error ⇐1010(1)

In action for injuries to city bus passenger, thrown to floor of bus when it was stopped suddenly to avoid striking automobile, which stopped suddenly in front of bus, trial court's finding, supported by evidence, that bus driver acted in reasonably prudent manner for his passengers' safety is binding on District Court of Appeal on appeal from judgment for defendant city.

3. Appeal and Error ⇐996

The District Court of Appeal is bound by fact findings of trier of facts on evidence from which reasonable minds might draw different conclusions.

4. Carriers ⇐316(3)

The res ipsa loquitur doctrine was inapplicable in action for injuries to city bus passenger thrown to floor of bus when it was stopped suddenly to avoid striking automobile which suddenly stopped in front of bus, where complete explanation of cause of action was given by witness who directly observed its occurrence.

5. Negligence ⇐121(2)

The inference of negligence, which trier of facts may draw from application of res ipsa loquitur doctrine in proper case, is in nature of indirect evidence, but conclusion therefrom that negligence exists is not mandatory.

6. Carriers ⇐320(1)

In action for personal injuries to passenger in defendant's bus, whether plaintiff's prima facie case arising from application of res ipsa loquitur doctrine is adequately met or balanced by defendant's showing of bus driver's careful conduct and circumstances of accident is sole province of jury to determine from all evidence.

7. Appeal and Error ⇐1010(1)

A reviewing court is bound by and may not disturb trial court's fact finding, if supported by any substantial evidence, whether contradicted or not.

8. Appeal and Error ⇐1001(1)
Trial ⇐142

Where either of two inferences may reasonably be deduced from facts in evidence, there is fact question for jury, even though all facts are admitted or uncontradicted, and jury's verdict cannot be set aside by reviewing court as not sustained by evidence.

9. Appeal and Error ⇐930(1)

In reviewing fact question determined by jury on evidence from which either of two inferences might reasonably be deduced, all reasonably possible inferences favorable to prevailing party must be indulged by appellate court.

10. Carriers ⇐318(4)

In action for injuries to city bus passenger as result of being thrown to floor of bus, testimony of another passenger, standing directly behind bus driver at time of accident, that bus was stopped suddenly when automobile ahead of it stopped suddenly, was sufficient to support trial court's finding that bus driver was not negligent.

Coffey & Margolis, San Francisco, for appellant.

Dion R. Holm, City Atty., and Edward F. Dullea, Deputy City Atty., San Francisco, for respondent.

JONES, Justice pro tem.

This is an action to recover damages for injuries sustained on account of the alleged negligence of the defendant. The trial court found that the defendant was not negligent, and judgment was entered accordingly. From this judgment the plaintiff has appealed.

On the date of the accident appellant was riding as a passenger on a municipally owned bus operated by the defendant. The route of the bus was westerly on Market Street and thence to the Richmond District in San Francisco. The accident occurred between 4:30 p. m. and 5 p. m. at the height of the commuter traffic. As the bus approached the intersection of Stockton Street an automobile was proceeding along directly in front of it. When this automobile stopped suddenly the bus was also suddenly stopped to avoid striking it. By this operation the appellant was thrown to the floor and injured.

Only two witnesses were called to testify upon the trial of the case. Appellant took the stand in her own behalf, and the defendant called as its only witness, Mrs. Lucille Rothblatt. Mrs. Rothblatt was also a passenger on the bus, and, at the time of the accident, she was standing directly behind the bus driver facing in the same direction. In her testimony she detailed what occurred as follows:

"Q. What did you observe in relation to a car preceding the bus as it approached Stockton Street there? A. Do you mean before the signal changed?

"Q. Just before, yes. A. There was a car traveling in front of the bus.

"Q. At what speed would you say it was traveling, your bus, now? A. About 20 miles an hour I should judge.

"Q. The automobile was traveling that speed? A. About the same.

"Q. And the bus was traveling about the same speed? A. Approximately, yes.

"Q. Approximately how far behind the automobile was the bus? A. It was running in the normal line of traffic. I would say a few feet behind.

"Q. When you first observed the signal what was the condition of the signal? A. The car in front of the bus started to cross and the signal change, and it stopped very abruptly and the bus driver was forced to stop or hit the car.

"Q. The automobile in front stopped very abruptly? A. The automobile in front stopped very abruptly. I thought he was going right through. The signal changed and I watched to

see what would happen, and he slammed on the brakes and stopped very abruptly, and the bus driver was forced to stop. * * *

"Q. This car, the car ahead of the bus, as it approached the intersection, the intersection signal changed, is that correct? A. The signal changed.

"Q. The signal changed and this bus—this automobile then stopped, is that correct? A. It stopped. It started to stop suddenly, as some drivers decide they will make it, the last car over, then change his mind as the pedestrians step from the curb, and stop abruptly, and jammed on his brakes. * * *

"Q. And it was going along you would say at a pretty good speed? A. No, just normal, as any other bus I have ridden on that hour of night.

"Q. But you say it was following within a few feet? A. The normal line of traffic.

"Q. A few feet? A. Yes a few feet.

"Q. When this car ahead stopped the bus then stopped? A. To avoid hitting the car.

"Q. The car ahead stopped suddenly, is that correct? A. Yes.

"Q. And the bus itself stopped suddenly, is that correct? A. Yes. * *

"Q. You noticed Mrs. Aboudara being thrown to the floor? A. That is right."

[1–3] It is obvious from the facts as detailed by this witness that the driver of the bus was confronted with the choice of either stopping the bus or striking the car in front. Whether in so stopping he acted in a manner which was reasonably prudent for the safety of his passengers was a question of fact for the trial court. The court below having answered the question in the affirmative, this court is bound by its determination. When, as is said in James v. American Buslines, 111 Cal.App. 2d 273, 244 P.2d 503, 505, "there is presented for review simply a question of fact from which reasonable minds might draw different conclusions this court is bound by the findings of the trier of fact."

[4–9] It may be said in answer to the contention of appellant that the doctrine of res ipsa loquitur applies to the case that a complete explanation of the cause of the accident was given by the witness who directly observed its occurrence. This explanation proved satisfactory to the trial court as is evidenced by its finding that the defendant was not negligent. "The inference of negligence, which the" trier of fact "may draw from an application of the doctrine of res ipsa loquitur, in a proper case, is in the nature of indirect evidence, but the conclusion therefrom that negligence exists is not mandatory." Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 373, 168 P.2d 457, 461. As is said in James v. American Buslines, 111 Cal.App. 2d 273, 276, 244 P.2d 503, 505, "In an action for personal injuries sustained by plaintiff while a passenger in defendant's bus, it is the sole province of the jury to determine from all the evidence whether plaintiff's prima facie case arising from the application of the doctrine of res ipsa loquitur is adequately met or balanced by defendant's showing of the conduct of the driver and the circumstances of the accident." There is a legion of authorities to the effect that where there is any substantial evidence, contradicted or uncontradicted, which will support a questioned finding of fact the reviewing court is bound by the finding and may not disturb it on appeal. See Haak v. Southern Cities Transit Company, 94 Cal.App.2d 262, 210 P.2d 522; Collas v. Pasadena City Lines, 89 Cal.App. 2d 93, 200 P.2d 77; Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 168 P.2d 457. In Crooks v. White, 107 Cal. App. 304, 309, 290 P. 497, 499, it is said that "even though all facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may reasonably be deduced from those facts, there still remains a question of fact to be determined by the jury, and that the verdict of the jury cannot be set aside by a reviewing court on the ground that it is not sustained by the evidence. In reviewing a question of this kind, all inferences, reason-

ably possible from the evidence favorable to the prevailing party, must be indulged by this court. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 139 P. 800; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Wilbur v. Wilbur, 197 Cal. [1], 7, 239 P. 332."

[10] Even though appellant testified to the contrary in some particulars, the testimony of Mrs. Rothblatt affords abundant support for the finding that the defendant was not negligent.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



HOLM, City Attorney et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. *

No. 15521.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1952.

Rehearing Denied Jan. 14, 1953.

Hearing Granted Feb. 11, 1953.

Proceeding for writ of prohibition to prevent Superior Court from enforcing an order of inspection. The District Court of Appeal, Jones, J. pro tem., held that where inspection of photographs of bus and passenger taken after accident, statement of facts by plaintiff, and statement by bus driver was ordered, no clear abuse of discretion of trial court was shown nor any violation of a fundamental right of defendant, and defendant was not entitled to writ of prohibition to prevent judge from enforcing order of inspection.

Alternative writ discharged and peremptory writ denied.

1. Discovery ⇐89

In action by bus passenger against city and bus driver for injuries, materiality of photographs of passenger and bus taken immediately after accident, report of driver concerning accident, and statement by passenger given to city's agent could be determined from pleadings and inspection of documents would not be denied on ground that documents were not material. Code Civ.Proc. §§ 1000, 1870, subd. 2.

2. Discovery ⇐90

A party is to be protected from unnecessary disclosure to others of contents of his private books, papers and records, but no party has right to refuse to produce any report or document which may have bearing upon the facts of a pending litigation. Code Civ.Proc. § 1000.

3. Discovery ⇐90

In action against city and bus driver for injuries sustained while plaintiff was riding as passenger on bus operated by city, documents, including photographs taken after the accident, statement of facts by plaintiff to city attorney, and report of driver of bus, which did not appear to have been directed to any attorney, were not privileged communications from client to attorney, and inspection by plaintiff would not be denied on that ground. Code Civ.Proc. § 1000.

Dion R. Holm, City Atty., City and County of San Francisco, Donald J. Kropp, Deputy City Atty., San Francisco, for petitioner.

Shirley, Saroyan, Calvert & Barbagelata, San Francisco, for respondents.

JONES, Justice pro tem.

A writ of prohibition is sought by this proceeding to prevent the respondent, court from enforcing an order of inspection granted under § 1000 of the Code of Civil Procedure. This section provides that: "Any court in which an action is pending, or a judge or justice thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relat-

* Subsequent opinion 267 P.2d 1025.

ing to the merits of the action, or the defense therein."

The controversy arises out of an action for damages filed against the City and County of San Francisco by Wynona Bell on or about May 8, 1952. As plaintiff she alleges that she sustained injuries while riding as a passenger on a bus operated by the City because of the negligence of the driver, one Raymond Gnecco.

It appears that immediately after the accident photographs were taken of the passenger and the bus. The driver made his report of the circumstances connected with the accident, which was transmitted to the officials in charge of the transportation service. Later a representative of the City presented to the passenger a written statement made up by him which she signed. No copy of this statement was given to her, and she now has none. She does not recall whether the statement relates to the circumstances of the accident, or to her alleged injuries, or to both, and she has no way of telling its exact contents. But be that as it may, it would seem that the defendant intends to hold her bound by it.

Plaintiff moved the court for an order directing the defendant to produce for inspection and copying the statement, the photographs, and the report of the bus driver. The motion was supported by her affidavit and also that of her counsel. Counter affidavits were filed denying the right of inspection. With these affidavits and the pleadings before it, the court made the order that the specified documents be produced and submitted to the plaintiff for her inspection.

The writ is sought on the grounds that the documents are privileged communications from a client to an attorney, and that the materiality of the documents has not been made to appear.

[1] It would seem that the materiality of the documents is not open to question. The photographs of the passenger and the bus taken immediately after the accident could hardly fail to depict some circumstance about the event. The report of Gnecco, the driver, covering the accident is a statement by a party to the action, as is the statement by the plaintiff given to defendant's agent, and, as a declaration, each statement could be given in evidence. § 1870, subd. 2, C.C.P.

[2] The pleadings by which the issues were framed were before the court and from these pleadings the materiality of the documents could be deduced. Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259. While a party is to be protected from unnecessary disclosure to others of the contents of his private books, papers and records, as is said in McKinley v. Southern Pacific Co., 80 Cal.App.2d 301, 315, 181 P.2d 899, 908, "no party has a right to refuse to produce any report or document which may have a bearing upon the facts of the pending litigation."

[3] Nor can it be said that any of the documents are privileged as petitioner contends. The photographs have simply recorded what any eyewitness could have seen. The statement of facts by the plaintiff was made to the defendant's agent. Certainly, the relationship of client and attorney did not exist between Wynona Bell and the City Attorney. They were dealing at arm's length. Although the report of Gnecco, the driver, originated with him, it does not appear to have been directed to any attorney. In fact the record does not disclose that Gnecco had any attorney at the time the report was made up. The report appears to be more of a statement of facts for study in the prevention of accidents than a communication from a client to his attorney. As is stated in Wigmore on Evidence, Section 2318, Second Edition, it is only those documents which the party has created as a communicating client, that are privileged.

In Construction Products Corp. v. Superior Court, 103 Cal.App.2d 403, 404, 229 P.2d 399, 400, it is said that "In determining the propriety of an order under section 1000, Code of Civil Procedure, it must be borne in mind that the trial court's action thereunder is discretionary and that all intendments are in favor of the validity of such order. Accordingly, such action will not be annulled unless a clear abuse of that discretion appears. Milton Kauffman, Inc., v.

Superior Court, 94 Cal.App.2d 8, 16, 210 P. 2d 88." The order here made does not appear to violate any fundamental right of the petitioner.

The alternative writ is discharged and the peremptory writ denied.

GOODELL, Acting P. J., and DOOLING, J., concur.



114 Cal.App.2d 733

CARVALHO v. LUSARDI.

Civ. 15157.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1952.

Pedestrian brought action against motorist to recover for injuries sustained when struck by automobile. The Superior Court, County of Santa Clara, John D. Foley, J., entered order granting pedestrian's motion for new trial after judgment for motorist on jury's verdict, and motorist appealed. The District Court of Appeal, Wagler, J. pro tem., held that Circuit Court did not abuse its discretion in granting motion for new trial on ground of newly discovered evidence.

Order affirmed.

1. Appeal and Error ⇐933(4)

Where only order contained in record was minute order granting new trial without specifying grounds for granting motion, District Court of Appeal was precluded from considering alleged insufficiency of evidence to support judgment, unless evidence was without conflict and insufficient as a matter of law. Code Civ. Proc. § 657.

2. Appeal and Error ⇐939

Where record before District Court of Appeal showed that clerk's transcript on appeal was certified as correct by the clerk under rule on appeal, without objection and without a hearing thereon by trial judge pursuant to rule on appeal, District Court of Appeal was required to assume on appeal by defendant from order granting plaintiff's motion for new trial that affidavits filed by plaintiff in support of motion for new trial, were properly before court and that in his consideration of motion for new trial, trial judge used entire record on file at time of his decision. Rules on Appeal, rule 8(a, b).

3. New Trial ⇐99

Question as to effect on case of newly discovered evidence, on which party bases motion for new trial, is, from its nature, peculiarly one addressed to discretion of trial court.

4. Appeal and Error ⇐981

An appellate court will not disturb trial judge's ruling on motion for new trial on ground of newly discovered evidence, unless it is manifest that a gross or unmistakable abuse of discretion appears.

5. New Trial ⇐104(3)

Where probably most crucial point in trial of injury action by pedestrian against motorist was whether pedestrian was in crosswalk, as she testified, or a number of feet from crosswalk when she was struck, as testified by motorist, and pedestrian and motorist were only witnesses of accident, and affidavit, which was offered by pedestrian in support of motion for new trial on ground of newly discovered evidence, disclosed entirely new evidence that was material because it tended to corroborate testimony of pedestrian, trial court did not abuse its discretion in granting motion for new trial.

Campbell, Hayes & Custer, San Jose, (Edward J. Niland, Santa Clara, of counsel), for appellant.

John H. Machado, San Jose, for respondent.

WAGLER, Justice pro tem.

This is an appeal by defendant from an order granting plaintiff's motion for a new trial. In her complaint the plaintiff, a pedestrian, alleged that she was injured when the defendant so negligently operated

his automobile as to cause it to collide with her at an intersection in the city of San Jose. The defendant denied negligence and set up the affirmative defense of contributory negligence. Judgment for defendant was entered upon a jury's verdict. Thereafter the plaintiff moved for a new trial upon all of the statutory grounds except that of excessive damages.

The minute order granting the new trial reads as follows: "The above entitled matter having been regularly heard and submitted, the Court makes its order that plaintiff's motion for new trial is granted."

[1] Since this is the only order contained in the record and since it specifies no grounds for granting the motion, we are precluded from considering the insufficiency of the evidence to support the judgment unless the evidence was without conflict and insufficient as a matter of law. Code Civ. Proc. sec. 657; Pitt v. Southern Pacific Co., 121 Cal.App. 228, 9 P.2d 273; Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499; Adams v. American President Lines, 23 Cal. 2d 681, 146 P.2d 1.

The evidence was conflicting on the issues of negligence and contributory negligence and the plaintiff before this court has abandoned all grounds except: (1) Newly discovered evidence and (2) Errors in law.

[2] Two affidavits were filed by plaintiff in support of her motion. They are contained in the transcript certified by the court but there is nothing in the record to indicate that they were ever offered in evidence or considered by the trial judge. While defendant tacitly admits that the affidavits were referred to during the argument on the motion and in part at least read by the trial judge, he contends that since they were not formally offered and received in evidence the order granting the new trial can not be based on the contents thereof. Appellant relies upon the following cases: Gunning v. Forbes, 60 Cal.App. 2d 521, 141 P.2d 30; Deary v. Shields, 54 Cal.App.2d 795, 129 P.2d 935; People v. Thompson, 5 Cal.App.2d 655, 43 P.2d 600 and Ambrose v. Allen, 113 Cal.App. 107, 298 P. 169. All of these cases were decided before the adoption of the new Rules on Appeal. They are no longer applicable. The record before us shows that the clerk's transcript on appeal was certified as correct by the clerk under Rule 8(a), Rules on Appeal, without objection and without a hearing thereon by the trial judge pursuant to Rule 8(b). Under such circumstances we must assume here that the affidavits were properly before the court and that in his consideration of the motion for a new trial the trial judge used the entire record on file at the time of his decision. Redsted v. Weiss, 71 Cal.App.2d 660, 163 P.2d 105.

Defendant also contends that neither affidavit sets forth evidence likely to render probable a different result on a new trial. One affidavit was by plaintiff's attorney; its contents are not material to this appeal. The second affidavit reads as follows:

> "Thomas Bettencourt, being first duly sworn, deposes and says:
>
> "That on the evening of the 8th day of April, 1949, he was standing on the church property which property is located at the intersection of East Santa Clara Street and Twenty-eighth Street in the City of San Jose, County of Santa Clara, State of California. That he heard first a thud and then the shrieking of brakes. That he ran to the street and saw an injured woman lying on the street with her feet toward the automobile of defendant and with her head toward the curb of the street. That she was crying and yelling. That he heard someone say, 'Don't move her.' That he ran into the parish house and telephoned for the ambulance. That he did not talk to the plaintiff or her attorney until after the trial of the action.
>
> Thomas Bettencourt"

Probably the most crucial point in the trial was whether the plaintiff was in the crosswalk, as she testified, or some eighty-five feet to the east thereof, as testified by defendant. The accident occurred on April 8, 1949, at about 7:25 P.M. on East Santa Clara Street, a main highway running out of the city of San Jose in a generally east-west direction at or near its intersection with 28th Street. Plaintiff testi-

fied that she walked to the southeast corner of the intersection and, after observing the condition of traffic, started across the street toward the north sidewalk of East Santa Clara Street; that she stopped at the center line of Santa Clara Street to allow a west bound car to pass, and she was then struck by defendant's automobile which was east bound. She was rendered unconscious by the impact.

The defendant testified that he was east bound traveling in the lane closest to the center line, that he crossed 28th Street at a speed of 20 to 25 miles per hour, that after crossing the intersection he may have increased his speed to as much as 28 miles per hour, that when he first observed plaintiff she was about a car length and a half past the intersection, that she was about 35 to 40 feet from him walking diagonally across the highway, that he immediately applied his brakes and at no time released them, that he swerved to the right but that his bumper hit the plaintiff's legs, and she fell. She fell forward toward the center of the highway. At the time of the impact he was barely moving; his car travelled only 3 or 4 feet after it struck plaintiff.

The plaintiff and defendant were the only witnesses as to the point of impact. One of the investigating officers testified that there was no damage on defendant's vehicle but that there was some dust disturbance on the left front bumper and fender. That about twelve inches of the left front fender had been wiped clean, the dust has been taken off, that for a distance of from three to four feet up over the fender the dust had been disturbed, that he found defendant's car facing the east with its front wheels about 90 feet east of the intersection, that it had laid down 69 feet of skid marks on the left side and 38 feet on the right side, 4 feet on each side being beyond the point of impact as indicated by the defendant; that the end of these skid marks was 89 feet 7 inches from the eastern curbline of 28th Street and that the point of impact as indicated by defendant was 31 feet 8 inches north of the south curb of East Santa Clara Street and 85 feet 7 inches east of 28th Street.

Thomas Bettencourt, according to his affidavit, was on the church property which occupies the northeast corner of the intersection. He *first* heard a thud and *then* the shrieking of brakes. This evidence is not in the record of the trial. It is entirely new evidence. It is material because it has a tendency to corroborate the testimony of plaintiff that she was crossing at the intersection. It is also material as it may be a fact which may be considered as creating an inference of speed. It contradicts the testimony of defendant in that it refers to the striking of an object, to wit, the hearing of a thud and then a noise which is caused by the application of brakes. From this evidence the jury could infer that the plaintiff was struck first and that thereafter the defendant applied his brakes. The defendant testified that he saw the plaintiff, then applied his brakes prior to striking her and was barely moving when she was struck. The facts of the affidavit when considered in connection with the testimony of the investigating officers as to the dust disturbance on the fender of defendant's car could create an inference, and the jury could find that the plaintiff was struck, thrown on the fender of defendant's car and carried for some distance before defendant applied his brakes. This inference would corroborate plaintiff's testimony that she was struck in the crosswalk.

[3–5] The question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court, People v. Oxnam, 170 Cal. 211, 149 P. 165; Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127; Rauer's Law, etc., Co. v. Bradbury, 3 Cal.App. 256, 84 P. 1007; Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 276 P. 394, and an appellate court will not disturb the trial judge's ruling unless it is manifest that a gross or unmistakable abuse of discretion appears. Cooper v. Kellogg, 2 Cal.2d 504, 42 P.2d 59; Kirschbaum v. McCarthy, 5 Cal.2d 191, 54 P.2d 8; Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 221 P.2d 73, 23 A.L.R.2d 216; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P.2d 756; Montaldo v. Hires Bottling Co., 59 Cal.App.

2d 642, 139 P.2d 666. We find no such abuse of discretion on the part of the trial judge in this case.

Since the order must be affirmed on this ground it is unnecessary to discuss the second point relied upon, to wit, alleged errors of law. These alleged errors deal primarily with matters concerning which the trial judge as arbiter of the facts enjoys a wide discretion. Suffice it to say that we have examined the record and find no error in any of the criticized rulings.

The order granting plaintiff's motion for a new trial is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



114 Cal.App.2d 640

CARPENTER PAPER CO. v. KELLOGG, etc., et al.

KELLOGG v. ALFRED M. LEWIS, Inc.

Civ. 18999.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1952.

Rehearing Denied Jan. 5, 1953.

Hearing Denied Feb. 5, 1953.

Action by printer against advertising agency and wholesale grocery company which had employed agency, for damages for breach of contract by which printer was to supply certain cards to agency for use in promotion scheme for grocery company. The advertising agency cross-complained for damages for breach of its employment contract by termination of promotion scheme. The judgment of the Superior Court of Los Angeles County, Samuel R. Blake, J., entered judgment adverse to grocery company and it appealed. The District Court of Appeal, Patrosso, J. pro tem., held that evidence was insufficient to support finding that splitting of printing cards into three runs constituted a breach of contract between printer and agency, and consequently could not support finding that grocery company was responsible for such purported breach.

Judgment reversed, and cause remanded for new trial.

1. Contracts ⇐322(3)

In action by printer against advertising agency and wholesale grocery company which had employed agency, for breach of contract by which printer was to supply certain cards to agency for use in promotion scheme for grocery company, evidence was insufficient to support finding that splitting of printing of cards into three runs constituted a breach of the contract between the printer and advertising agency, and consequently could not support finding that grocery company was responsible for such purported breach.

2. Compromise and Settlement ⇐6(4)
Principal and Agent ⇐111(4)

Where printer brought action against advertising agency and wholesale grocery company which had employed agency, for breach of a contract by which printer was to supply certain cards to agency for use in promotion scheme for grocery company, agreement of advertising agency, by way of settlement or compromise, to pay certain sum to printer in satisfaction of its demands was binding upon agency even though it was later ascertained that sum agreed upon was in excess of that which agency was legally obligated to pay, but such settlement was not binding upon grocery company when it was not a party to and did not consent thereto.

3. Indemnity ⇐15(7)

While an indemnitee who seeks reimbursement from his indemnitor for payment made by him in discharge of a claim indemnified against is not bound to submit to suit before paying the claim, if he pays without such suit, he is under the necessity, as a condition of recovery from his indemnitor, of proving that he was liable for the amount thus paid.

4. Damages ⇐189

In action by printer against advertising agency and wholesale grocery company which had employed agency, for damages for breach of contract by which printer was to supply certain cards to agency for use in promotion scheme for grocery company,

wherein it was claimed that damage had resulted from splitting of run of cards into three runs, and from loss of profits which would have been realized if promotion scheme had not been discontinued by grocery company, and from loss incurred in resale of paper, evidence was insufficient to sustain finding of loss or damage from any of the claimed causes, except loss from resale of paper.

5. Principal and Agent ⇐77

Where printer brought action against advertising agency and wholesale grocery company which had employed agency, for damages for breach of contract by which printer was to supply certain cards to agency for use in promotion scheme for grocery, and agency entered into agreement for settlement with printer as to all claims of damage, but evidence supported finding of loss and liability of agency with respect to only one of the items claimed, even if grocery company be considered liable as an indemnitor, such liability could not have been invoked as to amount so agreed to be paid by settlement agreement.

6. Principal and Agent ⇐41(4)

In action by printer against advertising agency and wholesale grocery company which had employed agency, for damages for breach of contract by which printer was to supply certain cards to agency for use in promotion scheme for grocery company, wherein advertising agency cross-complained for breach of employment contract by wholesale grocery company by termination of promotion scheme, evidence was insufficient to support finding that there had been express agreement between advertising agency and grocery company that agency was to be employed for period of twenty-six weeks, or that employment was to continue for any definite or fixed period.

7. Contracts ⇐215(1), 217

Where no period is fixed for the duration of a contract calling for the rendition of personal services, contract is terminable at will of either party, except where the employment is coupled with an interest, or is entered into upon an independent consideration, in either of which events it is terminable only after a reasonable time.

8. Principal and Agent ⇐28

Mere fact that advertising agency was retained by grocery company in connection with promotion scheme which was to endure for a fixed time, did not compel conclusion that a special contract for duration of contemplated scheme came into being, when oral contract by which agency services were procured fixed no duration of the contract.

Thompson & Colegate, Riverside, for appellant.

Hahn & Hahn, Pasadena, for respondent.

PATROSSO, Justice pro tem.

While we are concerned here only with an appeal by the cross-defendant, Alfred M. Lewis, Inc., from a judgment rendered against it in favor of cross-complainant, Edward S. Kellogg, the somewhat confusing situation disclosed by the record makes necessary an extended statement of the pleadings, findings, and evidence as well as the proceedings in the trial court.

Plaintiff instituted this action against both respondent and appellant seeking to recover damages for breach of contract. The fourth amended complaint upon which the cause went to trial contains two counts, the first alleging that on October 11, 1948, the respondent "acting as the advertising agent and representative of" appellant employed plaintiff's assignor, Carter and Galantin, Inc. (hereinafter referred to as the "printers"), to make up and produce 26 separate series of "Recipe of the Week" cards, each series to comprise 300,000 cards, the printers agreeing to furnish all material and labor to produce said cards *"all at one time"* for $3.56 per thousand; that later the printers were informed by respondent that he could not deliver the art work and copy in time for the printers to run the 26 series at one time in its Chicago plant but he would deliver the art work and copy for the first six series only to be produced in one run in the printers' Los Angeles plant, and that the art work and copy for the remaining 20 series would be ready in time for running at one time in its Chicago plant; that the printers agreed to split the

run as aforesaid provided that the art work and copy were delivered in time to permit the running of all the remaining 20 series in its Chicago plant. After running the first six series the printers notified respondent to furnish the art work and copy for the last 20 series but that respondent failed to do so, delivering the art work and copy for only the next ten series and in insufficient time to run the same at one time, and the printers were compelled to split the run of said ten series by running numbers seven and eight as a separate run from the remaining eight series by reason of which the printers were compelled to purchase paper of a larger size and heavier weight than that specified in the order at an additional cost of $515.95; that each split incurred additional expense for overtime and other specified items in the amount of $3,452.70, making a total extra cost of $3,968.65, and that respondent and the printers agreed to compromise said extra costs by respondent's agreement to pay the sum of $3,199.90, of which no part has been paid.

The second count alleges that on January 15, 1949, respondent and appellant terminated and cancelled the contract hereinbefore mentioned without the printers' consent; that prior to the termination of the contract the printers had purchased paper to be used in the production of the last ten series of cards, and upon termination of the contract they had in their possession a quantity of such paper costing $2,724.48, which paper was made especially to size and thickness for use in making the cards, and by reason of the limited demand for paper of such character, the best price the printers had been offered therefor was the sum of $1,000, resulting in damage to plaintiff in the sum of $1,724.48. It is further alleged that if the printers had been permitted to complete the contract, they would have realized a profit thereon of $1,500, to their damage in this sum.

Separate answers were filed to the complaint by respondent and appellant, each denying the material allegations thereof. At the same time respondent filed a cross-complaint against appellant likewise containing two causes of action. The allegations of the first count may be disregarded as the trial court made no findings thereon, and those contained in the second need not be set forth here as they will sufficiently appear from the trial court's findings substantially in accordance therewith as hereinafter set forth in detail.

At the close of the plaintiff's case the court granted appellant's motion for a nonsuit upon both causes of action, and granted respondent's motion for a nonsuit as to the first cause of action but denied the same as to the second cause of action. As disclosed by the clerk's transcript, minute orders were duly entered granting the nonsuits as indicated. However, some three months after the signing of findings and judgment, the court caused a nunc pro tunc order to be entered correcting or amending the minute order as to respondent's motion so as to read that the motion was denied. In granting the nonsuit of the respondent as to the first cause of action the trial court stated that there was no evidence to support the allegations with respect to the alleged breach of contract by respondent in the particulars specified therein. Thereafter, however, further discussion was had between court and counsel for the plaintiff and respondent as to whether or not the first count sufficiently stated a cause of action upon the theory of an account stated, at the conclusion of which the court observed, in effect, that he would reserve a ruling upon this point.

Viewed in the light most favorable to the respondent and indulging in all reasonable inferences deducible therefrom, the evidence, insofar as material to the questions presented here, discloses the following:

Appellant is engaged in the wholesale grocery business while respondent conducts an advertising agency. Appellant's principal customers or at least a substantial portion thereof comprise a group of more than 700 independent retail grocers who operate under the common name or designation of Orange Empire Stores. As a means of enhancing its business, and, as an incident thereto, that of these retail outlets, appellant determined to embark upon an advertising and publicity campaign and to that end in the spring of 1948 engaged

the services of respondent under an oral agreement whereby appellant promised to pay respondent for his services a monthly consultation or publicity fee of $200 and $10 (later reduced to $8.23) per hour for each hour that respondent and members of his executive staff devoted to such advertising projects as might be determined upon by the parties. The agreement between the parties specified no fixed period of duration, and it is conceded that, until the parties embarked upon the Recipe of the Week program hereafter to be mentioned, it was terminable at the pleasure of either.

Prior to the time of respondent's employment by appellant the former had submitted to the latter a written memorandum containing various suggestions with respect to the types of advertising that might be undertaken in appellant's behalf, included within which there was a reference to a "give-away program" therein described as "Recipe of the Week card." Though at the time but briefly outlined, as it evolved into final form the plan contemplated the printing of a series of 26 weekly recipe cards in quantity of 300,000 each, and the procuring of 26 food manufacturers, each of whom would assume the cost of printing one series of such cards. These appellant was to sell to members of the Orange Empire Stores for the sum of one cent each, the proceeds from which were to be used to defray the cost of the program, and the latter in turn were to undertake to distribute the same to their customers and members of the public generally. In conjunction there was to be a radio program and a weekly contest with prizes awarded for the best letters received upon the subject, "I like this week's recipe best because—."

Following respondent's employment the parties proceeded to give consideration to the adoption of such a program. To this end respondent and Mr. Lewis, president of the appellant corporation, journeyed to San Francisco and met with officials of California Packing Corporation, to whom the proposed plan was outlined. In the ensuing discussion the question arose as to the cost of printing 300,000 of such recipe cards and, upon referring the matter to the advertising department of that corporation, an estimate was received of "five or six thousand dollars." All parties agreed that this figure was prohibitive and would render the plan impractical of adoption. Thereafter respondent advised appellant that he had ascertained that if the entire series of 26 cards was printed at one place, they could be furnished at the price of $1,275 to each manufacturer participating in the plan, including not only the cost of printing but the work of respondent in connection therewith, involving the writing of copy, art work, color separation, etc. Mr. Lewis thereupon stated that upon this basis no problem would be involved in securing the necessary 26 manufacturers. Appellant and respondent thereafter held meetings with both food manufacturers and members of the Orange Empire Stores to whom the plan was explained and their participation solicited, it being stated that the plan would continue for a period of 26 weeks. It is undisputed, however, that Mr. Lewis repeatedly stated to respondent that appellant would have nothing to do with the printing of the cards and that this was to be the sole responsibility of respondent. It is also an admitted fact that, in outlining the plan to the manufacturers whose participation was solicited, it was expressly stated by respondent that, while the cards could be obtained from the respondent for the price indicated, they were not obligated to do so but were at liberty to procure the same from other sources provided they conform to certain specifications as to size, art work, and finish. Following this and sometime in September, 1948, the appellant decided to proceed with the program and so advised respondent, it being understood that the respondent would undertake the printing of the cards, and that respondent was to bill each participating manufacturer therefor and not appellant.

Two days prior to the time that respondent entered into a contract with the printers for the printing of the cards he requested from Mr. Lewis a purchase order therefor to which Mr. Lewis replied that this was not necessary, that his word was good, and that he could and would procure the necessary 26 manufacturers to participate in

the program. Subsequently and before respondent ordered the printing of the cards, a member of respondent's staff had a further conversation with Mr. Lewis in which a request was again made for a purchase order for the 26 recipe cards to which Mr. Lewis replied that "we don't give purchase orders. You don't need a purchase order." Respondent's employee then stated to Mr. Lewis that respondent was afraid that 26 manufacturers could not be obtained and asked Mr. Lewis, "Will we have the whole 26 then? Can we go ahead and order the cards?" and Mr. Lewis replied, "Yes, you will get the 26. I take the responsibility for getting the manufacturers. You don't have to worry about that."

At this time the parties had secured promises of participation from only six or eight food manufacturers, but nevertheless immediately following the conversation last mentioned, the respondent proceeded to enter into a contract for the printing of the cards. This was evidenced by a written purchase order issued by the respondent to Carter and Galantin, Inc., dated October 8, 1948, reading, "300,000 each *4 units* (balance of 22 to be delivered shortly)" and contained the further statement, "$3.56 per M—f. o. b. Los Angeles. *It is our understanding that there will be some reduction if higher quantity than 12 units ordered at one time.*" Also, "Cards must be printed and delivered on Monday, November 8, 1948." (Emphasis added.)

The program, while at first successful, shortly seems to have lost its appeal, with diminishing interest upon the part of the members of the Orange Empire Stores, and as a result appellant determined to terminate it at the conclusion of the 16 weeks for which manufacturers had already been secured, although stating to respondent, when advising him of this decision, that the ten additional manufacturers necessary to continue the program for the contemplated 26 weeks were obtainable. Although the program thus terminated on or about February 20, 1948, respondent continued to render services to appellant in connection with general publicity and advertising until June, 1949, for which he was fully compensated at the agreed rate.

At the close of all of the evidence and following the argument of counsel, the trial judge reiterated that the evidence did not sustain the allegations of plaintiff's first cause of action to the effect that respondent had breached his contract with the printers, and hence that his finding thereon would be against the plaintiff, but at the same time stated that one of the issues remaining to be determined was "whether or not there was an account stated," between respondent and the printers.

Thereafter the trial court made and entered findings and judgment upon the complaint and separate findings and judgment upon the cross-complaint. With respect to the first count of the complaint the court, despite the fact that it had stated that there was no evidence to support the allegations thereof except possibly insofar as they might relate to an account stated, nonetheless found the facts to be substantially as therein alleged with the modification, however, that the agreement of compromise between the printers and respondent pleaded therein included not only the items of damage in the first cause of action set forth but also the printers' loss arising from the sale of the paper claimed in the second count, which the court found to be in the sum of $1,407.92.

With respect to the second cause of action in plaintiff's complaint, the court found the facts substantially as alleged therein; that the loss sustained upon the resale of the paper was $1,407.92 and that this was included in the settlement effected between the printers and respondent, as set forth in its findings upon the first cause of action, but made no finding with reference to the allegation that by reason of the cancellation of the contract plaintiff's assignor had sustained damage by way of loss of profits in the sum of $1,500, although in his memorandum decision the trial judge stated that there was no evidence to sustain the allegation of damage in this respect.

Upon the issues raised by the cross-complaint and the answer thereto the court found, as to the second cause of action thereof, that the parties agreed to proceed with the "Recipe of the Week" program "as

originated and developed by" respondent, that the program should be undertaken for a period of 26 consecutive weeks commencing with the week of November 15, 1948; that respondent should produce and supervise the program from the time of its adoption through the entire period of 26 weeks; that appellant would be responsible for obtaining 26 food manufacturers who would participate in the program and would provide the recipe cards for each of 26 weeks, and that appellant "would procure such 26 food manufacturers in sufficient time so that they could furnish the necessary material, content, and art work to permit the printing of 300,000 recipe cards for each of said 26 weeks at one printing; before the initiation of the program respondent advised the appellant that, in order to make it possible for the food manufacturers who were to participate in the program to purchase the same at the lowest possible cost, respondent would enter into a contract with Carter and Galantin, Inc., for the printing of all the 26 recipe cards at one time at a price of $1,068 for each issue of 300,000 cards; that respondent would do the necessary art work and other work incidental to the production of the cards and would sell the same to each participating manufacturer for the sum of $1,275 for each issue of 300,000 cards and respondent would retain for himself the difference between the printing costs thereof and the price charged the food manufacturer; that appellant knew that respondent would enter into the contract with Carter and Galantin, Inc., for the printing of the cards at one time and that its failure to perform its contract with respondent would in turn cause a breach of respondent's contract with Carter and Galantin, and a consequent loss to respondent; that the program commenced with the week of November 15, 1948, continued for a period of 16 weeks and appellant secured food manufacturers to participate therein and purchase recipe cards therefor for such period but appellant failed to procure the food manufacturers for said 16 weeks of the program in sufficient time to permit the printing of the recipe cards for said 16 weeks at one time, and that by reason of the delay in procuring said manufacturers the printers were required to split the printing of the cards into three different printings, the first consisting of six cards, the second of two cards, and the third of eight cards; that at the end of the 16-week period the program was terminated by the appellant and that such termination constituted a breach of the contract between respondent and appellant, by reason of which respondent became liable to the printers in the sum of $3,968.65 together with whatever loss the printers might sustain upon the sale of the paper purchased for the printing of the last ten series of recipe cards and for loss of profits which the printers would have realized if the program had not been cancelled; that upon the resale of the paper by the printers they sustained damage in the sum of $1,407.92 and that on or about February 1, 1949, respondent settled his dispute with the printers for the damages suffered by them "in the amount of $3,968.65, plus the loss of profits, for the sum of $3,199.99," which settlement was fair, reasonable, and just and to the advantage of both appellant and respondent; that, by reason of appellant's breach of its contract with respondent, the latter sustained damage as follows: (1) In the sum of $3,199.90 together with interest thereon at the rate of seven per cent per annum from February 1, 1949; (2) the sum of $2,070 profit respondent would have received upon the sale of the recipe cards for the remaining ten weeks of the program; (3) the sum of $213.60 which respondent would have received as a discount upon the printing bills upon the cards to be printed for the remaining ten weeks; (4) the sum of $893.60 which respondent would have received for the services of its executive's time for the services for the ten remaining weeks of the program; and (5) the sum of $1,123.90 which respondent would have received for the services of his organization in the preparation of radio programs and in the promotion of the program for the remaining ten weeks.

Appellant assails substantially all of the foregoing findings as unsupported by the evidence, but we confine our consideration to those only which we deem necessary to a proper disposition of the appeal.

We direct our attention first to the finding that the splitting of the printing of the 16 cards into three runs constituted a breach of the contract between respondent and the printers, by reason whereof the printers sustained damage in the sum of $3,968.65, for which respondent became liable, and that such breach and consequent damage was occasioned by the failure of appellant to procure manufacturers for the 16 weeks' program in sufficient time to permit the printing of all the cards for said 16 weeks at one time.

[1] This determination appears inexplicable in light of the trial judge's comments, when purporting to grant respondent's motion for a nonsuit as to plaintiff's first cause of action and repeated at the conclusion of all the evidence, with which we are in complete accord, that there was no evidence to sustain the charge in plaintiff's complaint to this effect. If this is true, it is inconceivable how the trial court could conclude that the appellant became obligated to respondent in damages therefor. If the splitting of the printing of the 16 cards did not constitute a breach of *respondent's contract with the printers,* obviously there is no basis for the wholly inconsistent finding that appellant occasioned a breach thereof in this particular.

There was a total absence of any proof, and counsel for respondent correctly so maintained throughout the trial, to establish that the so-called splitting of the run of the 16 cards was in violation of respondent's contract. However, if we were to assume otherwise, there is not a particle of testimony to be found in the record that appellant was in any wise responsible therefor. It is undisputed that appellant was to have nothing whatsoever to do with respect to the printing of the cards but that this was the sole responsibility of the respondent. Accepting respondent's own testimony, the sole obligation of the appellant was to procure the participation of 26 manufacturers who might become purchasers of the recipe cards from the respondent. If respondent undertook, as he did, to direct the printing of only four series of cards in the first instance, and this at a time when only six or eight manufacturers had indicated an intention to participate, it is evident that respondent as well as the printers then knew that 16 series of cards could not be run at the same time. Moreover there is no proof that such was the agreement between respondent and the printers. As the trial judge observed, there is a complete absence of evidence as to why the printing was split into three runs, although there is some suggestion in the record that this, in part at least, may have resulted from the delay occasioned by the failure of the manufacturers or some of them to furnish the necessary material or to promptly approve the proofs, but as already indicated, there is nothing to support the charge that appellant was responsible therefor.

[2] Despite the finding just discussed and which we have concluded to be without support in the evidence, it would appear that the court's ultimate determination that appellant is liable to respondent in the sum of $3,199.90 for the damage found to have been sustained by the printers rests solely upon the fact that respondent, by way of settlement or a compromise, promised to pay to the printers this amount in satisfaction of their demands, and the finding that such settlement was fair, reasonable, and just and to the advantage of both respondent and appellant. Conceding that, under familiar principles, the trial court properly concluded that this agreement of settlement was binding upon the respondent even though it was later ascertained that the sum agreed upon was in excess of that which respondent was legally obligated to pay (5 Cal.Jur., p. 391, sec. 7), it does not follow as a necessary consequence that such settlement was binding upon the appellant, which was not a party to and did not consent thereto.

[3, 4] The legal principle by which the liability of the appellant to respondent upon this theory is to be tested is, we apprehend, the same as that applicable in the case of an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in discharge of a claim indemnified

against. 42 C.J.S., Indemnity, § 20, p. 594. While such an indemnitee is not bound to submit to suit before paying the claim, if he pays without such suit, he is under the necessity, as a condition of recovery from his indemnitor, of proving that he was liable for the amount thus paid. (13 Cal.Jur., p. 993, sec. 13; 42 C.J.S., Indemnity, § 25; p. 603, 42 C.J.S., Indemnity, § 35, p. 625. Here the claim of the printers against respondent which the latter undertook to settle comprised three separate items; (1) the alleged damage sustained by reason of the splitting of the run of the 16 cards in the claimed sum of $3,968.65; (2) the loss incurred in the resale of the paper; and (3) the profits which would have been realized if the last series of ten cards had been printed as originally contracted for. As to (1), we have already seen that the evidence wholly fails to establish any liability of respondent therefor in any amount, and as to (3), while no finding was made thereon, the trial judge stated in his memorandum decision that the claim was unsupported by the evidence, with which statement we are in accord. As to (2), the trial court found that the loss incurred by the printer in the resale of the paper was the sum of $1,407.92. This last-mentioned finding alone may be said to be supported by the evidence, and is the full measure of the liability incurred by respondent by reason of the breach of his contract with the printers, as well as that of appellant to respondent if the former is answerable therefor. The facts recited likewise suffice to demonstrate the lack of support for the court's announced conclusion that the settlement was as to the appellant "fair, reasonable, and just" when we consider that the amount thereof is more than twice the maximum which the trial court found that the printers would otherwise have been legally entitled to recover against respondent.

[5] We consider next the finding that the parties agreed that respondent was to be employed as advertising agent of appellant to produce and supervise the recipe of the week program for a period of 26 weeks, and that the abandonment of the program by appellant after 16 weeks constituted a breach of such agreement.

If the trial court's finding in this regard is to be treated as declaring that the parties entered into an express contract or agreement of employment for a period of 26 weeks for the purpose stated, we fail to find in the record any evidence supporting the same. Both respondent and appellant unequivocally testified that at no time was there any agreement between them that respondent's employment by appellant was to continue for any definite or fixed period. The only evidence to which counsel for respondent refer as supporting a finding of an express contract of employment for a fixed term is the statement attributed to Mr. Lewis by respondent made at a meeting or meetings held for the purpose of soliciting the participation of some of the retail stores, that "we have retained the services of the Kellogg Company to put on a recipe of the week program for 26 weeks." This, however, is at most an admission which is completely dissipated by the testimony of both parties which in our view clearly discloses that the services rendered and to be rendered by respondent in this connection were but incidental to and contemplated by a general contract of employment having no fixed duration.

The finding under discussion must find support, if at all, upon the proposition, for which respondent contends, that even though the original contract by which respondent was employed was for no fixed period of time, a special contract of employment for a definite term of 26 weeks covering services to be rendered in connection with this specific program arose by implication under the circumstances here.

[6, 7] The contract between appellant and respondent was one calling for the rendition of personal services, and the general rule with reference to contracts of this character is that where no period is fixed for the duration of the contract, it is terminable at the will of either party except where the employment is coupled with an interest or is entered into upon an independent consideration, in either of which events it is terminable only after a rea-

sonable time. Thacker v. American Foundry, 78 Cal.App.2d 76, 83–84, 177 P.2d 322. The contract here falls within neither of the exceptions, and we see nothing in the nature of the agreement between the parties which necessarily implies that, simply because respondent during the period of his employment, which was otherwise terminable at will, was directed to render services in connection with a particular plan of advertising which at its inception was contemplated to endure for a fixed time, a special contract apart from the original contract of employment thereupon came into being, whereby respondent was employed for this specific purpose and for the definite period contemplated for the duration of the particular project.

The services rendered and to be rendered by respondent in connection with the Recipe of the Week program did not in their nature differ from those performed by him with respect to other forms and types of advertising adopted by appellant from time to time both before and after this particular program was in effect. All such services were rendered under the original agreement which admittedly had no fixed period of duration, and for these respondent was compensated in the same manner and at the same monthly and hourly rate as then agreed upon. The particular program in question was simply one of the means or methods of advertising which was resorted to as contemplated by and in connection with which respondent's services were required under the terms of his original employment. Indeed, as we have already noted, this particular program was suggested by respondent at the very inception of his employment by appellant. If respondent's position be accepted as correct, it would necessarily follow that every time appellant embarked upon and required the services of respondent in connection with a different advertising program which at its inception was contemplated to endure for a fixed period, a special contract of employment came into being for the specific purpose and the fixed period thus contemplated. With this we cannot agree.

Counsel in support of their contention cite a number of cases which they assert are to the effect that "even in the absence of a definite agreement the duration of a contract of employment may be implied from all of the surrounding circumstances." Without pausing to consider whether they support the proposition as thus stated, a cursory examination thereof readily discloses that they bear no factual resemblance to the case at bar. Typical of these is the case of Wittmann v. Whittingham, 85 Cal.App. 140, 259 P. 63, which involved an agreement whereby the respondent was employed by the appellant as an accountant and general manager at a specified weekly salary with the right to purchase a designated number of shares of stock in a corporation to be organized by appellant for which he was to execute his note for $4,800 but which he was not to be required to pay, it being *expressly stated that respondent "should remain in the employ of appellant until the dividends and profits of the stock were sufficient to pay off the note."* 85 Cal.App. at page 142, 259 P. at page 64, at which time the note was to be cancelled and the certificate evidencing the shares delivered to the respondent. Thus it is apparent the contract there involved itself fixed the duration of respondent's employment without any need of resorting to implication. The contention was not that the contract failed to specify the duration of the employment, but that as so stated it was indefinite because of the uncertainty as to the time when the event which marked its termination would occur. The court quite properly rejected this argument, but its decision affords no support to respondent's contention here where, as we have seen, the services in connection with the particular program were incidental to and comprehended by a general contract of employment terminable at the will of either party.

The judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

WHITE, P. J., and DRAPEAU, J., concur.

McNEAL v. GREENBERG et al. *

Civ. 18795.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1952.

Rehearing Denied Jan. 5, 1953.

Hearing Granted Feb. 5, 1953.

Action for personal injuries sustained when a skip loader, rented by plaintiff from defendants, rolled backwards over a declivity at the lower end of a hillside lot, being graded by plaintiff with such loader, as the alleged result of defective brakes thereon. From a judgment of the Superior Court of Los Angeles County, Thurlow T. Taft, J., on a directed verdict for defendants, plaintiff appealed. The District Court of Appeal, White, P. J., held that whether any defect in the loader existed when it was delivered to plaintiff or developed after delivery and whether examination of the loader by plaintiff before delivery would have revealed the defective condition of the brakes were fact questions for the jury.

Judgment reversed and cause remanded for a new trial.

1. Trial ⇐165, 178

A nonsuit or directed verdict for defendant may be granted only when, disregarding fact that evidence may be conflicting, giving plaintiff's evidence all value to which it may be legally entitled, and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Appeal and Error ⇐994(2), 996
Trial ⇐139(1), 140(1), 142

The trial court, on defendant's motion for directed verdict, and District Court of Appeal, on appeal from judgment on such verdict, are not concerned with credibility of plaintiff's testimony or value of evidence contradicting such testimony, as jury's function is to find, not only the facts, but inferences to be drawn therefrom.

3. Trial ⇐142

Where different conclusions may reasonably be drawn by different minds from same evidence, decision must be left to trier of facts.

4. Trial ⇐142

The trial court is not justified in taking case from jury by directing verdict for defendant, unless no other reasonable conclusion is legally deducible from evidence as matter of law and any other holding would be so lacking in evidentiary support that appellate court would be impelled to reverse it on appeal.

5. Appeal and Error ⇐854(5)

A judgment on directed verdict should be affirmed, if verdict was properly directed on any substantial theory, irrespective of reasons given by trial court for its action.

6. Evidence ⇐595

A conclusion cannot be drawn from an inference founded on an inference. Code Civ.Proc. §§ 1958, 1960.

7. Bailment ⇐9

Generally, a bailor impliedly warrants that thing hired is of character and in condition to be used by bailee as contemplated by bailment contract.

8. Bailment ⇐9

A bailor is liable to bailee for damages occasioned by faults or defects, of which bailor should have known or had duty as reasonable man to ascertain, in article hired.

9. Bailment ⇐33

In action for injuries sustained by plaintiff when a skip loader, rented by him from defendants, rolled backwards over a declivity at lower end of a hillside lot being graded by plaintiff with such loader, evidence was sufficient to take to jury question whether accident would not have happened had defendants, as owners and bailors of loader, caused inspection of mechanical condition of its brakes before delivering it to plaintiff.

10. Bailment ⇐21

One leasing chattel to another as safe for immediate use is liable to persons whom he should expect to use chattel or be in vicinity of its probable use for bodily harm caused by its use in a manner for which and by a person for whose use it is leased, if lessor fails to exercise reasonable care

* Subsequent opinion 255 P.2d 810.

to make chattel safe for such use or to disclose its actual condition to those who may be expected to use it.

11. Bailment ⇐21

Both lessor and lessee of chattel leased from person making business of leasing chattels may be assumed to understand that chattel is leased for immediate use by lessee, so as to render lessor liable for injuries to persons whom he should expect to use chattel or be in vicinity of its probable use as result of its use in manner and by person for whose use it is leased, if lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it.

12. Estoppel ⇐115

One relying on waiver to sustain a defense to cause of action must plead and prove it.

13. Contracts ⇐114

One may not, by contract, absolve himself from responsibility for his own negligence proximately causing damage to another.

14. Bailment ⇐33

In action for injuries sustained by grading contractor when a skip loader rented by him from defendants rolled backwards over declivity at lower end of hillside lot being graded by plaintiff with such loader, whether defect in loader's brakes existed when it was delivered to plaintiff by defendants and hence was waived by plaintiff or such defect developed after delivery was fact question for jury under evidence.

15. Bailment ⇐33

In action for injuries sustained by grading contractor when a skip loader rented by him from defendants rolled backwards over declivity at lower end of hillside lot being graded by plaintiff with such loader, whether examination of loader by plaintiff before its delivery to him would have revealed alleged defective condition of its brakes, so as to bar recovery by him on ground of waiver of such defects, was fact question for jury, though rental contract provided that plaintiff acknowledged that he examined loader and that it was in good condition when delivered to him.

16. Appeal and Error ⇐927(3, 7)

On appeal from judgment following a directed verdict or nonsuit, evidence must be taken in light most favorable to losing party in court below, and appellate court will express no opinion as to weight or truth of evidence or inferences deducible therefrom.

Chester S. Johnson, Los Angeles, Jerry Geisler and Harold C. Holland, Beverly Hills, for appellant.

Parker, Stanbury, Reese & McGee, Raymond G. Stanbury, Los Angeles, for respondents.

WHITE, Presiding Justice.

This appeal by plaintiff from a judgment entered upon a directed verdict in favor of defendants presents an evidentiary problem involving the liability of the renter or bailor of personal property for damage sustained by the rentee or bailee caused by a defect in the particular personal property, it being the theory of the plaintiff that the defendants impliedly warranted that the property rented was fit for the purpose for which it was rented.

Appellant, a grading and paving contractor, rented from respondents, who were in the business of renting out various types of construction equipment, a machine commonly known as a "skip loader", a self-propelled vehicle used for grading and leveling of land. This machine had two small front wheels and two large rear wheels, all equipped with pneumatic tires. A "blade" or scraper which could be raised or lowered was affixed to the rear of the machine, while at the front there was attached a maneuverable "bucket" or "scoop". Appellant proceeded to use the skip loader to grade a hillside lot in West Los Angeles which had a slope of from 20 to 30 degrees. At the lower end of the lot being graded there was an almost vertical drop of from 8 to 10 feet to the level of the adjacent lot. In the course of appellant's operations the skip loader rolled backwards over the de-

clivity to the lot below, pinning appellant against a building in course of construction on the lower lot. For the injuries so resulting appellant sought damages, charging in one cause of action that respondents failed to furnish equipment in mechanically sound condition and failed properly to inspect, test or repair the same, and by a second cause of action charged breach of warranty that the equipment was fit for the purpose for which it was hired. Specifically, it was charged that the brakes on the vehicle were defective and gave way, with the result that the equipment could not be controlled.

The defendants pleaded that they used due and proper care in inspecting, testing and maintaining the equipment; that the equipment was at all times in sound condition; that the accident was proximately caused by the negligence of plaintiff; and, further, that at the time of the hiring of the equipment the plaintiff acknowledged to the defendants that he had examined the equipment and knew of the condition thereof, and that the same was in good condition and repair.

[1] At the close of the presentation of evidence by both sides, the trial court directed a verdict for the defendants. This situation therefore presents a problem in the application of the settled rule that a nonsuit or directed verdict may be granted only when, disregarding the fact that the evidence may be in conflict, and giving to plaintiff's evidence all the value to which it may be legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for the plaintiff if such a verdict were given. Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579.

[2-4] Upon a motion for a directed verdict neither the trial court nor this court is concerned with the credibility of plaintiff's testimony that the brakes failed to hold, nor with the value of the evidence presented to contradict such testimony. It is for the jury to find not only the facts but the inferences to be drawn therefrom, Hamilton v. Pac. Electric Ry. Co., 12 Cal. 2d 598, 601, 86 P.2d 829, and where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact. Martin v. Fox West Coast Theaters Corp., 41 Cal.App.2d 925, 108 P.2d 29. "Unless it can be said that, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal the Court is not justified in taking it from the jury." Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184, 188.

The plaintiff testified that when he appeared at defendants' yard and asked for a skip loader he was told that none was available and that he would have to wait for one "to come in off a job." After a short wait, he was told that one was available and he found it still mounted on a trailer. No inspection of the equipment was made at the time it was delivered to the plaintiff, and he had no knowledge as to whether the equipment had been inspected before he saw it, whether it had been inspected at another yard of defendants', whether it had just come off another job, or whether it had come from another yard. He "surmised" that it had come off another job.

The motion for directed verdict was made upon the following grounds:

(1) There is no evidence of negligence on the part of respondents.

(2) There is no evidence of any defect in the brakes at the time of delivery and thus no evidence of breach of warranty.

(3) There is no evidence of any *discoverable* defect in the brakes at the time of delivery and thus no evidence of negligence or breach of warranty.

(4) There is no evidence that appellant relied upon any representation by respondents, express or implied, and thus no evidence of breach of warranty.

(5) The written contract precludes the existence of any warranty.

[5] If, irrespective of the reasons given by the trial court for its action, the directed verdict was properly granted upon

any substantial theory, the judgment should be affirmed. Hohnemann v. Pacific Gas & Electric Co., 35 Cal.App.2d 597, 601, 96 P.2d 350.

[6] In the instant case, though the evidence be viewed in the light most unfavorable to appellant, all that could be said was that the latter could have or may have inferred from the facts that the skip-loader may not have been inspected. But the conclusion that appellant did not rely upon any inspection or upon the condition of the equipment requires that such conclusion be drawn from an inference founded upon an inference. Such a course of reasoning is not permitted by law. Code Civ.Proc. §§ 1958, 1960; Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 601, 86 P.2d 829.

[7, 8] In considering the question of whether appellant has established a prima facie case under the theory of implied warranty, the general rule with reference thereto in connection with bailments and the responsibility of the bailor is that the latter impliedly warrants that the thing hired is of the character and in the condition to be used as contemplated by the contract. The bailor is liable for damages occasioned by faults or defects of the article hired of which he ought to have known or as a reasonable man had a duty to ascertain. That this is the rule finds support in the case of Dam v. Lake Aliso Riding School, 6 Cal.2d 395, 57 P.2d 1315, 1317, where the court said:

> "In his contract of hiring, he impliedly engages that he knows, or has exercised reasonable care to ascertain, the habits of his horses, and says to his customer that the horse which he lets is safe and suitable for the purpose for which he has hired it. His warranty is against defects or vicious habits, which he knows, or by the exercise of proper care could know; and, if he fails to exercise such care, and it occasions injury to his customer, he will not be relieved of liability, though he did not actually know the horse was unsuitable for the service. It is true a livery man is not an insurer of the suitableness of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring."

[9] In the instant case we are impressed that there is evidence in the record upon which the jury might have found that the skip-loader would not have rolled backwards over the declivity to the lot below had the respondents, as owners and bailors, first caused the skip-loader to be inspected as to the mechanical condition of its brakes. Rae v. California Equipment Co., 12 Cal.2d 563, 596, 86 P.2d 352.

[10] Concerning the duties and obligations of the appellant under the conceded facts as to what occurred at the time of the leasing of the equipment here in question, section 408 of the Restatement of the Law of Torts states: "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for bodily harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

In Comment (a) thereunder it is stated that "The fact that a chattel is leased for immediate use makes it unreasonable for the lessor to expect that the lessee will do more than give it the most cursory of inspections. The lessor must, therefore, realize that the safe use of the chattel can be secured only by precautions taken by him before turning it over to the lessee. * * *."

[11] In Comment "b" it is stated, in part: "The rule stated in this section is peculiarly applicable to persons who make a business of leasing chattels. In such a case, in the absence of an understanding to the contrary it may be assumed that both lessor and lessee understand that the article is leased as for immediate use."

[12–14] With reference to any waiver of a defect on the part of appellant, it is established law in this state that one who relies upon a matter of waiver to sustain

a defense to a cause of action must plead the same and prove it. With reference to the issue of waiver in the instant case, it cannot be said that reasonable minds might not differ upon the proof offered, if any, in support thereof. It requires no citation of authority for the statement that one may not by contract absolve himself of responsibility for his own negligence, if the latter is the proximate cause of ensuing damage. The question of whether any defect existed when the skip-loader was delivered or whether such defect developed after delivery is certainly under the facts of this case a debatable one. Being a question of fact upon which reasonable minds might differ, it should have been submitted to the triers of fact.

[15] Although the contract under which the skip-loader was rented contained a provision that appellant acknowledged he had examined the equipment and knew the condition thereof and that the same was in good condition, it became a question of fact for the jury to determine whether such an examination would have revealed the alleged defective condition of the brakes. If under the facts of this case the jury had found that respondent had taken all reasonable precautions to determine the condition of the brakes and that the defects, if any, therein developed after delivery of the bailed article, respondents' argument might prevail. But that is not the case, and we are asked to hold that as a matter of law appellant himself was negligent or that the defective condition of the brakes developed after possession of the equipment was delivered to him. This we cannot do, because we feel that reasonable people might well differ on these questions. The motion for a directed verdict should not have been granted.

[16] It should be understood that throughout this opinion we have followed the rule applicable to cases wherein the appeal is taken from a judgment following a directed verdict or nonsuit, which rule requires that evidence shall be taken in the light most favorable to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity or the inferences deducible therefrom.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.



114 Cal.App.2d 816

NEVADA CONSTRUCTORS, Inc. v. MARIPOSA PUBLIC UTILITY DIST.

Civ. 8346.

District Court of Appeal, Third District, California.

Dec. 19, 1952.

Hearing Denied Feb. 16, 1953.

Action to recover money alleged to be due on a construction contract. From an order entered in Mariposa County denying defendant's motion for summary judgment, defendant appealed. The District Court of Appeal, Van Dyke, J., held that the order was not an appealable one.

Appeal dismissed.

Appeal and Error ⇐78(1, 3)

As regards right of appeal, question is not what form order takes but what its legal effect is, and therefore even though denial of motion for summary judgment was denominated a "judgment", adjudication was not a judgment but an order, interlocutory in nature, and was not appealable. Code Civ.Proc. §§ 437c, 577, 963, 1003.

Crossland & Crossland, Fresno, for appellant.

Worthington, Park & Worthington, San Francisco, for respondent.

VAN DYKE, Justice.

Motion to dismiss appeal. Plaintiff and respondent brought action against the defendant and appellant to recover money alleged to be due on a construction contract.

Defendant moved for a summary judgment which motion the court heard and denied. From the order denying the motion defendant appealed.

Code of Civil Procedure section 963 treats of appeals and, inter alia, provides that an appeal may be taken from a final judgment entered in an action or special proceeding commenced in a superior court. The section also provides that appeals may be taken from certain orders therein designated. Orders denying motions for summary judgment are not included. Section 437c of the Code of Civil Procedure provides for summary judgments. By this section, and in certain designated proceedings, after answer filed, and if it be claimed that there is no defense to the action or that the action has no merit, the answer may be stricken or the complaint may be dismissed and judgment entered, if it be deemed by the court that there is present no triable issue of fact. The section specifically declares that "A *judgment* so entered is an appealable judgment as in other cases." (Italics added.) But this provision has no application to the appeal here taken. Obviously, where a motion to dismiss the complaint and enter judgment in favor of defendant is granted, or a like motion to strike the answer and enter judgment in favor of plaintiff is granted, and such an order in either case is followed by a formal judgment, a situation is presented which, without the specific appeal provision in section 437c of the Code of Civil Procedure, would have been governed by Code of Civil Procedure section 963, supra, declaring the right of appeal from a final judgment. The specific provision in section 437c of the Code of Civil Procedure that "A judgment so entered is an appealable judgment *as in other cases*" added nothing to the existing provision of section 963 of the Code of Civil Procedure; and it must be supposed this provision was inserted by the legislature simply and solely to make certain what might otherwise have been thought to be uncertain. (Italics added.) A judgment entered when a motion to strike the answer or dismiss the complaint is granted has all the qualities of a final judgment for thereby the proceeding is brought to an end; and except as it may be affected by appellate review the case is concluded and no further proceedings may be had. But if a motion to strike the answer or dismiss the complaint be denied, then the case goes forward to trial and ultimate judgment on the merits; such an order of denial possesses none of the attributes of a final judgment, nor is it one of the orders expressly made appealable by Code of Civil Procedure section 963.

That section distinguishes between judgments and orders. Further concerning what is meant by the term "judgment" reference may be made to section 577 of the Code of Civil Procedure which states that "A judgment is the final determination of the rights of the parties in an action or proceeding"; and to section 1003 of the Code of Civil Procedure which provides that "Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is denominated an order." We conclude (1) that the trial court determines the motion by an order, which order is never appealable; (2) that if the motion be granted a judgment in favor of movant follows, which is appealable. Since this appeal was taken from the order denying the motion it must be dismissed.

Appellant argues as follows: 1. The order appealed from was, according to the records of the trial court, a judgment. True, it was so entitled, but "The question, as affecting the right of appeal is not what the form of the order may be but what is its legal effect." Peterson v. Lightfoot, 47 Cal.App. 646, 648, 191 P. 48. Though on its face denominated a judgment, the adjudication was not a judgment but an order, interlocutory in nature. 2. That although no case in California has been reported dealing with the appealability of an order denying a motion for summary judgment, yet in other states and under other statutes, notably those of New York, such appeals are authorized. As to this contention we think that we must look solely to our own statutes to determine the appealability of such orders, and so looking it is apparent that such orders are not appealable.

The appeal is dismissed.

PEEK, J., and GLENN, Justice pro tem., concur.

114 Cal.App.2d 634

SCHREIBER v. HOOKER.

Civ. 15168.

District Court of Appeal, First District, Division 2, California.

Dec. 11, 1952.

Action was brought for breach of contract and accounting. Defendant moved for change of venue to county of his residence, and plaintiff opposed motion, contending that San Francisco County was proper venue, on ground that contract was made in San Francisco County when plaintiff's assignor deposited in mail in San Francisco County a resolution, addressed to defendant in county of his residence, accepting offer previously made by defendant's letter. The Superior Court of the City and County of San Francisco, Clarence Morris, J., entered order denying defendant's motion, and defendant appealed. The District Court of Appeal, Wagler, J. pro tem., held that finding of Superior Court that contract was made in San Francisco County was amply supported by verified complaint and affidavits.

Order affirmed.

1. Venue ⇐68

In action in San Francisco County for breach of contract and accounting, wherein defendant moved for change of venue to county of his residence, and wherein plaintiff contended that San Francisco County was proper venue, on ground that contract was made in San Francisco County when plaintiff's assignor deposited in the mail in San Francisco a resolution, addressed to defendant in county of his residence, accepting offer previously made by defendant in letter, burden was on defendant to show that terms of resolution differed from terms of offer so as to prevent formation of contract in San Francisco County.

2. Contracts ⇐24

An acceptance, to be effective, must in every respect comply with terms of offer, but it is not essential that identical language be repeated.

3. Appeal and Error ⇐912

On appeal from order denying motion for change of venue based on conflicting affidavits, it must be presumed that trial court found facts more favorable to prevailing party.

4. Appeal and Error ⇐912

On appeal from order denying motion for change of venue based on conflicting affidavits, all conflicts in affidavits must be resolved in favor of trial court's order, and, if there is room for conflicting inferences, inferences most favorable to order must be drawn.

5. Venue ⇐70

In action in San Francisco County for breach of contract and accounting, wherein defendant moved for change of venue to county of his residence, and wherein plaintiff contended that San Francisco County was proper venue, on ground that contract was made in San Francisco County when plaintiff's assignor deposited in the mail in San Francisco a resolution, addressed to defendant in county of his residence, accepting offer previously made by defendant in letter, trial court's finding that contract was made in San Francisco County, and that venue of action was in that county, was supported by verified complaint and affidavits.

Mazzera, Snyder & DeMartini, Stockton, for appellant.

Harry Gonick, Oakland, for respondent.

WAGLER, Justice pro tem.

Defendant appeals from an order of the Superior Court of the City and County of San Francisco, denying his motion for a change of venue to San Joaquin County, the county of his residence. The complaint alleges that plaintiff's assignor, the American Bulb Growers of California, Inc., a corporation, at San Francisco entered into an agreement with the defendant by the terms of which defendant was to supervise the harvesting of a crop of lily bulbs growing on land near Crescent City, California, negotiate for the sale of same, and perform other acts on behalf of said corporation. The prayer is for damages for a breach of this contract and for an accounting.

Plaintiff concedes that there is no special contract in writing designating the place of performance, and that under well established principles, Di Giorgio Fruit Corporation v. Zachary, 60 Cal.App.2d 560, 141 P.2d 8; De Campos v. State Compensation Insurance Fund, 75 Cal.App.2d 13, 170 P.2d 60; Turner v. Simpson, 91 Cal.App.2d 590, 205 P.2d 423, the order appealed from can be sustained only if the implied finding of the lower court, that the contract was entered into in the City and County of San Francisco, finds adequate support in the facts set forth in his complaint and the affidavits on file.

The affidavits present different versions of the manner in which the agreement in question was made. Both parties agree that one A. G. Adams, President of the American Bulb Growers of California, Inc., plaintiff's assignor, visited defendant at Lodi, San Joaquin County, California, on or about September 10, 1949, and discussed the subject matter of the contract and its terms. Defendant in his affidavit alleges "that on or about the 10th day of September, 1949, one A. G. Adams, President of said American Bulb Growers of California, Inc., a corporation, did personally visit your affiant in the City of Lodi, County of San Joaquin, State of California; * * * that the said American Bulb Growers of California, Inc., by and through its said President, A. G. Adams, and your affiant did then and there orally agree upon the terms and conditions under which your affiant would advance moneys for harvesting said crop of bulbs, and would supervise the harvest thereof * * *." Defendant further alleges that one of the conditions of said oral agreement was "that said American Bulb Growers of California, Inc., would give your affiant authority in writing to do all things necessary to carry out said oral agreement; that thereafter, and on or about the 23rd day of September, 1949, your affiant received in the mail a resolution of the Board of Directors of said American Bulb Growers of California, Inc., giving him certain authority to proceed with the harvest * *; that said authority was not in conformance with the oral agreement which affiant and the said American Bulb Growers of California, Inc., had made in the City of Lodi, * * *" that affiant "did object to said resolution" and that "on or about the 30th day of September, 1949, your affiant received in the mail a second resolution of the Board of Directors of the said American Bulb Growers of California, Inc., which said resolution was the same as the copy attached to Plaintiff's Complaint * * *; that said resolution contained authority for affiant to proceed substantially as orally agreed, and in addition thereto authorized him to advance moneys necessary to defend any suits filed against American Bulb Growers of California, Inc., by Byron Cossins or others, and agreed that any such sums so advanced should be repaid by said corporation out of funds received from the sale of said bulbs; * * * your affiant did advance certain sums, and did go to Crescent City, Del Norte County, California, and proceed there to carry out his obligation under said oral agreement."

Plaintiff in the complaint and in his counter-affidavit has taken the position that the contract was made in the City and County of San Francisco, that it was the outgrowth of a written offer contained in a letter written by defendant dated September 25, 1949, addressed to A. G. Adams, President of plaintiff's assignor, at its principal place of business in San Francisco, and an acceptance contained in a resolution of the American Bulb Growers of California, Inc., addressed to the defendant at Lodi, California, and deposited in the mail in San Francisco on September 29, 1949. See: 6 Cal.Jur., page 47; Fitzhugh v. University Realty Co., 46 Cal.App. 198, 188 P. 1023.

Defendant's letter, as set forth in the counter-affidavit, reads as follows:

> *"These are my terms, take them or leave them as you choose:* the company give me authority to clear up Ernest's legal matters so that we can go ahead with the harvest, also authority to pay out what is necessary to clear up the company's indebtedness to Ernest, also to finance the harvest and replanting of the bulbs. Further: the company gives me authority to sell the bulbs (I have a buyer waiting) and

after deducting the expenses incurred in the company's obligation to Ernest, in the expenses connected with the harvesting and replanting and sale of the bulbs (an accounting to be made to the company) the rest of the proceeds shall be turned over to Mr. Ellis for disbursal as per agreement of *Sept. 10th.* If you wish me to do what I can for the benefit of the company, send a resolution containing these terms at once so I can get back up there and straighten out this legal tangle and get on with the harvesting.

"I feel sure Mr. Ellis will agree with me in this position and will you let him read this letter. Of course to be included in the terms is the 500 dollars bonus for the use of my money in the transactions necessary.

"Please consider this and mail the resolution immediately. If you don't care to accept these terms then there is no other alternative than let a receiver be appointed, with the dissolution of the company. I shall do the best I can for the benefit of all concerned." (Emphasis ours.)

The resolution of acceptance, a copy of which was attached to the complaint and incorporated in the counter-affidavit, reads as follows:

"Be it resolved, that G. W. Hooker be, and he hereby is, appointed agent for this corporation with full authority covering the following matters:

"1. To take such steps as may be necessary to effect a settlement of the Ernest labor claim.

"2. To harvest the crop of bulbs on the property of this corporation with full authority to advance such monies as may be necessary, and to disburse the same as required in connection with the payment of the bills for the harvesting of said crop.

"3. To negotiate for the sale of and/or sale of said bulbs when harvested, and after deducting all costs of said harvesting and payment of the obligation due Ernest, setting aside the necessary money for the replanting of such bulbs as may be necessary to replant and deemed advisable by him, to turn over all the balance of said proceeds to Howard C. Ellis, the attorney for said company, for disbursal as per agreement dated *June 22, 1949.*

"4. To pay G. W. Hooker as consideration for the foregoing, in addition to repaying him any and all sums of money advanced by him in connection with carrying out the above, an additional sum of $500 which he is hereby expressly authorized to deduct from any and all proceeds prior to turning them over to Howard C. Ellis; said G. W. Hooker to render an accounting of all monies advanced and of monies disbursed in connection with any of the foregoing to the time of the delivery of any balance of proceeds to Howard C. Ellis.

"5. To take any and all other steps as may be deemed necessary by him for the purpose of carrying out the foregoing authorization and for the best interests of said corporation.

"6. To advance such sums as may be necessary in addition to the above on behalf of said corporation to resist any suits filed against said corporation by Byron Cossins or others; any such sums so advanced to be repaid by said corporation out of funds received from the sale of said bulbs." (Emphasis ours.)

The statement by defendant in his letter of September 25, 1949, *"These are my terms, take them or leave them as you choose,"* shows conclusively, we believe, that up to that time at least there had been no definite meeting of the minds. The defendant apparently recognizes the weakness of his original position in this regard, for in his opening brief he has abandoned his contention that an oral agreement was entered into on September 10, 1949, as alleged in his affidavit. He has accepted in part plaintiff's version of the manner in which the contract was made, in that he concedes that his letter was an offer, and that the resolution was a partial acceptance, but, argues the defendant, the acceptance was not an unqualified one;

it did not meet the offer squarely, and there was, therefore, no contract until the resolution was received by him and acted upon. Fitzhugh v. University Realty Co., supra.

[1] Defendant points out two particulars in which he says the acceptance did not meet the offer. The offer provided that "the proceeds shall be turned over to Mr. Ellis for disbursal as per agreement of *September 10th;*" while the acceptance provided that the proceeds shall be turned over to Mr. Ellis "for disbursal as per agreement dated *June 22, 1949.*" Since no point is made of this discrepancy in defendant's affidavit, we might infer that it was but a typographical error. In fact, defendant in his affidavit negatives the idea that this was a material point, for his affidavit recites that said resolution (referring to the resolution of September 29) contained authority to proceed "substantially as agreed." If there were in fact two agreements bearing different dates under which Mr. Ellis was to disburse moneys, the burden was upon the defendant as the moving party to show that the terms differed. Union Oil Company v. Basalt Rock Company, Inc., 30 Cal.App.2d 317, 86 P.2d 139. This he failed to do.

[2] It is true that an acceptance to be effective must in every respect comply with the terms of the offer. Ajax Holding Co. v. Heinsbergen, 64 Cal.App.2d 665, 149 P.2d 189; Caldwell v. Dalaray Mines, Inc., 68 Cal.App.2d 180, 156 P.2d 52; Briles v. Paulson, 170 Cal. 408, 149 P. 804. It is not essential, however, that the identical language be repeated. Beatty v. Oakland Sheet Metal Etc. Co., 111 Cal.App.2d 53, 244 P.2d 25.

The second discrepancy between the offer and the acceptance relied upon by the defendant appears in paragraph six of the resolution. This paragraph authorizes the defendant to advance whatever sums might be necessary to resist any suits filed against the corporation by one Byron Cossins or others. Since the Byron Cossins' claim was not mentioned in defendant's letter, he argues that this placed upon him an additional responsibility. In his affidavit, however, defendant took a different view. There he stated: "that said authorization was in excess of that required by said oral agreement, but since your affiant had never agreed to advance any such sums, he felt that he would not be obliged to do so." We believe that the view taken by the defendant in his affidavit is sound. The resolution did not obligate him to advance any money or to defend any suits, but gave him the authority to do so should the occasion arise, and should he wish to do so. The defendant in his letter set forth his terms and asked for authority to proceed. The resolution met his terms squarely. It also gave him without qualification all of the authority requested.

[3, 4] The trial court impliedly found that the additional authority contained in the resolution did not prevent the contract from becoming effective upon its deposit in the mail, and that the contract was accordingly made in the City and County of San Francisco. On an appeal from an order based on conflicting affidavits, it must be presumed that the court found the facts more favorable to the prevailing party. Not only must all conflicts in the affidavits be resolved in favor of the lower court's order, but where there is room for conflicting inferences, the inferences most favorable to the order must be drawn. Grangers' Union v. Ashe, 12 Cal.App. 143, 106 P. 889; Bernou v. Bernou, 15 Cal.App. 341, 114 P. 1000; Smilie v. Smilie, 24 Cal. App. 420, 141 P. 829; Argue v. Wilson, 3 Cal.App.2d 645, 40 P.2d 297; Miller v. Collins, 8 Cal.App.2d 10, 47 P.2d 334; Millard v. Millard, 102 Cal.App.2d 249, 227 P.2d 477; Doak v. Bruson, 152 Cal. 17, 91 P. 1001; Gordon v. Perkins, 203 Cal. 183, 263 P. 231.

[5] Applying the foregoing rule to the evidence in this case, we must conclude that the finding of the trial court finds ample support in the verified complaint and the affidavits on file.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

114 Cal.App.2d 738

CORCORAN v. SAN FRANCISCO CITY & COUNTY EMPLOYEES RETIREMENT SYSTEM et al.

Civ. 15232.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1952.

Rehearing Denied Jan. 14, 1953.

Hearing Denied Feb. 11, 1953.

Police patrolman brought mandamus proceedings against the San Francisco City and County Employees Retirement System and others to review ruling of Employees Retirement System Board denying patrolman of pension on ground of disability. The Superior Court, City & County of San Francisco, Theresa Meikle, J., entered judgment adverse to patrolman, and he appealed. The District Court of Appeal, Wagler, J. pro tem., held that evidence sustained decision of board denying application.

Judgment affirmed.

1. Mandamus ⇐172

Since the San Francisco City and County Employees' Retirement Board is a local board as distinguished from a board exercising state-wide jurisdiction, superior court in mandamus proceeding to compel granting of pension to police patrolman, was not authorized to exercise its independent judgment on the evidence. Code Civ. Proc. § 1094.5.

2. Mandamus ⇐172

Where it is contended that findings of the San Francisco City and County Employees' Retirement Board in denying a pension are not supported by the evidence, inquiry of superior court in mandamus proceeding is limited to question whether there was any prejudicial abuse of discretion, and such an abuse of discretion can be found only where decision of board is not supported by any substantial evidence in light of whole record. Code Civ.Proc. § 1094.5(b, c).

3. Mandamus ⇐187(9)

Where it is claimed that decision of superior court in mandamus proceeding against a local board lacks proper evidentiary support, power of appellate court begins and ends with inquiry whether there is any substantial evidence, contradicted or uncontradicted, which in and of itself will support conclusion reached by Superior Court. Code Civ.Proc. § 1094.5(b, c).

4. Municipal Corporations ⇐187(9)

Medical evidence sustained decision of the San Francisco City and County Employees' Retirement Board that police patrolman who ruptured intervertebral disc between fourth and fifth lumbar vertebrae while separating bumpers of automobiles, and on whom was performed operation fusing third lumbar vertebra and sacrum, was not entitled to pension on ground of disability.

5. Municipal Corporations ⇐187(8)

Failure of police patrolman to be represented by counsel on application to San Francisco City and County Employees' Retirement Board on ground of disability, did not prevent him from receiving a fair trial.

6. Mandamus ⇐187(4)

Contention of police patrolman that he did not receive a fair trial in application to the San Francisco City and County Employees' Retirement Board for pension on ground of disability, should have been raised before superior court in mandamus proceeding, and not for first time on appeal to District Court of Appeal from judgment of superior court.

7. Municipal Corporations ⇐187(9)

It was improper for San Francisco City and County Employees' Retirement Board after conclusion of hearing of application of police patrolman for pension on ground of disability and after submission of case, to receive in evidence certain medical reports. Civ.Code Proc. § 1094.5.

8. Administrative Law and Procedure ⇐458, 473

Though local boards are not bound by technical rules of judicial procedure, they must afford the parties appearing before them a reasonably fair hearing, and they cannot, lawfully, decide cases on evidence not submitted to or known by the other side.

9. Mandamus ⇐187(4)

Where contention that San Francisco City and County Employees' Retirement

Board acted improperly in receiving medical reports after conclusion of hearing on application of police patrolman for pension on ground of disability was not raised on petition of patrolman for rehearing, or at hearing of patrolman's petition for writ of mandate in superior court, or on his motion for new trial, though patrolman was represented by counsel at those hearings, he could not raise the contention for the first time on appeal.

10. Appeal and Error ⇐171(1)

An appellate court will not consider a theory which is different from that urged in the trial court, and which is presented for first time on appeal.

James C. Purcell and Michael Riordan, San Francisco, for appellant.

Dion R. Holm, City Atty., and Clayton W. Horn, Deputy City Atty., San Francisco, for respondents.

WAGLER, Justice pro tem.

Appellant was a limited tenure police patrolman appointed under the provisions of section 145.1 of the Charter of the City and County of San Francisco. He applied to the Retirement Board of San Francisco for a pension on the ground of disability alleged to have resulted from an injury incurred in the performance of duty. His application was denied. Thereafter an application was made for a rehearing which was also denied. Appellant then filed his petition for a peremptory writ of mandate in the superior court to secure a review of the board's ruling. The writ was denied as was his subsequent motion for a new trial. From the judgment of the superior court he takes this appeal.

The legal status of the Retirement Board has been commented on in a number of cases. Naughton v. Retirement Board of S. F., 43 Cal.App.2d 254, 110 P.2d 714; Brant v. Retirement Board of S. F., 57 Cal. App.2d 721, 135 P.2d 396; Rogers v. Retirement Board, 109 Cal.App.2d 751, 241 P.2d 611. In 1945 at the suggestion of the judicial counsel the legislature sought by the enactment of section 1094.5 of the Code of Civil Procedure to place in statutory form the law governing judicial review of administrative procedure as developed by the decisions of our courts. This section was amended in 1949.

In his petition for a peremptory writ of mandate before the superior court appellant attacked the decision of the Retirement Board on the sole ground of the insufficiency of the evidence. On this appeal appellant, seeking to apply the provisions of section 1094.5 of the Code of Civil Procedure, makes two principal contentions: (1) That the Retirement Board was guilty of a prejudicial abuse of discretion in that certain findings are not supported by the evidence and (2) that appellant did not receive a fair trial.

[1, 2] The Retirement Board being a "local" board as distinguished from a board exercising state wide jurisdiction, the superior court was not authorized to exercise its independent judgment on the evidence. Mogan v. Board of Police Com'rs, 100 Cal.App. 270, 279 P. 1080; McColgan v. Board of Police Com'rs, 130 Cal.App. 66, 19 P.2d 815; Hogan v. Retirement Board, 13 Cal.App.2d 676, 57 P.2d 520; Bennett v. Brady, 17 Cal.App.2d 114, 61 P.2d 530; Naughton v. Retirement Board of S. F., 43 Cal.App.2d 254, 110 P.2d 714; Rogers v. Retirement Board, 109 Cal.App.2d 751, 241 P.2d 611. Where it is claimed that the findings of the Retirement Board are not supported by the evidence the inquiry of the superior court is limited to the question of "whether there was any prejudicial abuse of discretion", C.C.P. 1094.5(b), and such an abuse of discretion can be found on the part of the Retirement Board only where its decision is "not supported by substantial evidence in the light of the whole record." C.C.P. 1094.5(c).

[3] Under the system of dual review permitted in these cases, when it is claimed that the decision of the superior court lacks proper evidentiary support, the power of the appellate court begins and ends with the inquiry whether there is any substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the superior court. Wing v. Kishi, 92 Cal.App. 495, 268 P. 483;

Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 143 P. 2d 689; Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258; Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20; Powell v. Pacific Electric Railway Co., 35 Cal.2d 40, 216 P.2d 448; Richter v. Walker, 36 Cal.2d 634, 226 P.2d 593.

All of the proceedings before the Retirement Board including all exhibits and the proceedings on appellant's petition for a rehearing before that board were received in evidence by the superior court. These records show without conflict that on September 24, 1946, appellant was injured while on duty as a police officer separating the bumpers of two automobiles, that he continued to work until October 14th when he felt a sudden pain in the low back with numbness in the left lower extremity. On October 16, 1946, he entered the San Francisco Hospital and was examined by Dr. Francis J. Cox who later diagnosed his injury as a rupture of the intervertebral disc between the fourth and fifth lumbar vertebrae. On November 21, 1946, Dr. Cox performed a Hibbs type of fusion between the third lumbar vertebra and the sacrum. Appellant received standard post operative treatment and returned to work with the police department on June 29, 1947. He worked until September 1, 1947, and was on vacation from September 1, 1947, to September 14, 1947. He then worked until October 1, 1947, and was again off work until October 19, 1947 (alleged cause neurasthenia—treatment by private physician). Appellant then worked until December 2, 1947, and was off work again until December 7, 1947 (alleged cause sore throat —treated by private physician, Dr. Benioff). He worked from December 8, 1947, to January 16, 1948, and was again off work until September 23, 1948.

On January 28, 1948, appellant appeared before the Retirement Board and testified on behalf of his application for retirement. On September 15, 1948, his application for retirement was denied and on October 28, 1948, his employment with the police department was terminated.

Based upon the record before it the superior court made a finding that: "At the time plaintiff [appellant] filed his said application for disability retirement with defendants [Retirement Board], he was not incapacitated for performance of duty with the police department by reason of any bodily injury received in, or illness caused by the performance of his duty; that he had made an excellent recovery from the injury sustained on September 24, 1946." It is this finding which appellant contends is not supported by the evidence.

The medical evidence bearing upon this issue, in addition to appellant's own testimony, consists of certain X-ray reports, the reports of the Rehabilitation Center of San Francisco where appellant went for physical and occupational therapy, one report from Dr. E. B. Towne, two reports from Frank W. Lusignan, and fourteen reports from Dr. Francis J. Cox. It was Dr. Cox who performed the laminectomy and was in charge of appellant's treatment.

All of the medical reports concede the existence of the original injury and that it was incurred in the line of duty. Both Dr. Towne, who saw appellant once, and Dr. Lusignan, who saw appellant twice, found him to be suffering from a "functional disorder" attributable to his injury. The reports of Dr. Cox, however, show an increasing doubt on his part of the bona fides of appellant's continuing disability.

On April 1, 1947, Dr. Cox reported to the Board in part as follows: "The patient, as you know, has refused to follow through any treatment advised during the past seven to eight weeks. He has remained at home, and as far as I can judge, done nothing towards rehabilitating himself. * * *

"Ever since I first saw this patient he has been complaining of a chronic cough. His lungs have been examined by X-ray and nothing found. For some reason or other, he still seeks to attribute the cough to his injury. I can see no connection. * * * I do not see any reason why he should not be able to resume his work with

the Police Department within six to eight weeks from present date."

On April 25, 1947, the Rehabilitation Center wrote to Dr. Cox as follows: "Physical and Occupational Therapy—Increased range of motion of back. Patient does what is asked of him but is lazy and just goes through the motions.

"Attendance irregular in occupational therapy. Does what he is told but without interest."

On May 31, 1947, Dr. Cox again wrote the Retirement Board in part as follows: "Mr. Corcoran has been released to return to light duty with the Police Department as of Monday 9, June 1947.

"At no time during the past month has Mr. Corcoran complained of pain in his back or in his lower extremities. He still has a sense of stiffness in his low back, but I do not consider this complaint as disabling."

On June 20, 1947, the Rehabilitation Center reported to Dr. Cox in part as follows: "Physical and Occupational Therapy —Patient was discharged June 2, 1947 to go back to work. The motion of his back was free; he was able to lift 30 lbs."

On October 14, 1947, Dr. Cox again reported to the Retirement Board in part as follows: "Conclusion: The patient is able to move about freely and shows no objective evidence of disability on physical examination. I feel that the clinical result taken from lamectomy and fusion, in this case is excellent. * * * *I feel the patient should be able to continue work.* He stopped work on the 3rd of October 1947 voluntarily. He was released by me to return to work on October 13, 1947." (Emphasis ours.)

On January 17, 1948, Dr. Cox again reported to the Retirement Board in part as follows: "Patient walks and moves with no evident disability. * * * There is no local muscle spasm. Patient bends forward to bring the finger tips to within 10" of the floor. * * * It is my feeling that the patient has made excellant recovery to date and that he has only a mild residual disability, as evidenced by intermittent back and left leg pain. *He is not disabled for his present type of duty* with the San Francisco Police Department.

"Later in the morning, when this examination was conducted, a true reason for this patient's present complaint became apparent. He stopped me in the hall of the San Francisco Hospital with the following statement: 'If I tell you a real reason, will you change your mind about putting me on the shelf for a week. My wife is getting operated on this morning and I want to be there.'" (Emphasis ours)

Again on March 15, 1948, Dr. Cox reported to the Retirement Board in part as follows: "I do not consider Mr. Corcoran disabled for duty with the Police Department."

[4] While there is ample evidence from which the board might have concluded that at the time of his hearing appellant was suffering from a "functional disorder" attributable to his injury and while it must be conceded that such a functional disorder can be just as disabling as an organic one, yet in view of the medical evidence above quoted we must conclude that the decision of the Retirement Board is supported by substantial evidence in the light of the whole record, and that the finding of the superior court to the effect that appellant had made a complete recovery from his injury is amply suppported by the record.

The second contention of appellant is that he did not receive a fair trial. His complaint in this regard is based on two grounds: (1) That he appeared before the Retirement Board without benefit of counsel and (2) that the Retirement Board received evidence after the case was submitted on January 28, 1948, to wit, the medical reports of Dr. Towne, Dr. Lusignan, and Dr. Cox.

Appellant has cited no authority to support his contention that his failure to appear through counsel before the Retirement Board resulted in any prejudice. He argues that he was unfamiliar with procedure and uncertain of his rights, yet being a police officer he undoubtedly had some knowl-

edge of the rights of people so far as representation by counsel is concerned. Furthermore, the record shows that appellant was given an opportunity without interruption or interference to make a full and complete statement of his case. At the conclusion of his testimony the following questions and answers appear in the record: "Q. Are you going to produce any other testimony? Have you any other testimony that you want to present to the Board? A. Well, how do you mean, sir? Q. You told us just what the picture is as you see it. Now, you have the privilege of bringing in anyone else whose information to the Board will help your case out. In other words, if you want to bring Doctor Benioff in, or anybody else—I am not saying you have to, I just wanted to know if you wanted to? A. No, sir, I just wanted to tell you how I feel."

[5, 6] It appears to have been the practice of the Retirement Board, like other similar boards and commissions, to permit applicant to appear either in person or by counsel. In this case appellant's failure to be represented by counsel did not prevent him from receiving a fair trial. Furthermore, the point should have been raised before the superior court and not for the first time on this appeal.

[7–10] Appellant's second complaint concerning the procedure of the Retirement Board would deserve serious consideration except for the fact that this point too is raised for the first time on appeal. The record shows that while appellant agreed at the hearing that all medical reports in the case could be admitted in evidence his stipulation could not possibly be construed to include medical reports not then in existence nor could it be interpreted as authorizing the receiving of evidence after the conclusion of the hearing and submission of the case. Yet the report of Dr. Towne dated February 17, 1948, the report of Dr. Lusignan dated March 4, 1948 and the report of Dr. Cox dated March 15, 1948, were received in evidence by the Retirement Board after the submission of the case and presumably considered by the Board in arriving at its decision. Such procedure can not be approved. This board acts in a quasi-judicial capacity. Its findings, based on conflicting evidence, are binding on the courts. It has no power to take or receive evidence, without the knowledge of the party adversely affected, or without giving him a right to cross-examine. These boards act as judicial bodies, with a limited jurisdiction. While not bound by technical rules of judicial procedure, they must afford the parties appearing before them a reasonably fair hearing. They cannot, lawfully, decide cases on evidence not submitted to or known by the other side. La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Rogers v. Retirement Board, 109 Cal. App.2d 751, 757–58, 241 P.2d 611. However since this point was not raised on the petition for rehearing, at the hearing of appellant's petition for writ of mandate nor on his motion for a new trial, and since at each of these hearings appellant was represented by counsel he can not raise the point for the first time on this appeal. The sole issue raised by the pleadings before the superior court was the sufficiency of the evidence to support the decision of the Retirement Board. The evidence was offered on no other theory. An appellate court will not consider a theory of a case which is different from that urged in the trial court and which is presented for the first time on appeal. White v. City of San Diego, 126 Cal.App. 501, 14 P.2d 1062; Rabbitt v. Carthage Marble Corp., 12 Cal.App.2d 572, 55 P.2d 1205; Vitale v. City of Los Angeles, 13 Cal.App.2d 704, 57 P.2d 993; Mercer Casualty Co. v. Lewis, 41 Cal.App.2d 918, 108 P.2d 65; Grimes v. Nicholson, 71 Cal. App.2d 538, 162 P.2d 934; Palmer v. Wolff, 88 Cal.App.2d 979, 200 P.2d 167; 2 Cal. Jur. 237; 3 Am.Jur. p. 35.

Furthermore the reports of Dr. Lusignan and Dr. Towne were entirely favorable to the appellant while the March 15th report of Dr. Cox contained only a reiteration of his previously expressed opinion that appellant was not "disabled for duty with the Police Department." Even assuming that the final report of Dr. Cox must be disregarded, Olive Proration Etc. Committee v. Agri. Etc. Comm., 17 Cal.2d 204, 109 P. 2d 918, the finding in question still finds ample support in the reports properly re-

ceived in evidence pursuant to the stipulation.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



114 Cal.App.2d 723

PEOPLE v. O'CONNOR.

Cr. 778.

District Court of Appeal, Fourth District, California.

Dec. 12, 1952.

Motion, in form of petition for writ of error coram nobis, to vacate judgment entered on petitioner's plea of guilty to charge of forgery, which plea had been entered more than two years before motion was filed. The Superior Court of Imperial County, Elmer W. Heald, J., denied writ, and petitioner appealed. The District Court of Appeals, Griffin, J., held that the delay involved justified denial of writ and petitioner's request for an order for his personal appearance.

Order denying writ of error coram nobis affirmed.

1. Extradition ⇐41

Where proceeding designated by uniform act of extradition was complied with in returning defendant from Arizona to California, and extradition papers had been approved by Governor of California and Attorney General of Arizona, as Acting Governor of Arizona, the trial court had jurisdiction to enter defendant's plea of guilty in prosecution for forgery.

2. Criminal Law ⇐997

Complaint of counsel in criminal proceeding may not be raised by defendant for first time upon motion, in form of petition for writ of error coram nobis, to vacate judgment upon petitioner's plea of guilty to charge of forgery.

3. Criminal Law ⇐997

Upon motion, in form of petition for writ of error coram nobis, to vacate judgment upon petitioner's plea of guilty to forgery charge, any claimed conflict in the affidavits upon which the matter was ordered submitted were properly resolved against petitioner.

4. Criminal Law ⇐997

Where petitioner had pleaded guilty to charge of forgery more than two years previously, remedy by motion, in form of petition for writ of error coram nobis, to vacate the judgment of conviction on grounds that case had been improperly handled and that sheriff and deputy district attorney had deprived petitioner of proper diet, rest, and medical care while petitioner was confined in county jail so that petitioner would enter plea of guilty, was not available to petitioner.

5. Criminal Law ⇐997

Upon motion, in form of petition for writ of error coram nobis, to vacate judgment upon petitioner's plea of guilty to charge of forgery which plea had been entered more than two years before, question whether petitioner should have been allowed to be present in court at time of hearing was matter within sound discretion of the trial court.

6. Criminal Law ⇐997

A showing of due diligence in seeking a writ of error coram nobis is a prerequisite to availability of relief upon motion, in form of petition for such writ, to vacate a judgment of conviction.

7. Criminal Law ⇐997

Upon motion, in form of petition for writ of error coram nobis, to vacate judgment of conviction for forgery, fact that more than two years had elapsed between entry of the judgment upon petitioner's plea of guilty and filing of the motion justified denial of the writ.

John O'Connor, in propria persona.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On October 3, 1949, defendant John O'Connor, alias John Nelson, was charged with forging a check on September 4, 1947, in Imperial County, and entered a plea of guilty. When arraigned, the public defender was appointed to represent him. After a hearing on a pre-sentence report of the probation officer, defendant, on October 4, 1949, was committed to the state's prison. No motion for new trial was made and no appeal was taken from the judgment. On March 3, 1952, more than two years later, defendant, in propria persona, filed a petition for writ of error coram nobis in the Superior Court of Imperial County. The court appointed an attorney to represent defendant, granted an order allowing him to file any paper as a pauper, without cost, denied a motion for defendant's personal appearance, and ordered that the matter be submitted on affidavits. Several continuances were granted defendant to secure affidavits. A hearing was had, the court ordered the matter submitted, and relieved defendant's counsel from further service. Subsequently, the petition for the writ was denied. Defendant, in propria persona, filed a notice of appeal from that order.

A general statement of defendant's contentions on appeal is as follows: That if he had been accorded his constitutional right he would not have pleaded guilty, and if he had had a fair trial by jury, with an opportunity to present evidence and speak in his own behalf, he would have been acquitted. He alleges that the judgment and sentence were illegal in the following respects: (1) that he was a kidnaped person and the court lacked jurisdiction to proceed; (2) that he was denied the services of competent counsel at arraignment; (3) that the public defender handled his cause improperly; (4) that his cause was prejudiced by misconduct of the sheriff; (5) that he was prejudiced by misconduct of the deputy district attorney; and (6) that the court erred in proceeding to judgment and sentence knowing the defendant entered a plea of guilty through duress, illness, hunger, exhaustion, denial of medical treatment and care, and physical and mental torture resulting therefrom.

The first contention has to do with charges to the effect that defendant was illegally extradited from Arizona after serving a term in prison in that state; that the commutation of sentence in Arizona, proclamation of parole, and warrant of extradition were signed through fraud, duress and collusion, to prevent defendant from filing charges against certain Arizona officials.

Defendant offered in evidence certain exhibits consisting of the proclamation of the Governor of Arizona commuting his sentence, a proclamation of parole, and certain communications pertaining to the whereabouts of a judge of the United States District Court of that district on September 22nd and 23rd, 1949, the materiality of which is not fully disclosed.

[1] The affidavit of the deputy district attorney states that the record of defendant's case shows that he was brought to California from Arizona by a process of extradition which papers were approved by the governor of California and the attorney general of Arizona, as acting governor of that state; that the proceeding, as designated under the Uniform Act of Extradition, A.C.A.1939, §§ 44–3603 to 44–3630, was complied with in returning the defendant from Arizona to California. Under the facts related, the trial court had jurisdiction to enter the plea of the defendant in Imperial County in the forgery case here involved. People v. Youders, 96 Cal.App.2d 562, 568, 215 P.2d 743.

[2] As to the second claim, the record shows that counsel was appointed and represented the defendant at the arraignment notwithstanding defendant's allegation to the contrary. The complaint of incompetency of counsel may not be raised for the first time in a coram nobis proceeding. People v. Youders, supra; People v. James, 99 Cal.App.2d 476, 479, 222 P.2d 117.

[3, 4] As to the third claim, there is no showing that the case was improperly handled. Apparently the defendant made a full statement of his guilt to the district attorney before his arraignment and made

a similar statement to the probation officer after his plea of guilty. Counsel for defendant was justified in relying upon defendant's insistence that he plead guilty even though, as defendant contends, his physical condition was such that he was unable to eat the jail food. He now assigns this fact as the reason for his urgent plea of guilty so he could be committed to the penitentiary where he could obtain hospitalization, and where they understood his diet. His counsel averred that defendant, being a four-time loser, knew that he was not eligible for probation and that defendant was not induced to plead guilty through any misrepresentation of his. All the facts above indicated, even if true, must have been known to defendant at the time he entered his plea of guilty. Any claimed conflict in the affidavits in this respect was properly resolved against defendant. People v. Ynostroza, 105 Cal.App.2d 332, 334, 232 P.2d 913; People v. James, supra; People v. Boyce, 99 Cal.App.2d 439, 443, 221 P.2d 1011; People v. Costello, 113 Cal. App.2d 481, 248 P.2d 27. Remedy by writ of error coram nobis at this late date, on these claimed grounds, is not available. People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13.

The fourth claim is equally untenable under the authorities last above mentioned. Defendant claims that the sheriff deprived him of proper diet, rest, and medical care, while he was confined in the county jail, in order that defendant should enter a plea of guilty, and to protect the sheriff against kidnaping charges, as indicated in claim No. 1. He offered in evidence several statements of certain individuals and of persons confined with him in the jail to the effect that he did lose weight and that he did complain about the food; that he requested a particular diet and medical attention; and such request was denied.

The sheriff's affidavit indicates the food that was served was substantial and was "a well balanced diet"; that defendant was constantly complaining not only about the food but about many other conditions; that it did not appear to him that defendant's physical condition required treatment in the hospital or the need of any special diet.

The fifth claim is similar and is directed against the deputy district attorney. The ruling above made is equally applicable to this complaint. He replies that he had no control over the food and diet of the county jail's inmates; that defendant admitted the commission of the crime to him and also did so in open court at the time he was sentenced; that although defendant did make a statement in open court that he was extradited from Arizona by fraud and that he was seeking and had asked for a doctor and a special diet, he never indicated that he was not guilty of the charge nor that his plea of guilty was entered as a result of his claimed treatment. The court had jurisdiction to pronounce sentence. No new trial was sought and no appeal from the judgment was taken. In this respect relief by writ of error coram nobis is unavailable. People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635; People v. James, supra.

[5] There is no merit to the claim that the motion of defendant for personal appearance at the hearing was improperly denied. Under the circumstances related the question of whether or not defendant should have been allowed to be present in court at the time of the hearing was a matter within the sound discretion of the trial court. People v. Bailey, 105 Cal.App. 2d 150, 153, 232 P.2d 518; People v. Kerr, 113 Cal.App.2d 90, 247 P.2d 927.

[6, 7] Defendant has not accounted for the delay of nearly 29 months from the time judgment was entered before filing his motion to vacate the judgment in the form of a petition for writ of error coram nobis. A showing of due diligence in seeking the writ is a prerequisite to the availability of relief on such a motion. People v. Bailey, supra, 105 Cal.App.2d at page 154, 232 P. 2d 518. The court was justified in denying the writ and the request made for an order for his personal appearance for this reason alone. People v. Krout, supra; People v. Bailey, supra; People v. Watkins, 92 Cal. App.2d 375, 376, 206 P.2d 1118; People v. Savin, 37 Cal.App.2d 105, 108, 98 P.2d 773.

Order denying writ of error coram nobis affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



114 Cal.App.2d 772

SANCHA v. ARNOLD.

Civ. 8191.

Sac. 6276.

District Court of Appeal, Third District, California.

Dec. 17, 1952.

Rehearing Denied Jan. 16, 1953.

See 252 P.2d 55.

Action against administrator of estate of deceased putative husband for specific performance of oral contract between plaintiff and defendant's decedent that they would become and live together as common-law husband and wife and that upon death of either, their property would belong to survivor. The Superior Court, Lassen County, Ben V. Curler, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, J., held that in equity and good conscience, plaintiff was entitled to specific performance of agreement entered into and performed by her in honest and justifiable belief that the parties were lawfully married.

Judgment affirmed.

1. Specific Performance ⇐82

Existence of a putative or supposed marriage will justify specific enforcement of accompanying agreement between the parties concerning such property as they may thereafter acquire, even though a common-law marriage did not arise between the parties.

2. Marriage ⇐20(2)

Under Nevada law in effect until 1943, present assent between parties capable of contracting marriage, followed by cohabitation as husband and wife, and the holding out to the world of each other as such, resulted in a "common-law marriage."

See publication Words and Phrases, for other judicial constructions and definitions of "Common-Law Marriage".

3. Specific Performance ⇐121(6)

In action against administrator of estate of deceased putative husband for specific performance of oral contract, evidence supported findings that plaintiff had entered into oral agreement with putative husband that they would become and live together as common-law husband and wife, operating together a rooming and boarding house to be acquired by husband, and that upon death of either all the property would belong to the survivor, and that plaintiff had fully performed her part of agreement.

4. Marriage ⇐54

A woman who lives with a man as his wife in belief that a valid marriage exists is entitled upon termination of their relationship to share in the property acquired by them during its existence.

5. Marriage ⇐54

Belief in the existence of a valid marriage is the essential basis of a "putative marriage".

See publication Words and Phrases, for other judicial constructions and definitions of "Putative Marriage".

6. Specific Performance ⇐121(3)

In action against estate of deceased putative husband for specific performance of oral contract that plaintiff and putative husband would become and live together as husband and wife and that upon death of either all their property should belong to survivor, evidence supported finding that throughout the 24 ensuing years that the parties lived together as husband and wife until husband's death plaintiff honestly and reasonably believed herself to be decedent's wife.

7. Marriage ⇐54

In order for one party to supposed marriage to occupy the status of a putative spouse, it is not necessary that the other party also believes supposed marriage to be valid.

8. Specific Performance ⇐123

In action against estate of deceased putative husband for specific performance

of oral contract concerning disposition of property acquired after supposed marriage upon death of either spouse, whether plaintiff in good faith believed herself to be decedent's wife was a question of fact.

9. Specific Performance ⇐82

Where plaintiff, justifiably believing herself to be married, entered into oral contract with supposed husband concerning property to be acquired by them thereafter, and in reliance thereon and believing herself legally married labored with supposed husband for more than 24 years in conducting a rooming and boarding house acquired by husband, regardless of whether a common-law marriage existed, she was entitled in equity and good conscience to specific performance of agreement that upon the death of either party all their property would belong to survivor.

10. Frauds, Statute of ⇐144

Where plaintiff had lived with putative husband as his wife for more than 24 years, assisting him in operation of rooming and boarding house, in reliance on oral agreement that upon death of either party all their property woud belong to survivor, administrator of estate of deceased putative husband was estopped from pleading the statute of frauds, in action by putative wife for specific performance of agreement.

11. Frauds, Statute of ⇐144

The doctrine of estoppel to assert statute of frauds will be applied to prevent fraud that would result from refusal to enforce oral contracts, where fraud inheres in unconscionable injury that would result from denying enforcement of contract after one party has been induced to change his position seriously in reliance on contract or in unjust enrichment that would result if party who has received benefits of other's performance were allowed to rely on the statute.

12. Specific Performance ⇐82

Where putative wife honestly and justifiably believed that she was entering into lawful common-law marriage, her right to specific performance of oral agreement with putative husband that upon death of either all their property would belong to survivor did not depend upon actual existence of marriage, since, whatever supposed husband may have believed as to legality of marriage, putative wife was not in pari delicto with him.

13. Specific Performance ⇐87

Where all property was kept in name of putative husband, wife's failure to keep in force a will in his favor did not preclude specific enforcement by her of oral agreement with supposed husband that upon death of either their property would belong to the survivor.

Stanley Arnold, Susanville, Louis Ferrari, Sylvester Andriano, Theodore Cicoletti, San Francisco, of counsel, for appellant.

Arthur J. Anderson, Hardin Barry, Susanville, for respondent.

VAN DYKE, Justice.

This is an appeal by the administrator of the estate of C. Sancha, deceased, from the judgment entered in favor of respondent, Helen Knight Sancha. Her action was brought to enforce specific performance of an oral contract entered into in May, 1926.

Concerning that contract and the relations of the parties thereafter, the trial court made the following findings: On May 1, 1926 in Reno, Nevada, respondent and Sancha entered into an oral contract whereby respondent on her part promised to become, and live with Sancha as, "his common-law wife"; to devote all her attention exclusively to making a home for him; to assist him in the operation of a boarding and rooming house to be acquired by him in Susanville; to look after his general welfare and comfort so long as he should live and to be and remain associated with him in the management and operation of the boarding and rooming house to be so purchased and acquired by him; that decedent on his part agreed with respondent that he would be "her common-law husband and would live with her as her husband and in all respects be her husband"; that he would purchase and acquire the rooming and boarding house property and that the two would run a rooming and boarding house business; that Sancha would, upon

his death, by will or otherwise leave respondent all of the property of which he was possessed when he died; that respondent accepted the terms and conditions of the oral agreement and fully and faithfully performed all her promises to decedent; that by the agreement it was stipulated that the property would be kept in the name of decedent, but upon his death, if he died first, would belong to respondent, and, conversely, if she died first would remain the property of decedent; that Sancha died without leaving any will or other instrument conveying the property to plaintiff. The court further found that in performance of her promises under the agreement respondent left the place where she had been working and thereafter devoted her entire life up to decedent's death, a period in excess of 24 years, in living with decedent "as his common-law wife" and that she actually and in good faith believed that she was his common-law wife; that during said period decedent lived with respondent as her common-law husband; that she assisted him in the conduct and management of the business during the entire period, working in the kitchen, preparing and serving meals and keeping the rooms; that all of the income of the two was derived from the conduct of the business jointly by them; that during all that time respondent received no wages or salary but did receive small amounts of money from time to time for her personal wants; that at the time of the agreement the laws of Nevada recognized the validity of common-law marriages; that the agreement was entered into by the parties voluntarily, each of his or her own account and without any undue influence or persuasion; that the agreement was in all respects just and fair and that the performance by respondent of her promises constituted adequate consideration therefor; that such services, owing to their peculiar nature, were incapable of pecuniary compensation and that it was never intended by the parties that they should be compensated in money; that respondent never received or asked money compensation for her services; that by her performance of the contract and her reliance on the promises of decedent the respondent had so changed her condition in life that she could not be restored to the situation she occupied before the agreement was made; that the property which decedent owned at his death was the property concerning which the bargain had been made and accumulations therefrom; that by reason of the foregoing facts the respondent was the owner of all the property in the estate of Sancha.

Appellant contends that the oral agreement pleaded and found was in effect one to leave property by will and was therefore not enforceable; that the contract being one mutually to leave property by will, the respondent, by failing to keep in effect during the life of Sancha a will of her own, leaving her share of the property to Sancha, was guilty of such nonperformance as to bar specific performance in her favor; that respondent's only remedy was in quantum meruit based upon a claim which the law required should have been filed in the estate proceedings.

[1, 2] It will be noted that the trial court did not expressly find that by reason of what occurred in Reno, Nevada, and the subsequent living together as man and wife of the parties to that agreement a marriage in fact existed. In this connection appellant argues that notwithstanding the statutes of Nevada, when the agreement was made, recognized the validity of common-law marriage, yet the respondent here failed to prove the existence of such a marriage. We think it was not necessary that the court should have found that a common-law marriage arose between the parties for the court did find all the essentials of a putative or supposed marriage which would justify the court in specifically enforcing the accompanying contract between the parties thereto concerning such property as they might thereafter acquire. Common-law marriages were valid under the statute law of Nevada as it existed in May, 1926 and up until 1943, when by amendment to the existing statutes Nevada for the first time required a ceremonial solemnization of marriage as a condition to its validity. The elements of a common-law marriage in May, 1926 under the Nevada statutes were stated by the Supreme Court

of that state in Dahlquist v. Nevada Industrial Commission, 46 Nev. 107, 206 P. 197, 199, 207 P. 1104, as follows: "A marriage * * * of common-law * * * character, is the consequence of a contractual relationship. * * * it is the result of present assent, between parties capable of contracting marriage, followed by subsequent cohabitation as husband and wife, and the holding out to the world of each other as such." See also In re Estate of Keig, 59 Cal.App.2d 812, 140 P.2d 163.

[3] Respondent testified that while she was working in Susanville as chambermaid in a hotel being conducted by decedent and another she was told by decedent that he wanted to buy the rooming house property which thereafter was bought and that he then asked her if she would go into partnership with him in respect to such a business; that she told him then such an arrangement would be satisfactory to her; that thereafter and in Reno a further discussion occurred in which, after restating what had been said theretofore, it was proposed by Sancha and agreed to by her that they would return to Susanville and thereafter live together as husband and wife; that he would buy the rooming house property and whatever profit resulted from their running the same together would belong half to one and half to the other, but that if anything happened to Sancha she would get everything and if anything happened to her he would own all of the property. She testified further that upon their return to Susanville Sancha purchased the subject property; that she and Sancha began living together as husband and wife and so continued until his death; that during all of that period she believed herself to be his common-law wife and that she was married to him; that in reliance upon the agreement and in the belief that she was his wife she performed the usual duties of a wife and while he was the business head of the rooming house, boarding house, pool hall, cigar and newsstand business which they conducted she ran the boarding house, did all the cooking, ran the rooming house, doing all the housekeeping work in connection therewith and generally in all respects that each treated the other as husband and wife. Two witnesses who were intimate friends of the couple for many, many years testified that from the relationships which they observed they believed them to be married. Sancha declared during the life together of himself and respondent that when he died whatever he had would belong to her. We think the foregoing fully supports the findings of the trial court hereinbefore stated.

[4, 5] "It is well settled that a woman who lives with a man as his wife in the belief that a valid marriage exists, is entitled upon termination of their relationship to share in the property acquired by them during its existence. * * *

"The essential basis of a putative marriage, however, is a belief in the existence of a valid marriage. * * * In addition, in the majority of cases, the de facto wife attempted to meet the requisites of a valid marriage, and the marriage proved invalid only because of some essential fact of which she was unaware, such as the earlier undissolved marriage of one of the parties * * *, a consanguineous relation between the parties * * *, or the failure to meet the requirement of solemnization." Vallera v. Vallera, 21 Cal. 2d 681, 683, 684, 134 P.2d 761, 762.

[6–8] In May of 1926, when common-law marriages were valid under the Nevada statutes, an agreement between a man and a woman otherwise capable of entering into the marriage state, that they then presently took each other as husband and wife, followed by cohabitation and a holding out to the world that they were husband and wife made a valid marriage. Appellant argues that there was was no proof here of the required cohabitation and holding out, but assuming this were so, yet what occurred in Nevada and what occurred thereafter in California sufficiently supported the trial court's finding that respondent during all of the years ensuing after the consensus that occurred in Nevada honestly and reasonably believed herself to be the wife of Sancha. This holding is supported by the following cases: Santos v. Santos, 32 Cal. App.2d 62, 89 P.2d 164, wherein the parties

having obtained a license to marry believed that nothing more was necessary and failed to solemnize the marriage as required by the California code, and Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143, another case where the parties failed to properly solemnize a marriage after procuring a license to wed. It is not necessary, for one spouse to occupy the status of a putative spouse, that the other also believed the supposed marriage to be valid. Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 99, 69 P.2d 845, 111 A.L.R. 342. Whether or not such belief on the part of respondent was held by her in good faith was a question of fact resolved in her favor by the trial court and such finding is supported by the evidence hereinbefore related.

It was held in Re Estate of Krone, 83 Cal.App.2d 766, 189 P.2d 741, that a putative spouse, upon the death intestate of the other member of the supposed marital community was entitled to take, as though it were the community property of a valid marriage, such property as the two had acquired. That rule, however, is not the basis of the judgment here appealed from, which rests rather upon an agreement between the parties to the supposed marriage. Concerning this contract, the trial court made full findings as noted, finding also that the same had been fully performed by respondent and that specific enforcement thereof was necessary if justice were to be done. Precedent for this decision may be found in Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884. Indeed, it has been held that even where a putative marriage did not exist, yet a contract concerning property rights between a man and a woman living in meretricious relationship could be enforced if the illicit relationship was not so involved in the contract as to render it illegal. Garcia v. Venegas, 106 Cal.App.2d 364, 368, 235 P.2d 89. See, also, Vallera v. Vallera, supra, where the court declared, 21 Cal.2d at page 685, 134 P.2d at page 763:

> "Plaintiff's lack of good faith in alleging the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. * * * Even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition."

[9] Where, as found by the trial court here, a woman has, justifiably believing herself to be married, entered into a contract with her supposed husband concerning property to be acquired by them thereafter, and in reliance thereon, and believing herself legally married, has labored with him for a quarter of a century in making the common living, receiving no wage or other compensation for her efforts, except what might ultimately prove to be the fruits of her labor, foregoing in the meantime all other opportunity of marriage or the conduct of a business of her own, she is not at the end of the time, when death has claimed the man she supposed to be her husband, to be turned off uncompensated, or relegated to her community rights or to a claim against the estate based solely on the value that may be ascribed to her toil as a domestic servant. On the contrary, she is entitled to and should receive in equity and good conscience the benefit of the bargain she justly and lawfully made. The decedent had agreed with respondent that if and when he died the property he agreed to acquire and in the use of which she agreed to toil, together with what earnings the two could so accumulate, would belong to her. There can in equity be no just result save a decree specifically enforcing the agreement made.

[10, 11] Appellant insists that the agreement was one which the law required to be in writing. Conceding this to be so, yet the facts found by the trial court clearly show that decedent would have been during his lifetime, and appellant is now, estopped from pleading the statute.

"* * * The doctrine of estoppel

to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract * * *, or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. * * * In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations." Monarco v. Lo Greco, 35 Cal.2d 621, 623, 624, 220 P.2d 737, 739.

[12] Appellant also argues that if there was no marriage then the contract was illegal because based in part upon a consideration of meretricious relations. The contention cannot be sustained because of the trial court's findings of justifiable and reasonable belief on the part of respondent that the relationship she entered into with decedent was that of wife, not that of paramour. Whatever Sancha may have believed, and upon this we have no express finding, as to whether or not he and respondent were legally married, she was not in pari delicto with him and equity therefore finds no obstacle to relief in the fact, if it be a fact, that these parties were not lawfully married.

[13] Finally, it was unnecessary that respondent, in order to perform her duties under the contract, keep in force a will in favor of Sancha. The property was all kept in his name and he needed no testamentary disposition of her share to evidence his title, which rested on respondent's death, in their mutual contract.

The judgment is affirmed.

PEEK, J., and SCHOTTKY, J. pro tem., concur.



114 Cal.App.2d 666

MARIOTTI v. BERNS

No. 15317.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1952.

Hearing Denied Feb. 5, 1953.

Action by member of state highway patrol for injuries plaintiff received when plaintiff parked automobile at edge of parking area leased by defendant to State Department of Motor Vehicles and plaintiff slipped and fell by a chuckhole in parking lot while walking to adjacent building, part of which was subleased to state highway patrol by State Department of Motor Vehicles which had leased building and parking area from defendant. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Wood, J., held that fact that plaintiff knew chuckholes existed in parking area did not as a matter of law relieve defendant of liability for such injuries.

Judgment affirmed.

1. Landlord and Tenant ⇐164(2), 167(3)

A lessor of land is subject to liability for bodily harm caused to his lessee and others upon land with consent of lessee or his sub-lessee by a condition of disrepair existing before or arising after lessee has taken possession, if lessor, as such, has agreed by covenant in lease or otherwise to keep land in repair, and disrepair creates an unreasonable risk to persons upon land which performance of lessor's agreement would have prevented.

2. Landlord and Tenant ⇐169(11)

Where office building and adjacent parking area was leased to State Department of Motor Vehicles, which sub-leased portion of building to state highway patrol, and lease obligated landlord to maintain demised premises in good repair and tenantable condition during duration of lease, fact that plaintiff member of state highway patrol knew chuckholes existed in parking area did not as matter of law relieve landlord of liability for injuries received when plaintiff parked automobile in parking area and slipped and fell by a chuckhole in parking area while walking to rented building in order to comply with his employer's orders to attend a meeting in such building.

Bronson, Bronson & McKinnon, San Francisco, for appellant.

James F. Boccardo, San Jose, Edward J. Niland, Santa Clara, of counsel, for respondent.

FRED B. WOOD, Justice.

Defendant Herman Berns owned an office building and adjacent parking area in San Jose which was leased to the State Department of Motor Vehicles. The department had sublet a portion of the building to the California Highway Patrol.

The lease provided that "The lessor shall * * * maintain the demised premises in good repair and tenantable condition during the continuance of this lease."

The parking area was not in repair at the time of plaintiff's accident. It was full of ruts and holes, a condition of which defendant was aware. Plaintiff, a member of the highway patrol, also knew it was full of holes.

Plaintiff, under orders from his employer to attend a meeting at this place on May 20, 1949, at 7:30 P.M., drove his car to the meeting and parked it at the edge of the parking area, arriving at dusk, about 7:25 P.M. Two cars were already parked there. He got out of his car and started to walk across the parking area toward the building, a distance of about 20 feet. His left foot slipped and he fell into a chuckhole. He knew the holes were there, saw them along the driveway and avoided the ones he saw. He said he was going very carefully. As he walked along he could see other chuckholes there. He said he did not trip on some part of the chuckhole but that his foot slipped right by the chuckhole and he went down. His foot probably slipped right on the edge of the chuckhole. He was not hurrying.

Plaintiff's back and his left knee were affected by the fall. He brought this action to recover damages for the injuries sustained. The jury gave him a verdict for $12,000. Defendant Berns has appealed from the judgment entered upon that verdict.

The sole error assigned by the defendant is the rejection by the trial court of two instructions requested by the defendant, defining the duties of the defendant toward the plaintiff under the circumstances narrated. The rejected instructions read as follows: "While as I have told you, it is the duty of the owner of real property to exercise ordinary care to maintain the premises in a reasonably safe condition, this does not mean that his duty is to keep the premises absolutely safe. The real ground of liability, if any there is, is the owner's superior knowledge of an unsafe condition on the premises and the danger, if any therefrom, to persons entering said premises. It is only when a voidable, dangerous condition exists and is known to the owner, or should, in the exercise of ordinary care, be known to him, and not to the person injured, that a recovery is permitted." (Defendant's proposed instruction No. 11.) "Should you find from a preponderance of the evidence that a dangerous condition existed in the parking area in question at the time of the accident, but if you should also find from the evidence that such condition, if any, was an obvious one; that is, a condition that was as apparent to plaintiff Gus Mariotti as it was to defendant, then I instruct you that plaintiff is not entitled to recover against the defendant, but your verdict must be against the plaintiff and in favor of the defendant, providing, of course, that you find plaintiff's failure to observe said condition contributed directly and proximately to the in-

juries sustained." (Defendant's proposed instruction No. 13.)

The first sentence of instruction No. 11 is accurate as far as it goes, but was adequately covered by an instruction given. The remainder of Nos. 11 and 13 was based upon descriptions of the obligation which the law imposes upon the owner of property toward his own invitees in the absence of a contract by the owner to make repairs. See Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512, 50 P. 2d 801; Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 624, 104 P.2d 26; Blumberg v. M. & T. Incorporated, 34 Cal. 2d 226, 229, 209 P.2d 1; Restatement of the Law of Torts, §§ 340 and 343. In such a case, it is said, the duty of the property owner is reduced to the extent that the duty of self-protection rests upon the invitee; e. g., if the dangerous condition is known to the invitee and he realizes the risk, the owner is absolved from responsibility. That obligation, says the defendant, passes to the tenant when the owner leases the property unless the owner covenants to keep the premises in good repair, in which case he simply retains that obligation unchanged in character and scope. That may be the law in some jurisdictions, but not in California.

[1, 2] In this state, when an owner leases real property and in the lease obligates himself to keep the property in good repair, his obligation toward the lessee and invitees of the lessee is as expressed in section 357 of the Restatement of the Law of Torts: "A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if (a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented." That was the holding in Scholey v. Steele, 1943, 59 Cal.App.2d 402, 138 P.2d 733, limited "to the case of an express covenant to make the repairs included in the terms of the lease or otherwise supported by consideration." 59 Cal.App.2d at page 405, 138 P.2d at page 735. In overruling a contention that the lessee's knowledge of the dangerous condition (defective steps and railing) should be imputed to the invitee, the court made this additional comment: "even if the doctrine of imputed negligence is applicable, it would still present a question of fact for the trial court as to whether a person of ordinary prudence with the tenant's knowledge would continue to use the steps." 59 Cal.App.2d at page 406, 138 P.2d at page 735.

The Scholey ruling was followed in Singer v. Eastern Columbia, Inc., 1945, 72 Cal. App.2d 402, 164 P.2d 531, in which it appeared that the lessee may have known of the dangerous condition (insecurely fastened window panes) but the injured invitee did not. "The rule, insofar as liability to an invitee is concerned, is not predicated upon the tenant's lack of knowledge of the defective condition, and this the court in the Scholey case no doubt had in mind when following the rule, since the tenant in that case had full knowledge of the condition. The fact that the tenant has knowledge of a defective condition although it relieves the landlord of liability where there is no agreement upon his part to repair, does not relieve him where there is such an agreement. This is entirely reasonable, for when the duty rests upon the landlord the tenant will naturally depend upon him to make the repairs and allow conditions to exist which he would otherwise cause to be corrected. Under defendant's theory a landlord having contracted to keep premises in repair would be under no greater liability for injuries to his tenant, or the latter's invitees, than if there had been no such covenant. But the agreement of the landlord to correct a condition which is dangerous places him under a duty which would not exist otherwise, and in order to relieve himself of responsibility he must correct the condition as agreed, and not merely notify the tenant that it exists." 72 Cal.App.2d at pages 411–412, 164 P.2d at page 536. In the Singer case, as in the Scholey case, a

petition for a hearing by the Supreme Court was denied.

The Scholey and Singer decisions are in line with the trend of decision elsewhere. Prosser, writing in 1941, observed that an increasing minority of the courts had worked out a liability in tort and that the "minority view has been slowly gaining ground, and has received the approval of the Restatement of Torts," citing sections 357 and 378 of the Restatement. Prosser on Torts, p. 661. The author of the note in 163 A.L.R. 300, writing in 1946, observed that at the time of certain earlier annotations (1920 and 1930) there was clearly a majority and a minority view as to liability of the landlord for personal injuries in case of his total failure to perform his agreement to repair. "The majority rule was that the landlord was not liable. However, there is now a pronounced trend toward the view that the landlord is liable for personal injuries under such circumstances, and the American Law Institute's Restatement of the Law of Torts accepts this view. (See § 357.)" (P. 300 of 163 A.L.R.)

The facts in our case are similar in many respects to those which obtained in Foster v. A. P. Jacobs & Associates, 85 Cal.App.2d 746, 193 P.2d 971. There the plaintiff was an employee of the tenant of a portion of an office building. She fell and injured herself on the newly waxed floor of a hallway. The floor had been waxed by a person employed by the landlord as janitor and maintenance man for the building. The plaintiff noticed that the floor had been waxed and that it was "very slippery and glaring." She had occasion to go into the hallway during the course of her work and on the way to and from lunch. It was not until the latter part of the afternoon that she slipped and fell. Her knowledge of the dangerous condition did not absolve the lessor as a matter of law. The court distinguished Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, upon the ground that in the Mautino case plaintiff, employed by a patient in defendant's hospital, discovered the dangerous condition at the inception of her employment, whereas in the Foster case the plaintiff had been upon the premises as an invitee for several years before the dangerous condition developed. Accordingly, in the Foster case it was the "duty of the owner not only to maintain the premises in a reasonably safe condition but to refrain from creating an unsafe condition by active negligence. Plaintiff had every right to continue on with her work even though she observed a change in the condition and realized that it involved *some* additional risk if as a reasonable person she concluded that this could be done through the exercise of additional precautions. She could not in reason be expected to either quit her job or waive all recourse for using a floor that her duties of long standing required her to use just because her employer's landlord chose * * * in the course of such maintenance, to apply wax in such manner as to make the floor slippery and dangerous * * *." 85 Cal.App.2d at pages 753–754, 193 P.2d at page 976. That reasoning applies to our case. Plaintiff had been in the employ of the highway patrol for 27 years. The patrol had been using this particular building and parking area for six or seven years. The holes in the pavement did not begin to develop until the last two years.

However, the length of the invitee's previous employment would not seem to be the crucially determinative factor in ascertaining the lessor's liability. The Mautino case readily may be distinguished upon the ground that the plaintiff Mautino was treated as the invitee of the owner of the building (at Mautino's own request the trial court so instructed the jury) and the judgment in Mautino's favor had to be reversed because three of the instructions given were erroneous under any theory. In contrast, the plaintiff in the Foster case was an invitee of a tenant of the owner of the building and was injured as the result of a dangerous condition in a hallway which the lessor kept under his own control to the extent at least of furnishing janitorial service. There is a marked resemblance between the Foster case and Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 170 P.2d 5, in which the court enunciated the principle that "One

who leases a part of the premises, retaining control of other portions such as common walks or passages which the tenant is entitled to use, is subject to liability to persons lawfully on the land with the consent of the tenant for damages caused by a dangerous condition existing on the part under the owner's control, if by reasonable care he could have discovered the condition and made it safe. Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 14, 47 P.2d 462; Spore v. Washington, 96 Cal.App. 345, 274 P. 407; see Brown v. Pepperdine, 53 Cal. App. 334, 336, 200 P. 36; Rest., Torts, § 360; Prosser on Torts (1941), pp. 656–657; 32 Am.Jur. 561; 15 Cal.Jur. 741." 28 Cal. 2d at page 399, 170 P.2d at page 7. This is the very principle which is expressed in somewhat different words in section 360 of the Restatement of the Law of Torts and leaves no room for the concept that in such a case the landlord would be under no obligation toward the invitee if the latter knew of the dangerous condition.

The same principle was expressed in Harris v. Joffe, 28 Cal.2d 418, 423, 170 P.2d 454, 458, in these words: "When a portion of the premises is reserved by the landlord for use in common by himself and his tenants, or by different tenants, a duty is imposed upon the property owner to use ordinary care to keep that particular portion of the premises in a safe condition." The plaintiff, lessee of an apartment, slipped and fell while walking through the entranceway to the building. There was evidence that plaintiff had previous knowledge of the dangerous condition there. That knowledge did not of itself, as a matter of law, reduce or satisfy the lessor's obligation toward her. It was evidence, but not conclusive evidence, on the issue of contributory negligence. Said the court: "Turning to the question of contributory negligence, the finding of the trial court on this issue is also fully justified by the evidence. Previous knowledge of the defective condition is not, of itself, conclusive evidence that a plaintiff failed to exercise due care." Page 425 of 28 Cal.2d, page 459 of 170 P. 2d. That reasoning is equally pertinent and persuasive when applying the principle expressed in section 357 of the Restatement and convinces us that in our case the trial court's rejection of defendant's instructions 11 and 13 was without error.

The judicial authorities upon which defendant relies are not helpful. None of them involved a breach of a lessor's agreement to repair, as a ground of liability for personal injury to a tenant or the invitee of a tenant. Nearly every one, illustrated by Blodgett v. B. H. Dyas Co., supra, 4 Cal. 2d 511, 50 P.2d 801, was the case of an action brought against an owner or occupant of real property by one of his own invitees.

Plaintiff claims that defendants' profferred instructions were erroneous under any theory. That is a question we do not undertake to decide. The decision which we have indicated determines the sole issue upon this appeal.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



114 Cal.App.2d 658

In re PAILHE'S ESTATE.

PAILHE v. PAILHE.

No. 15242.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1952.

Application by attorneys for administrator of decedent's estate for fees for services rendered in maintaining action to set aside deed of decedent and for allowance of reporter's fee for preparing abstract in appeal in such action, all fees to be paid out of the estate. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered an order allowing such fees, and one of the heirs of decedent appealed. The District Court of Appeal, Wood, J., held that the heir by participating in the proceeding had waived any defect in the giving of notice, and held that the reporter's fees were improperly allowed under statute permitting

attorney to apply for payment of his fees from the estate.

Modified and affirmed.

See also 247 P.2d 838.

1. Attorney and Client ⇐70

Attorney's act in appearing for heir of deceased in proceeding for allowance of attorney's fees for services rendered deceased's estate carried with it presumption of due authority upon his part to so appear. Probate Code, § 911.

2. Appearance ⇐24(1)

By voluntary appearance at hearing on attorney's application for fees for services rendered deceased's estate, heir of deceased waived any defect in giving of notice. Probate Code, §§ 911, 1200.

3. Executors and Administrators ⇐227(1)

Written notice of motion that attorneys would at a certain time and place move for allowance of fees for services rendered administrator of estate, and accompanying affidavit describing the services, was sufficient application for payment of attorneys' fees. Probate Code, §§ 911, 1233; Code Civ.Proc. § 1003.

4. Evidence ⇐43(3)

In proceeding for allowance of attorneys' fees for services rendered administrator of estate in maintaining action to set aside deed of deceased, record of proceedings in prior action was judicially cognizable by trial court, in view of reference by parties to such prior proceedings. Probate Code, § 911; Code Civ.Proc. § 1827.

5. Executors and Administrators ⇐256(6)

Absence of record of proceedings by administrator to set aside deceased's deed from transcript on appeal from order allowing administrator's attorneys' fees for services rendered in such proceeding would not of itself furnish basis for reversing the order appealed from, but would, at most, mean that appellant had failed to furnish basis for determining soundness of his claim that evidence did not support such order. Probate Code, § 911; Code Civ.Proc. § 1827.

6. Evidence ⇐43(3)

On appeal from order allowing administrator's attorneys' fees out of estate for services rendered in action to set aside decedent's deed, Court of Appeal would take judicial notice of its own record in action to set aside deed. Probate Code, § 911; Code Civ.Proc. § 1827.

7. Executors and Administrators ⇐221(4)

Evidence authorized allowance of attorneys' fees from estate of decedent for services rendered in maintaining action to set aside deed of decedent. Probate Code, § 911; Code Civ.Proc. § 1827.

8. Executors and Administrators ⇐223

Statute authorizing attorney for administrator to apply for allowance of fees to be paid out of estate for services rendered administrator is limited to application by attorney for fees, and therefore allowance under such statute of reporter's fee for transcript on appeal in action wherein attorney's services were rendered was error. Probate Code, § 911.

Gus K. Burgren, San Francisco, for appellant.

Matthew Koppel, James G. Flaherty, San Francisco, for respondent.

FRED B. WOOD, Justice.

Rene Pailhe, one of the heirs of the decedent, has appealed from an order directing Alfred Pailhe, as administrator, to pay the latter's attorneys, respondents Matthew Koppel and James G. Flaherty, $1,000 on account of fees for extraordinary services rendered by them in a certain action brought by the administrator against Rene, and to pay the official reporter $124.80 for the transcript on appeal in that action.

As grounds for reversal, appellant claims: (1) No order prescribing notice of the hearing was made by court or judge, (2) no notice of hearing was given pursuant to section 1200 of the Probate Code, (3) no petition was filed by the applicants, (4) there was no evidence before the court to support the order, and (5) the reporter's fee was erroneously allowed.

(1) *The proceeding for the order appealed from was initiated by written notice of motion* by the attorneys, accompanied by the affidavit of one of them describing the extraordinary services. This notice stated that at a certain time and place the attorneys would make the indicated motion. The notice was addressed to Alfred, the administrator, and to Rene "and Messrs. Carl E. Brown, H. Jacobs and W. Dawson, his [Rene's] attorneys." There was no court order of any kind concerning notice.

Appellant invokes that provision of section 911 of the Probate Code which says that any attorney may apply to the court for an allowance upon his fees "upon such notice to the executor or administrator and to the persons interested in the estate as the court or judge thereof shall require". Appellant claims that in the absence of an order prescribing such notice, the entire proceeding was void.

The answer is that appellant appeared and participated at the hearing through his attorney, Carl E. Brown. Alfred Pailhe, the administrator and the only other heir, attended and was personally present throughout the hearing.

[1] At the outset of the hearing Brown said "I am the attorney representing Mr. Pailhe, in the matter of the estate." It is clear from the context that he meant Rene Pailhe. The order made after that hearing recited that among those present was "Carl E. Brown, attorney for Rene Pierre Pailhe, an heir at law, representing said heir in this proceeding." The attorney's act in appearing for Rene carried with it a presumption of due authority upon his part to do so. Voinich v. Rolleri, 203 Cal. 379, 264 P. 240; 3 Cal.Jur. 647, Attorneys at Law, § 54. Soon thereafter, Rene confirmed that presumption. September 27, 1951,[1] he filed a writing dated August 30, in which he declared over his signature: "I hereby substitute G. K. Burgren as attorney for myself as an heir at law and party interested in the above entitled Estate and proceedings, in place and stead of Carl E. Brown, former attorney of record for me therein."

[2] By his voluntary appearance at the hearing appellant waived any defect there may have been in the giving of notice to him. It is like In re Estate of Palm, 68 Cal.App.2d 204, 213–214, 156 P.2d 62, in which it was held that an administrator's appearance and participation in a hearing on the merits rendered innocuous the failure to serve him with the citation required by section 1206 of the Probate Code. See also In re Estate of Pierce, 28 Cal.App.2d 8, 11–12, 81 P.2d 1037; Brainard v. Brainard, 76 Cal.App.2d 850, 853–854, 174 P.2d 702; and In re Estate of Reinhertz, 82 Cal.App.2d 156, 161, 185 P. 2d 858, 186 P.2d 755.

Appellant relies upon Olcese v. Superior Court, 210 Cal. 566, 292 P. 964, and Bank of America, etc., v. Fidelity & D. Co., 9 Cal.App.2d 687, 51 P.2d 472, as holding that failure to give notice as prescribed by law prevents a court from obtaining jurisdiction to proceed. The Olcese case involved an order appointing a special administrator without the notice prescribed by statute, indeed, without any notice whatsoever, the trial court having found, when making the appointment, that no notice was necessary. That bears no resemblance to our case, one in which a party who attends and participates at the hearing later raises the question of notice. In the Bank of America case, the reviewing court held that an order merely directing a guardian to give a new bond did not operate to exonerate the old bond upon the giving of the new. In interpreting that order, the court noted that the sureties on the original bond had not applied for an order of discharge, that no notice of a proposed discharge had been given, and that no order for discharge had been made. The court then directed attention to section 1483 of the Probate Code which authorizes discharge of sureties "after such notice given as the court may direct", and quoted from the Olcese case to the effect that such a notice is jurisdictional.

1. The hearing was held August 9 and the order filed August 15, 1951.

It is apparent that the facts of the Bank of America case render those remarks inapplicable to our case.

(2) *Appellant predicates lack of jurisdiction, also, upon a failure to give the notice prescribed by section 1200 of the Probate Code* "in all cases in which notice is required and no other time or method is prescribed by law or by court or judge".

Appellant's appearance and participation at the hearing operated as a waiver of any objection he may have had, predicated upon asserted lack of notice, for the same reasons as those indicated in our discussion of his similar objection predicated upon section 911 of the Probate Code. He relies upon Stiebel v. Roberts, 42 Cal. App.2d 434, 109 P.2d 22; In re Guardianship of Carlon's Estate, 43 Cal.App.2d 204, 110 P.2d 488; Security-First Nat. Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 37 P.2d 69; and Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008. But none of those cases is apt. None involves the waiver of a prescribed notice by the appearance and participation of the very person for whose benefit the notice was prescribed.

[3] (3) *Appellant claims that only a "petition" could satisfy the jurisdictional requirements for the initiation of such a proceeding as this.* The statute says nothing about a "petition." It says that an attorney who has rendered services to an executor or administrator may "apply" to the court for an allowance upon his fees. The written notice of motion filed in this case, and the accompanying affidavit upon which, in part, the motion was based, satisfied the requirements of the statute in this respect. Especially significant is section 1003 of the Code of Civil Procedure. It defines an "order" and declares that "an application for an order is a motion." Section 1003 is made applicable by section 1233 of the Probate Code.

(4) *Appellant claims there was no evidence before the trial court* to support the order appealed from. A literal reading of the reporter's transcript would indicate that this claim is true, in the sense that no witness was sworn and no testimonial or documentary evidence was formally introduced. While such informality in a proceeding which involves substantial rights is to be deplored, it does not necessarily follow that the resultant order must be reversed.

[4] The record of the proceedings in the action in which the extraordinary legal services had been rendered was judicially cognizable by the trial court in view of the reference to those proceedings and that record made in the notice of motion and the supporting affidavit for allowance of attorney's fees. In re Estate of McSweeney, 107 Cal.App.2d 140, 144, 236 P. 2d 846, and cases cited. The transcript of the hearing clearly shows that counsel for both sides understood and assumed that the court had that record before it for consideration. Counsel for the aplicants said, among other things, "Representing the administrator, we filed a suit to set aside a Deed which had been given by Mrs. Elizabeth Pailhe, in her lifetime to one of her sons, and we filed that suit on behalf of the other son, as administrator of the estate. The suit was successful, and we have a judgment of the court after a trial by court, before the Honorable I. L. Harris." In response to a question asked by the court, appellant's counsel said he felt it would be just to allow the applicants something on account and wanted the court to be acquainted with the fact that an appeal had been taken in the other action. The court then said "At least he is entitled to some compensation for what he had already done, no matter what the outcome is," and appellant's counsel replied "Surely, your Honor, but with those facts before your Honor, I have no—." Counsel for the applicants then said "May I acquaint your Honor with the file in the matter and show what the judgment indicates? The judgment indicates that we have secured a home," and orally described the nature, scope and extent of the legal work done. The court then asked Rene's counsel if he had "anything to say on this question of application for attorney fees" and he responded "Only that the attorney fees have not, at the present time—what I mean is, he

hasn't enriched the estate at this time as long as the appeal is pending, and I feel that should be taken into consideration in anything your Honor grants," and the court said "Well, that is true. It isn't final yet. I think I will grant you $1000, on account. That will be without prejudice to any final fee."

It is clear, therefore, that despite the failure to introduce the record of the other action formally in evidence, counsel for appellant acquiesced in the use of the record in the argument of the motion and it seems equally clear that all parties and the trial court believed that the record was properly before the court. This situation is strikingly similar to that which obtained in Mann v. Mann, 76 Cal.App.2d 32, 172 P.2d 369. There the reviewing court found that the record of certain divorce proceedings had been properly brought to the judicial notice of the trial court by the allegations of one of the pleadings. The court then added that, "though the record was not formally offered in evidence, counsel for appellant acquiesced in the use of the record in the argument on the pre-trial motion to limit the issues, and it is manifest that all parties and the court believed that the record was properly before the court. This is indicated by the remarks of counsel for respondent near the close of the argument on the motion asking that the record should show that these proceedings were before the court and had been read and examined in passing upon the motion. The trial court at the time stated that respondent had offered the complete file of the divorce proceedings and that the record had been fully considered in passing upon the motion. No objection was made by the appellant to either of the statements of court or counsel and it is fair to assume that he acquiesced in these statements as to the course of procedure. The record thus shows that the trial court and both parties treated the record of the proceedings in the divorce case as having been properly received in evidence on the hearing of the motion. When such is the state of the record in the trial court a reviewing court will not look for technical reasons to exclude from consideration any part of the record which was before the trial court." 76 Cal.App.2d at pages 41–42, 172 P.2d at page 375; followed in Walsh v. Walsh, 108 Cal.App.2d 575, 578–579, 239 P.2d 472.

[5–7] "The knowledge of the court" being a form of evidence, Code of Civ.Proc. § 1827 the trial court's knowledge of the record of the action in which the legal services in question were rendered supplied the evidential basis of the order allowing the applicants $1,000 on account. The absence of that record from the transcript upon this appeal would not of itself furnish a basis for reversing the order appealed from. That lack, at most, would mean that the appellant had failed to furnish a basis for determining the soundness of his claim that the evidence did not support that order. It happens, however, that we may take judicial notice of the record in the other action, upon the same basis that we took judicial notice of another action in Re Estate of McSweeney, supra, 107 Cal.App.2d 140, 142–144, 236 P.2d 846. In the instant case the record in the other action appears in the record upon Rene Pailhe's appeal to this court from the judgment rendered in that action, Pailhe v. Pailhe, Cal.App., 247 P.2d 838. Our examination of that record convinces us there was a sufficient basis in the evidence for the order in question.

[8] (5) *As to the reporter's fee for the transcript on appeal in the other action,* we find no basis in law for its allowance in this proceeding.

Prior to the 1905 and 1909 amendments to sections 1616 and 1619 of the Code of Civil Procedure (now sections 910 and 911 of the Probate Code), "the reasonable allowance for legal services was made by the probate court to the executor or administrator, and could not be made to the attorney. The attorney employed by an executor or administrator to assist him in the execution of his trust had no claim that he could enforce against the estate either by action or in any other way. He was not a person interested in the estate. The amount of compensation fixed by the

contract of the executor of an estate with his attorney for legal services to be rendered in settlement thereof was a matter of personal obligation on the part of the executor, or representative, with which the probate court had no concern. In re Estate of Kruger, 143 Cal. 141, 76 P. 891. Volume 11, California Jurisprudence, pp. 1187, 1188, 1193, 1194, 1195, contains a full discussion of this question with numerous citations of authority directly holding that prior to the amendment of 1905 attorneys could not assert a demand against the estate of a deceased person, but were limited to their personal action against the executor or other representative of the estate who had employed them. This rule was changed by the amendment above noticed prior to the present transaction to the form in which it now exists by providing that attorney fees 'shall be allowed out of the estate.' Code Civ.Proc. § 1619." Chapman v. Pitcher, 207 Cal. 63, 68, 276 P. 1008, 1010.

The change of status thus given to the attorney by authorizing him to "apply to the court for an allowance upon his fees" to be paid "out of the estate," § 911, is necessarily limited by its terms to an application by an attorney for "his fees," for payment to him (not for the fees of a court reporter, for payment to the reporter) out of the funds of the estate. "The only case where an attorney may proceed independently and maintain an action or an appeal is for services rendered during administration of an estate as provided in section 911, of the Probate Code, formerly section 1616 of the Code of Civil Procedure." Stafford v. Superior Court, 1 Cal. 2d 321 at page 324, 34 P.2d 998, 999, decided prior to the 1951 addition of section 1556.1 to the Probate Code.

The question whether or not "fees," as used in section 911 of the code, includes necessary and reasonable "expenses" paid or incurred by an attorney for an administrator, is not involved and, of course, is not decided upon this appeal.

The order appealed from is modified by striking therefrom the provision for payment of $124.80 to the official reporter and, as so modified, is affirmed. The parties will bear their own costs, respectively, upon this appeal.

PETERS, P. J., and BRAY, J., concur.



114 Cal.App.2d 618

TRIMBLE v. COFFMAN.

Civ. 4442.

District Court of Appeal, Fourth District, California.

Dec. 9, 1952.

Action to petition realty and crops growing thereon. The realty had been conveyed to plaintiff's predecessor and defendant, who were husband and wife, as joint tenants, but predecessor subsequently conveyed her interest to plaintiff. The Superior Court of Orange County, Franklin G. West, J., entered interlocutory judgment and decree ordering partition and appointing a referee to carry decree into effect, and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to sustain trial court's ultimate findings that no agreement existed between defendant and plaintiff's predecessor upon which a resulting trust in favor of defendant could be predicated.

Judgment affirmed.

1. Trusts ⇐81(2)

Where husband and wife took title to realty as joint tenants, fact that entire purchase price of the realty came from separate property of husband did not conclusively establish existence of resulting trust in favor of husband.

2. Husband and Wife ⇐14(3), 249

A community estate and a joint tenancy cannot exist in the same property at the same time, and fact that property is held by spouses under joint tenancy deed raises rebuttable presumption of an intent to hold the property as joint tenants.

3. Trusts ⇐86, 89(5)

Where trust claimant pays entire purchase price of property which is conveyed to him and another as joint tenants, a resulting trust may be presumed, but, where terms of deed are unconditional, and evidence indicates a gift and existence of executed oral contract between parties changing character of the property, a resulting trust will be declared only upon clear and convincing proof thereof.

4. Trusts ⇐89(4)

In action to partition realty and crops growing thereon, where realty had been conveyed to plaintiff's predecessor and defendant, who were husband and wife, as joint tenants, and predecessor had conveyed her interest to plaintiff, evidence sustained ultimate finding that defendant and plaintiff's predecessor had not agreed that defendant should have a resulting trust in the property if plaintiff's predecessor predeceased defendant. Code Civ.Proc. § 1856; Civ.Code, § 1056.

Arthur M. Bradley, Santa Ana, Lloyd S. Verry, Fullerton, for appellant.

Harold A. McCabe, Fullerton, R. C. Mize, Santa Ana and Donald J. Schumacher, Fullerton, for respondent.

GRIFFIN, Justice.

Martha Trimble, plaintiff, cross-defendant and respondent, brought this action to partition certain real property and crops growing thereon. A. B. Coffman, defendant, cross-complainant and appellant, filed an answer denying plaintiff's claimed title, and a cross-complaint seeking to cancel a deed to plaintiff, executed by his joint tenant, and alleged it was procured without consideration, by undue influence, and in violation of confidential relationship. It is also claimed that the grantor of the joint tenancy interest held such interest in trust and was not authorized to convey it.

The trial court found against defendant's several claims and in favor of plaintiff, ordered partition, entered its interlocutory decree appointing a referee, and provided a procedure to carry the decree into effect.

The evidence shows that defendant was an orange grower and had two sons. In August, 1942, he married Helen J. Scott. She was a real estate broker. At the time of marriage she owned certain personal property and an equity in some real property in Los Angeles County, which was subsequently sold. She had been ill for some time. After the marriage she underwent two operations. On May 11, 1948, she died of cancer. At the time of the marriage Mr. Coffman owned the home place where the parties lived and two other parcels of property. He sold the home place in July, 1943, and one parcel in March, 1944, for $50,000. The parties moved to a home owned by defendant in Garden Grove, which was sold in 1944. Mrs. Coffman told a broker that they would like to secure some income property. He showed them the Dunlap home located in a 10-acre orange grove in Fullerton, the property here involved. The purchase price was $35,000. As found by the court, $25,000 was paid by funds furnished by Mr. Coffman, and a note and trust deed for $10,000 was signed by both husband and wife. Title to the ranch was taken by them as joint tenants. The parties lived on the premises, worked the property, and the note was paid off from the proceeds of their crops and their efforts. Some weeks before the death of the wife a separation occurred and the parties were trying to adjust their differences. Mrs. Coffman had prepared for her a grant deed of her one-half joint tenancy interest in the ranch property, transferring it to plaintiff, Mrs. Trimble, her sister-in-law, and signed a will on May 10, in which she recited that the deed prepared by her was for the purpose of severing the joint tenancy between her and her husband. On that same day she executed the deed and handed it to plaintiff, who immediately recorded it. On May 10, plaintiff signed an acknowledgment directed to Mrs. Coffman, reciting: "I acknowledge that in connection with the deed to me of a one-half interest in the ranch and any funds turned over, that the same is received by me for all monies advanced for your care, or for other reasons, and to meet my expenses and trouble in looking after your affairs, and that the balance, if any, shall be turned

over to your nieces and nephews in equal shares, as named in your will."

Defendant, by his pleadings and testimony, would attach to the joint tenancy deed certain conditions predicated on certain claimed oral conversations between the parties as to the effect of the deed and the manner in which his wife's title would be held. He testified he told his wife that if they bought the property "I will fix it from my other property and make you a will"; that during the escrow he talked it over with his wife and they agreed "survivorship in the way of title would be better than a will", and "She said in a way, survivorship required if I die it was hers and if she dies it was mine, a home for either one of us."

Upon this testimony and the findings of the trial court, defendant claims that, as a matter of law, a resulting trust arose in favor of defendant; that accordingly, defendant's wife was unauthorized to dispose of her joint tenancy interest, and that plaintiff acquired no interest in the property other than a bare legal title. The finding relied upon in support of this conclusion recites that the purchase money, i.e., $25,000, was the separate property of Coffman and that no sum was paid by Mrs. Coffman; that "at the time of said purchase of said property Helen J. Coffman and A. B. Coffman agreed that the parties would be owners of the property, as joint tenants, and the survivor would be the owner of the property."

As opposed to this conclusion, the court found that by virtue of the joint tenancy deed Mrs. Coffman became the owner of an undivided one-half interest in the property; that it was not true that at the time Mr. Coffman purchased the property, or at any time, he told Mrs. Coffman that in the event she should die before he did, all of his property should go to his children by a prior marriage; that it is not true that she agreed or promised that she would not transfer said property or any interest therein, except at the request and with the consent of Mr. Coffman, or that she would not assert any title or right of possession in said property until Mr. Coffman died, or during his lifetime, or that Mr. Coffman caused said deed to be executed by Mrs. Dunlap to said parties as joint tenants with the right of survivorship because of any oral agreement of Mrs. Coffman; that it is true that at the time of the purchase of the property Mr. Coffman and Mrs. Coffman reposed confidence in and had great respect and affection for each other; and that it is not true that by virtue of the death of Mrs. Coffman Mr. Coffman became the owner and entitled to the possession of the property. It then found as true that plaintiff and defendant are now the owners of the property as tenants in common in equal shares.

Although death has sealed the lips of the wife to contradict the testimony of the defendant, there is evidence that the money from the sale of crops was used to pay for the $10,000 note and trust deed; that they did maintain separate bank accounts as well as a bank account which was in joint tenancy; that one acquaintance testified that defendant asked her shortly after the property was purchased to "come on out and look over the property Mama and I bought * * *." Another testified defendant told him "the orange grove was community property" but the other property was not. During the separation, apparently a divorce complaint had been prepared by Mrs. Coffman and served on Mr. Coffman, who went to plaintiff's attorney and complained about the allegations pertaining to the property. According to the attorney's testimony, defendant said that "one-half of the property out there where we moved is Mrs. Coffman's * * * but the rest of the property is (mine) that I had before marriage"; that "that's our understanding about it"; that he would be willing to "pay off her half of it"; that he wrote up some kind of an agreement to this effect and that defendant signed it. Defendant denied these conversations.

Two canceled checks, totaling $3,000, endorsed by defendant and drawn on the joint account and on Mrs. Coffman's separate account, were in evidence as indicating that she may have contributed to the purchase price of the property here in question. However, the court found that they were not directly traceable to it. It then found that defendant had not met the bur-

den of proving the allegations of his cross-complaint as to a claimed oral agreement, and that the deceased had a title which she could and did pass by executing and delivering the grant deed.

[1] Defendant cites such cases as Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31; Huber v. Huber, 27 Cal. 2d 784, 167 P.2d 708; in relation to the claimed confidential relationship; and Socol v. King, 36 Cal.2d 342, 223 P.2d 627, which in effect holds that the existence of a resulting trust will be presumed, to the extent that a gift was not intended, in favor of one who has paid the entire purchase price of property which is conveyed to the trust claimant and another as joint tenants. The findings do recite that the entire purchase money used in the purchase of said property was the separate property of Mr. Coffman, and that no sum or amount was ever paid by Mrs. Coffman for said premises, notwithsanding the testimony that the $10,000 payment on the trust deed and note was the result of the joint efforts of the husband and wife and profits from the crops. Such findings would not, however, be conclusive evidence that a resulting trust was, in fact, created.

[2] It probably becomes unnecessary to determine whether the property here involved was separate or community property. A community estate and a joint tenancy cannot exist in the same property at the same time, and the fact that property is held by spouses under a joint tenancy deed raises a rebuttable presumption of an intent to hold the property as joint tenants. Sandrini v. Ambrosetti, 111 Cal.App.2d 439, 244 P.2d 742.

[3, 4] It is true that upon a proper showing a resulting trust may be presumed but, as opposed to this presumption are the unconditional terms of the deed, the evidence indicating a gift, and the indication that there had been an executed oral agreement between the parties changing the character of the property. Under these circumstances there must be clear and convincing proof before a resulting trust may be declared. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; 9 Cal.Jur. p. 388 et seq., secs. 235, 236; Tomaier v. Tomaier, 23 Cal. 2d 754, 759, 146 P.2d 905; In re Estate of Wahlefeld, 105 Cal.App. 770, 775, 288 P. 870; Williams v. Reich, 123 Cal.App. 128, 10 P.2d 1030; Rogers v. Rogers, 86 Cal. App.2d 817, 195 P.2d 890; In re and Estate of Wilson, 64 Cal.App.2d 123, 148 P.2d 390. Whether the showing is clear and convincing is primarily a question to be determined by the trial court. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 173, 168 P.2d 946; Sec. 1856, C.C.P.; Sec. 1056, Civ.Code. The trial court was fully justified in finding that defendant failed to meet this burden.

If a confidential relationship did exist, as contended, the evidence does not conclusively show that the wife did make or violate any claimed agreement pertaining to the manner in which, or period for which, title was to be held by her so as to prevent her from executing the deed in question. Lynch v. Lynch, 22 Cal.App. 653, 135 P. 1101. The ultimate finding of the trial court that no such agreement existed is supported by the evidence and such finding will not be disturbed on appeal. Laherty v. Connell, 64 Cal.App.2d 355, 148 P.2d 895.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



HERRSCHER v. HERRSCHER et al.

HERRSCHER v. JACKSON et al. *

Civ. 19108.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1952.

Rehearing Denied Jan. 5, 1953.

Hearing Granted Feb. 5, 1953.

Action by unborn infant, instituted by its mother as guardian ad litem, for support of such infant, in which defendant filed cross-complaint denying parent and child relationship and seeking damages for alleged conspiracy to embarrass and humiliate him. The Superior Court, Los Angeles Coun-

* Subsequent opinion 259 P.2d 901.

ty, Julius V. Patrosso, J., entered order dismissing and striking cross-complaint, and defendant appealed. The District Court of Appeal, Doran, J., held that the cross-complaint was sufficient under statute providing that affirmative relief sought by cross-complaint must relate to or depend upon the transaction, matter, or happening upon which original action is based.

Order reversed and cause remanded.

Pleading ⇐148

Where, after complaint was filed for support of an unborn infant, defendant filed cross-complaint denying parent and child relationship and seeking damages for alleged conspiracy to embarrass and humiliate defendant, cross-complaint was sufficient under statute providing that affirmative relief sought by cross-complaint must relate to or depend upon the transaction, matter, or happening upon which original action is based. Code Civ.Proc. § 442.

Marcel E. Cerf, Robinson & Leland, San Francisco, and James B. Fredericks, Beverly Hills, for appellant.

Hahn, Ross & Saunders, Los Angeles, and Thomas D. Mercola, Beverly Hills, for respondent.

DORAN, Justice.

This is an appeal from an order granting a motion to strike the defendant's cross-complaint.

As recited in appellant's opening brief, "plaintiff John Doe Herrscher, an infant by Ann Jackson, its guardian ad litem, filed a complaint for support of an unborn infant against defendant and cross-complainant. * * * defendant and cross-complainant filed an answer and a cross-complaint against Ann Jackson individually. The subject matter of the cross-complaint was two-fold. First, a declaration of the nonexistence of the relationship of parent and child between cross-complainant and the purported plaintiff John Doe Herrscher. And, secondly, for damages caused by a conspiracy existing between the cross-defendants to embarrass and humiliate cross-complainant thereby affecting his credit and reputation. A demurrer was filed by Ann Jackson individually, which demurrer was ordered off calendar. A motion to strike the cross-complaint, filed by cross-defendant Ann Jackson individually, was granted by the court. From the order dismissing the cross-complaint and striking said cross-complaint from the files this appeal was taken."

Respondent takes the position that "The correctness of the ruling of the trial court in striking the cross-complaint depends upon whether the pleading comes within the provisions of Section 442 of the Code of Civil Procedure. Under this section, the affirmative relief sought by the cross-complaint must *relate to* or *depend upon* the transaction, matter, or happening upon which the original action is based. Presumably, counsel for appellant concedes that the remaining conditions set forth in this code section, namely, a contract, an accident, or property, do not here exist, as a basis for relating the relief he seeks to the subject matter of the complaint.

"The complaint, filed on July 5, 1951, merely alleges that in April of 1951, appellant and respondent engaged in sexual relations as a result of which respondent became pregnant and was expecting a child whom she desired appellant to support and whose expenses of birth she desired him to pay. It is to be noted that at this state of the proceedings respondent was not even a party to the action, having appeared only as the guardian *ad litem* of the real plaintiff, the coming child. She did not become a party to the action until appellant named her as such in his purported cross-complaint."

The cross-complaint in addition to naming the guardian ad litem, the mother of the unborn child as a defendant, also names several John Does and, in effect, alleges a conspiracy to extort money from defendant.

Respondent's contention that the cross-complaint is not authorized under the provisions of section 442 of the Code of Civil Procedure as above noted is without merit. Section 389 of the Code of Civil Procedure

provides that, "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served."

The granting of the motion to strike the cross-complaint, in the circumstances presented, was error.

The question as to whether the action herein is valid is not raised and the within opinion is not to be understood as so deciding.

The order is reversed and cause remanded.

WHITE, P. J., and DRAPEAU, J., concur.

40 Cal.2d 91

STOUT et al. v. DEMOCRATIC COUNTY CENTRAL COMMITTEE OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 18702.

Supreme Court of California, in Bank.

Dec. 23, 1952.

Petition for writ of mandate. The Supreme Court, Carter, J., held that statute authorizing county committee of political party in any city and town to increase its membership by a majority vote of committee is invalid.

Order in accordance with opinion.

Edmonds, J., dissented.

1. Mandamus ⇐77(1)

Generally title to a public office cannot be tried in a mandamus proceeding.

2. Mandamus ⇐172

It is proper in mandamus proceeding to determine whether offices claimed legally exist.

3. Mandamus ⇐172

Title to office may be incidentally determined in mandamus proceeding in discretion of court.

4. Quo Warranto ⇐10

Generally quo warranto is appropriate only where there is involved a public office in sense that incumbent exercises some sovereign powers of government.

5. Mandamus ⇐77(1)

Mandamus was proper remedy where real question was whether offices claimed existed and title to such offices was incidental.

6. Statutes ⇐101(1)

Statutory provision authorizing county committee of political party in any city and town to increase its membership by a majority vote of committee is invalid as violating constitutional provisions forbidding local and special laws. Elections Code, § 2833; Const. art. 1, § 11; art. 4, § 25, subd. 9.

Delany, Fishgold & Minudri and Manuel Furtado, San Francisco, for petitioners.

Albert Brundage, in pro per., for respondents Louise T. O'Connor et al.

Thomas E. Feeney, Robert I. McCarthy and A. J. Zirpoli, San Francisco, for respondent Committee et al., and Real Parties in Interest.

CARTER, Justice.

Seven of the petitioners in this petition for a writ of mandate were duly elected at the June, 1952, primary election as members of the Democratic County Central Committee for the City and County of San Francisco; one petitioner, Collins, is an ex officio member by reason of section 2838 of the Elections Code which makes the nominee of the party for state senator or the incumbent of the nominees of the party for the Assembly ex officio members of the county central committee. Respondents are the Democratic County Central Committee and twenty-three duly elected members of the committee. Designated as real parties in interest are twenty-five persons who, after the primary election, were appointed by a majority of the committee to serve as additional committee members pursuant to section 2833 of the Elections Code.[1]

Charging that the italicized portion of section 2833, supra, violates various provisions of the Constitution forbidding local and special laws, Cal.Const. art. I, § 11; art. IV, § 25(9), petitioners assert that the real parties in interest are unlawfully holding the position of committeemen and request that the committee be ordered by a writ of mandate to revoke their appointment.

Respondents claim that mandamus is not the proper remedy here; that *quo warranto* is; and that section 2833 of the Elections Code, supra, is valid.

[1–4] Turning first to the question of remedy, it may be said generally that title to public office cannot be tried in a manda-

1. "In any city and county the county central committee of each party shall be elected by each assembly district and shall consist of five members from each assembly district in the city and county. *The county committee in any city and county may increase its membership by a majority vote of the committee.*" (Italics added.) Elections Code, § 2833.

mus proceeding, Nider v. City Commission, 36 Cal.App.2d 14, 26, 97 P.2d 293; Black v. Board of Police Com'rs, 17 Cal.App. 310, 119 P. 674; Meredith v. Board of Supervisors, 50 Cal. 433; Humburg v. Board of P. & F. Com'rs, 27 Cal.App. 6, 148 P. 802; People v. Bailey, 30 Cal.App. 581, 158 P. 1036; People ex rel. Smith v. Olds, 3 Cal. 167; 16 Cal.Jur. 792, for the reason that *quo warranto* is an adequate remedy. There are, however, many limitations on that rule and it cannot be applied in all cases. See 22 Cal.Jur. 792 et seq.; 9 So. Cal.L.Rev. 189, 211. Various reasons are given for the rule, such as that where there are two claimants for the office, one would not be a party in the mandamus proceeding and complete relief could not be given, and that when title to a public office is involved, sovereign power by *quo warranto* should be invoked in preference to private interests in order to avoid undue interference with government. See High's Extraordinary Legal Remedies, § 49 et seq.; People ex rel. Smith v. Olds, supra, 3 Cal. 167. Considering the foregoing factors, it has been held proper in mandamus to determine whether the office claimed by a person legally exists. Spaulding v. Desmond, 188 Cal. 783, 207 P. 896. Title to office may be incidentally determined in mandamus, McKannay v. Horton, 151 Cal. 711, 91 P. 598, 13 L.R.A.,N.S., 661; Bannerman v. Boyle, 160 Cal. 197, 116 P. 732; Brennan v. Riley, 3 Cal.2d 736, 46 P.2d 972; Klose v. Superior Court, 96 Cal.App.2d 913, 217 P.2d 97, and discretion rests with the court to determine whether the title should be so determined. McKannay v. Horton, supra, 151 Cal. 711, 91 P. 598; Klose v. Superior Court, supra, 96 Cal.App.2d 913, 217 P.2d 97. Generally, *quo warranto* is appropriate only where there is involved a public office in the sense that the incumbent exercises some of the sovereign powers of government, Coulter v. Pool, 187 Cal. 181, 201 P. 120; People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d 388; Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858, and it has been held that a party committeeman is not such an officer because he performs duties and exercises powers for a particular political party rather than the sovereign power of the public, Tuck v. Cotton, 175 Ark. 409, 299 S.W. 613; People v. Brady, 302 Ill. 576, 135 N.E. 87; Attorney General v. Drohan, 169 Mass. 534, 48 N.E. 279; contra Dastugue v. Cohen, 14 La.App. 475, 131 So. 746; Morris v. Peters, 203 Ga. 350, 46 S.E.2d 729. We recognize, of course, that such committeemen perform important duties as a means through which the right of suffrage is exercised, Independent Progressive Party v. County Clerks, 31 Cal.2d 549, 191 P.2d 6, and primaries are a part of the election process. In re McGee, 36 Cal. 2d 592, 596, 226 P.2d 1.

[5] In the instant case we have only one claimant to each of the "offices" (the additional committee memberships created) and it is doubtful that they are public officers for the purpose of *quo warranto*. The real question presented is whether those offices exist at all, because their existence depends upon the validity of the italicized portion of section 2833 of the Elections Code, supra. The title of the persons named to those additional offices is incidental to that main question. We hold, therefore, that mandamus is the proper remedy. The case of Malone v. Superior Court, Cal. App., 1952, 249 P.2d 324, being out of harmony with these views is disapproved.

[6] Concerning the validity of section 2833, it appears that it applies only to cities and counties. There is only one city and county in the state, namely, San Francisco, and it is the only place where the membership of the county central committee may be increased and the additional members appointed by the committee. The law applicable to other counties is as follows: In counties with four assembly districts the committee is elected by supervisor districts, five members for each district, Elections Code, § 2835.5; in counties with less than four assembly districts the committee is elected by supervisor districts, the number being based on a formula applied to the number of votes cast at the last gubernatorial election but not less than twenty-one members, Id., § 2837; in counties with twenty or more assembly districts there are seven members for each district, Id., § 2834; in counties with more than five and less

than twenty assembly districts there are five members for each district, Id., § 2835. Assembly districts are established on the basis of population distribution. Cal.Const., art. IV, § 6. Thus the number of committeemen are apportioned according to population as determined by the legislature, and are chosen by the electorate except in San Francisco. We can see no rational basis for such a classification. While it is true that the other counties in the state are classified according to the number of assembly districts, or the voters at the last election, which may be a reasonable basis, there is no basis for the selection of one county in the state, and provision that in such county, an unspecified additional number, above the number fixed as in the other counties by assembly districts, may be appointed by the committee. There is no conceivable reason why the number and non-legislative ascertainment thereof should be different. There is no reasonable relation between the method of ascertaining the number and the population or the fact that San Francisco City and County is a compact area with little or no rural territory. The recent case of Hollman v. Warren, 32 Cal.2d 351, 196 P.2d 562, 567, is closely in point. We there held a statute which limited the number of notaries public in San Francisco was an invalid special and local law. We there said:

"The legislation on its face expressly chooses without reason to limit the number of notaries for one county, and one county only, thus leaving no room for the presumption of constitutionality or for the presumption that the Legislature had a conceivably rational basis for the limitation on the number of notaries for San Francisco, or the presumption of constitutionality from the long existence of the statute without attack. * * *

"The most recent expression by this Court in regard to special and local laws, and what constitutes a proper basis for the classification of counties, is contained in Consolidated Printing & Publishing Co. v. Allen, 18 Cal.2d 63, 112 P.2d 884. There the statute provided a method for the publication of delinquent tax lists for counties of the first class (Los Angeles is the only county of that class) different than that for all other counties. In holding the statute invalid this Court said: 'We can find no natural, intrinsic, or constitutional ground of distinction between the county of Los Angeles and other counties which would justify the application of a special procedure with reference to the sale of delinquent property.'"

We hold, therefore, that the italicized portion of section 2833 of the Elections Code, supra, is invalid, and it is ordered that a peremptory writ of mandate issue, commanding respondents to revoke the appointment of the additional members to the Democratic Central Committee for San Francisco City and County.

Each party shall pay his own costs in this proceeding. Pursuant to stipulation the writ issued hereunder may be served upon counsel for respondents and real parties in interest in lieu of service on each respondent and real party in interest.

Let the peremptory writ of mandate issue forthwith.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

That mandate lies solely to compel the performance of a duty especially enjoined by law is well established. Spaulding v. Desmond, 188 Cal. 783, 789, 207 P. 896, and cases cited therein. I dissented in Hollman v. Warren, 32 Cal.2d 351, 196 P.2d 562, on the ground that the petitioner failed to establish a clear legal duty upon the governor to consider her application. In the present case, the petitioners have even less basis for the position that the elected members of the committee have a duty to revoke the appointments made by them pursuant to the challanged code section. The only purpose of this proceeding is to compel them to do so. Even if it be conceded that the statute is unconstitutional, no showing is made that the committee has a clear legal duty to revoke the appointments.

I would, therefore, deny the peremptory writ.

PEOPLE v. AMAYA.

Cr. 5363.

Supreme Court of California, In Bank.

Dec. 17, 1952.

Rehearing Denied Jan. 15, 1953.

Defendant was convicted of murder in the first degree. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment of conviction, and automatic appeal under Penal Code was taken. The Supreme Court, Spence, J., held that evidence was sufficient to support judgment of conviction.

Judgment affirmed.

1. Homicide ⇐228(1, 2)

In prosecution for murder, the corpus delicti consists of two elements, the death of the alleged victim and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially.

2. Criminal Law ⇐414

So that one accused of murder may be protected against possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator, the corpus delicti must be proved by evidence independent of extrajudicial declarations and statements of accused.

3. Criminal Law ⇐412(1)

In prosecution for murder, extrajudicial declarations and statements of accused may be admitted when there has been a prima facie showing that alleged victim met death by criminal agency, and it is not necessary to establish corpus delicti by proof as clear and convincing as is necessary to establish guilt, nor is it necessary to connect defendant with perpetration of crime before extrajudicial declarations and statements may be admitted.

4. Criminal Law ⇐412(1)

In prosecution for murder, independent evidence establishing the corpus delicti was sufficient to warrant admission of extrajudicial statements and declarations of accused.

5. Criminal Law ⇐412(2)

In prosecution for murder, fact that statements of accused were made while he was in custody and were made to police and prosecuting officer did not affect their voluntary character.

6. Criminal Law ⇐412(1)

In prosecution for murder, evidence was insufficient to establish that accused's possible pain at time he made statements to police and prosecuting officer rendered him incompetent, and evidence of pain did not affect admissibility of statements but went only to weight to be given to them.

7. Criminal Law ⇐1120(1)

In prosecution for murder, record failed to establish that trial court excluded evidence bearing on mentality and intelligence of accused.

8. Criminal Law ⇐656(2)

Where court included word "vicious" in remark concerning question of counsel for accused but word was used by court in an explanatory sense, having reference to purported ambiguity in wording of question and its possible misleading effect, remark was not objectionable.

9. Criminal Law ⇐1166½(12)

Where court stated that it would rule against objection of counsel for codefendant to cross-examination of accused regarding his association with codefendant if pressed, but upon continuance of same line of questioning sustained objection, and matter objected to had been admitted by accused, comment of court had no prejudicial effect on rights of accused.

10. Criminal Law ⇐1035(3)

Where certain remarks of court were not objected to at trial, they could not be urged on appeal as grounds for reversal.

11. Criminal Law ⇐1171(1)

Where assistant district attorney stated that gun was found at same time that other gun used in robbery was found, statement only amounted to a reasonably quick attempt to identify the circumstances of the gun's discovery, and in view of fact that accused had admitted that other gun was used in homicide, remark was not prejudicial.

12. Criminal Law ⇐728(2)

If accused deemed that harmful effect might result from statement of as-

sistant district attorney, he should have made timely ojection at trial so that misunderstanding could have been clarified by proper instruction to jury.

13. Criminal Law ⇐720(9)

In prosecution for murder, where deputy district attorney referred to accused as having committed a cold-blooded murder, remark was no more than a characterization of the evidence sustaining prosecution's charge of first-degree murder and did not transcend the bounds of legitimate comment.

14. Criminal Law ⇐726

Where, in closing argument in murder prosecution, assistant district attorney referred to statement of counsel for accused that eight states had repealed death penalty and stated that most, if not all, of those states provide on sentence of imprisonment for life that there shall be no parole, statement could properly be regarded as fair comment to correct false impression created by statement of counsel for accused.

15. Criminal Law ⇐730(16)

Where, in closing argument in murder prosecution, assistant district attorney referred to statement of counsel for accused that eight states had repealed death penalty and stated that most, if not all, of those states provide on sentence of imprisonment for life that there shall be no parole, and court instructed that statements and arguments of counsel were not evidence, remark was not prejudicial, in view of fact that case was not closely balanced.

16. Homicide ⇐235

In prosecution for murder arising out of attempted robbery, evidence was sufficient to sustain finding that accused intended to commit robbery and that his ineffectual acts were done in attempting its commission.

17. Criminal Law ⇐412(1)
Homicide ⇐172

In prosecution for murder, evidence of an attempted robbery was relevant to establish the degree of the murder, and accused's extrajudicial statements were pertinent to its proof. Pen.Code, § 189.

18. Criminal Law ⇐742(1)

In prosecution for murder, where testimony of accused was in conflict with that of witnesses, credibility was for jury.

19. Homicide ⇐235

In prosecution for murder allegedly committed during attempted robbery, evidence was sufficient to sustain conviction.

Ivan C. Sperbeck, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., J. F. Coakley, Dist. Atty., Oakland, and Francis v. Vukota, Deputy Dist. Atty., Pleasantown, for respondent.

SPENCE, Justice.

Appellant Amaya and his codefendant Mason were jointly charged with the crime of murder, to which they both pleaded not guilty. Amaya was also charged with a prior felony conviction, which he admitted. After a joint trial before a jury, verdicts of guilty of murder in the first degree were returned against both defendants, the verdict against Mason bearing the recommendation of life imprisonment but that against Amaya being without recommendation. Amaya made a motion for a new trial, which was denied. Judgment followed, and the death sentence was imposed on Amaya. From such judgment and the order denying his motion for a new trial, Amaya appeals.

As grounds for reversal appellant argues the following points: (1) admission of his confession and extrajudicial statements before establishment of the corpus delicti; (2) exclusion of evidence bearing on his mentality and intelligence; (3) prejudicial misconduct of the court; (4) prejudicial misconduct of prosecuting counsel; (5) insufficiency of the evidence to show an attempted robbery rather than mere preparatory acts; and (6) insufficiency of the evidence to sustain the verdict. An examination of the record compels the conclusion that appellant's arguments are without merit.

On February 29, 1952, shortly after 2:00 p. m., Steven Apostolos was found by the

police lying on the floor behind the meat counter of his grocery store in Oakland, with a bullet wound near the eye. When the body was removed, a gun fully loaded was discovered underneath the right knee; it obviously had not been fired. The autopsy performed the next day disclosed that the cause of death was subarachnoid hemorrhage due to gunshot wound with skull fracture. An examination of the interior of the premises and the canned goods on the shelves revealed that there was fired only one shot, which lodged in the decedent's head. A ballistics expert testified that the bullet appeared to have been fired from a fairly large pistol, in the neighborhood of a .41 caliber.

According to witnesses in the vicinity, sometime between 1:30 and 1:45 p. m. that day a man was seen standing in front of the decedent's grocery store. He was described as wearing a gray hat, a beige-colored overcoat and glasses. After a few minutes' wait for the last customer to leave the store, he was seen to raise a handkerchief, which was tied around his neck, so that it would cover the lower part of his face, and to enter the store. Then within a short time following the sound of one shot coming from within the store, he was seen to run out the door, down the street, turn the corner, jump into a parked automobile wherein his confederate was waiting, and together they made their escape. The automobile was described as a chartreuse Ford open-top convertible. The deceased's wife, who was sitting on the stairs of their home which adjoined the store, heard the shot and as the assailant sped down the street, she ran into the store, where she found the victim lying on the floor as above described. A neighbor summoned the police. None of the witnesses was able to identify appellant as the assailant.

About 7:30 that evening the police arrived at appellant's apartment. In their search of the premises they found a gray felt hat and two revolvers, one being a Colt .41 with one live cartridge in it. Two of the officers remained at the apartment in wait for appellant. In about an hour appellant returned. As he started to enter his unlighted apartment, the officers identified themselves and told him to raise his hands. Appellant immediately "jerked back" and at the same time turned, at which instant one of the officers fired one shot, hitting appellant on the outside of his right arm. Appellant was then placed under arrest and taken to the hospital.

Appellant gave two statements at the hospital. The first, taken about 11 that night, was in the form of an oral discourse with a police officer, who immediately thereafter wrote down the substance of appellant's remarks but did not ask him to sign or verify the writing because appellant was "unable to." The second, taken the next day, was a stenographic report of the questioning of appellant by the assistant district attorney. In both statements appellants gave substantially the same story: his planning of the robbery with Mason on the morning of February 29 and their driving around Oakland "looking for a place to take"; their selection of the grocery store because no one seemed to be in there; appellant's entry into the store, with pistol in hand and the lower part of his face covered with a handkerchief; his firing of one shot at the proprietor but only after the latter had first fired; his wearing of two pairs of pants so he could change easily and avoid recognition; and finally, his disposal of the empty cartridge somewhere along the road as he and Mason were making their escape so "there wouldn't be any evidence." At the trial defendant verified the truth of these statements, and added these further details: that with Mason he went about 1:00 p. m. to his apartment to get certain clothing for use in carrying out the proposed robbery—including the aforementioned hat, overcoat and handkerchief; that after he and Mason had cruised around town for about half an hour, Mason parked the chartreuse Ford convertible around the corner from the grocery store and waited while appellant, about 1:45 p. m., entered the store intent on committing the planned robbery; and that the gun he carried as he entered the store had only two shells in it. The evidence does not show that any money or other property was taken from the store or the person of the deceased in the course of the homicide.

[1–3] Taking up appellant's points in their order of presentation, the first is his contention that the corpus delicti was not proved before his confession and extrajudicial statements were admitted. In a murder charge the corpus delicti consists of two elements: the death of the alleged victim and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially. People v. Cullen, 37 Cal. 2d 614, 624, 234 P.2d 1, and cases there cited. However, the corpus delicti must be proved by evidence independent of the extrajudicial declarations and statements of the defendant, People v. Mehaffey, 32 Cal. 2d 535, 544, 197 P.2d 12; People v. Corrales, 34 Cal. 2d 426, 429, 210 P.2d 843, so that he may be protected against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator. People v. Cullen, supra, 37 Cal.2d 614, 625, 234 P.2d 1; People v. Stoddard, 85 Cal.App. 2d 130, 134, 192 P.2d 472. But as prerequisite to the reception of such statements in evidence, the corpus delicti need not be established by proof as clear and convincing as is necessary to establish the fact of guilt; rather it is sufficient that only a prima facie showing be made that the alleged victim met death by a criminal agency. People v. Mehaffey, supra, 32 Cal.2d 535, 545, 197 P.2d 12; People v. Corrales, supra, 34 Cal.2d 426, 429, 210 P.2d 843. Nor is it necessary at this point to connect the defendant with the perpetration of the crime. People v. Cullen, supra, 37 Cal.2d 614, 624, 234 P.2d 1. Tested by these rules, the sufficiency of the preliminary proof of the corpus delicti is not open to dispute.

[4] On the day in question the body of Steven Apostolos was found shortly after 2:00 p. m. in his grocery store, showing death from a gunshot wound. His gun was lying underneath his body but it had not been fired, and so the wound was not self-inflicted. About half an hour earlier a man was described as waiting near the premises and, after a few minutes, entering the store, meanwhile adjusting a handkerchief so that it would cover the lower part of his face; a single shot was heard; the same man was then seen to run out the door and down the street, turn the corner and jump into a parked automobile, which thereupon sped down the road. This evidence, showing the death and a criminal agency as the cause, was introduced prior to the admission of appellant's confession and extrajudicial statements. Accordingly, the most exacting requirements of the law as to the essential preliminary proof of the corpus delicti were satisfied, and without reference to the rule that the order of proof is deemed discretionary with the trial court. People v. Mehaffey, supra, 32 Cal.2d 535, 547–548, 197 P.2d 12; People v. Cullen, supra, 37 Cal. 2d 614, 625, 234 P.2d 1.

[5, 6] Nor is admission of the statements open to objection by reason of the surrounding circumstances. The fact that they were made while appellant was in custody and to a police or prosecuting officer does not affect their voluntary character. People v. Gonzales, 24 Cal.2d 870, 875, 151 P.2d 251; People v. Mehaffey, supra, 32 Cal.2d 535, 548, 197 P.2d 12. The police officer who took the first statement testified that it was freely and voluntarily given by appellant, made without any previous inducement or by reason of any intimidation or threat; and the second statement taken by the assistant district attorney was admitted without objection as to its voluntary nature, and was practically the same in substance. Any evidence tending to show that appellant may have been in pain when he gave the statements at the hopsital did not affect their admissibility but only the jury's consideration of the weight and effect to be given them. People v. Miller, 135 Cal. 69, 71–72, 67 P. 12; People v. Lehew, 209 Cal. 336, 342, 287 P. 337; People v. Egan, 133 Cal.App. 152, 158, 23 P.2d 1042. His possible pain at the time was in nowise shown to reflect on his competency. Accordingly, the jury was instructed that it was for them to determine ultimately the credibility and voluntary nature of the statements.

[7] Nor is there merit to appellant's second argument that the trial court circumscribed evidence of his mental condition. The only testimony offered on this point was that of appellant's mother. She

testified fully on the subject of appellant's background and mentality, and the record does not show that either she or appellant's counsel had any further evidence to introduce in that connection.

[8] Appellant directs his third argument to alleged prejudicial misconduct of the court. Two points are here raised and both appear of trifling importance. The first concerns the condition of the record in that four guns had been introduced in evidence, two of them having been found in the grocery store: one under the victim's body as above stated and the other wrapped in a cloth in a drawer of the cash register. The deceased's wife, in the course of cross-examination by counsel for appellant's codefendant, was describing the appearance of the latter gun on the only occasion when she had previously seen it. Counsel asked her if she recalled when the deceased showed her "this particular gun." At this juncture, the court interposed the remark: "That is the *viciousness* of the question. You don't say where she was shown it. 'This,' counsel?" The court then added: "It is very misleading." Thereupon counsel proceeded to frame his question more exactly by reference to the gun according to exhibit number and the witness concluded her testimony on the point. It is manifest that the word "viciousness" was used by the court in an explanatory sense, having reference to a purported ambiguity in the wording and its possible misleading effect. In the course of direct examination, the witness had directed her remarks to two guns in evidence, a circumstance which apparently provoked the court's alleged objectionable remark upon her cross-examination so as to avoid any confusion in the identity of the guns. In this sense, the court's remark would be no more objectionable than a comment that a question by examining counsel is not intelligible. People v. Becker, 94 Cal.App.2d 434, 445, 210 P.2d 871. Moreover, appellant appears to have attached no importance to the court's remarks at the time, for he made no objection to their tenor at the trial. People v. Avery, 35 Cal.2d 487, 493, 218 P.2d 527; People v. Becker, supra, 94 Cal. App.2d 434, 445, 210 P.2d 871; People v. Kobey, 105 Cal.App.2d 548, 560, 234 P.2d 251.

[9, 10] The second objection to the court's behavior relates to a comment made during the course of the deputy district attorney's cross-examination of appellant with reference to his association with Mason, his codefendant, on the day in question. Counsel for Mason objected to such questioning as "not proper cross-examination" and the court stated that it would "reserve a ruling" but would rule against counsel if pressed. Appellant argues that his codefendant's counsel was thus precluded from making a further objection because of the threat of an adverse ruling. Regardless of the fact that the disputed propriety of the court's comment concerned a matter between the court and counsel for appellant's codefendant, in any event it has no significance in the record, for upon the deputy district attorney's continuance with the same line of questioning of appellant, the court promptly sustained the objection of counsel for appellant's codefendant. As relating to questions directed to establishing Mason's admitted connection with appellant in the commission of the crime, manifestly the matter had no prejudicial effect on appellant's rights. Again appellant made no objection to the court's remarks at the trial and he may not now urge the point on appeal. People v. Avery, supra, 35 Cal.2d 487, 493, 218 P.2d 527.

[11, 12] Likewise there is no force to appellant's fourth argument concerning alleged prejudicial misconduct by prosecuting counsel. Three matters are raised. The first relates to the circumstance of the police officers having found two guns in appellant's apartment. In discussing the admissibility of one of the guns in evidence, the assistant district attorney stated that it was found at the same time that the "other gun used in the robbery was found." Apparently appellant would prefer that the assistant district attorney had said "allegedly used." But that, of course, is what was meant and the statement only amounted to a reasonably quick attempt to identify the circumstances of the gun's dis-

covery. Cf. People v. Lew Fat, 189 Cal. 242, 246, 207 P. 881; People v. Frank, 132 Cal.App. 360, 368, 22 P.2d 792. Moreover, appellant admitted at the trial that the "other gun" was used in the homicide. If appellant deemed that any harmful effect might attach to the statement in question, he should have made timely objection at the trial so that any misunderstanding could have been clarified by a proper instruction to the jury. People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881; People v. Cook, 39 Cal.2d 496, 247 P.2d 567.

[13–15] The second and third matters concern remarks made by prosecuting counsel in their arguments to the jury. In his opening argument, the deputy district attorney referred to defendant as having committed a "cold-blooded murder." Such remark appears no more than a characterization of the evidence sustaining the prosecution's charge of first-degree murder, People v. Rossi, 37 Cal.App. 778, 782, 174 P. 916, and does not transcend the bounds of legitimate comment. People v. Harris, 219 Cal. 727, 732, 28 P.2d 906. In his closing argument, the assistant district attorney alluded to the plea of appellant's counsel that the extreme penalty should not be exacted in this case and the latter's reference to the "enlightened action of some eight states in repealing the death penalty." The assistant district attorney then added that "most, if not all those states provide that life imprisonment is life imprisonment, and that there is no parole if the death penalty is not imposed." Such last statement may properly be regarded as fair comment to correct a false impression created by the remark of appellant's counsel as to the practice in *other* states. Cf. People v. Gomez, 209 Cal. 296, 300, 286 P. 998. It notably did not include any comment on the parole system in California, cf. People v. Rameriz, 1 Cal.2d 559, 564–565, 36 P.2d 628; People v. Rogan, 1 Cal. 2d 615, 621–622, 36 P.2d 631, 95 A.L.R. 560, and so would be less likely to have a harmful effect. Moreover, the court admonished the jury that the statements and arguments of counsel were not evidence in the case, and where they were not supported by the evidence or were inconsistent with the instructions as to the law, they should be disregarded. Under the circumstances and in view of the record showing that the case is not "closely balanced," the assailed remarks cannot be held prejudicial. People v. Sampsell, 34 Cal.2d 757, 764, 214 P. 2d 813.

[16] Appellant's fifth argument rests on the claim that the evidence did not show an attempted robbery but only acts which did not go beyond the preparatory stage. There is no merit to his position. The evidence showed both appellant's intent to commit a robbery and his ineffectual acts done in attempting its commission. 7 Cal. Jur. 877, § 32; People v. Moran, 18 Cal. App. 209, 210–211, 122 P. 969; see People v. Parrish, 87 Cal.App.2d 853, 856, 197 P. 2d 804. In both his extrajudicial statements as well as in his testimony at the trial, appellant admitted that he was looking that day for a place to rob and that he entered the deceased's store for that purpose. In line with that intent, he further stated that he dressed so as to avoid recognition, wearing an extra pair of pants so he could make "a quick change," and as he opened the door into the store, pulling a handkerchief over the lower portion of his face and his gun out of his pocket. Witnesses in the vicinity unanimously agreed in their testimony as to the timely sequence of the assailant's acts: his entry into the store, after first waiting outside a few minutes for the last customer to leave; his adjusting of a handkerchief over his face as he entered; his running from the premises and jumping into a waiting car, which was parked around the corner and used to make his escape. Such condition of the record readily supports the conclusion that an attempt to commit a robbery was here undertaken. See People v. Moran, supra, 18 Cal.App. 209, 210–211, 122 P. 969; People v. Raucho, 8 Cal.App.2d 655, 663, 47 P.2d 1108.

[17–19] Appellant's final and sixth argument is his unavailing challenge of the sufficiency of the evidence to sustain the verdict. The attempted robbery was relevant to establishing the degree of the murder, Pen.Code, § 189, and appellant's extra-

judicial statements were pertinent to its proof. People v. Miller, 37 Cal.2d 801, 806, 236 P.2d 137; see, also, People v. Lytton, 257 N.Y. 310, 178 N.E. 290, 292, 79 L.R.A. 503. Appellant's testimony confirmed the robbery motive and accompanying acts in furtherance of its commission prior to the homicide charged. His only point of disagreement with the unanimous account of all other witnesses in the vicinity who testified was his claim that the deceased fired first. Of course, it was for the jury to determine his credibility as against that of said witnesses who agreed that only one shot was fired. People v. Smith, 15 Cal. 2d 640, 648, 104 P.2d 510. There was substantial evidence in support of the jury's determination and its finding will not be disturbed. People v. Smith, supra, 15 Cal. 2d at page 648, 104 P.2d 510; People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 1.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



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HOOPER v. MAYFIELD et al.

Civ. 15122.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1952.

Hearing Denied Feb. 16, 1953.

Action against vendors to recover real estate broker's commission. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., having sustained a general demurrer to complaint without leave to amend, entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the writings relied on to show agreement employing broker to sell the realty were insufficient to satisfy the statute of frauds.

Judgment affirmed.

1. Brokers ⇐43(2)

Agreement employing a middleman to bring vendor and purchaser together, though middleman takes no part in negotiations and leaves the parties to make their own contract, is an agreement authorizing or employing agent or broker to purchase or sell realty and hence is subject to requirement of statute of frauds that such agreement or some note or memorandum thereof must be in writing. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5; Business and Professions Code, § 10134.

2. Brokers ⇐43(2)

The statute of frauds requiring agreement employing agent or broker to purchase or sell realty or some note or memorandum thereof to be in writing, must be so construed as to effect its object to protect against unfounded claims. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

3. Brokers ⇐82(1)

In order to state a cause of action for recovery of real estate broker's commission, complaint must show that agreement by which broker's services were engaged or some memorandum thereof was in writing signed by the party to be charged or his agent in compliance with statute of frauds. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

4. Brokers ⇐43(3)

The writing required by statute of frauds with respect to employment of broker to buy or sell realty must unequivocally show on its face the fact of authority or employment of broker to act as intermediary. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

5. Brokers ⇐43(3)

A writing from owner to a broker merely stating that owner will sell designated realty on specified conditions is insufficient to satisfy statute of frauds, since it does not show employment, and statement that regular commission will be paid as part of conditions on which owner is willing to sell does not make the writing sufficient to satisfy the statute. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

6. Brokers ⇐43(3)

Notice offering designated realty for sale to highest bidder on specified terms and letter from owners' attorney explaining that notice was being forwarded to broker because he had indicated an interest in purchase of the property did not satisfy the statute of frauds in that no intention to employ broker as an intermediary was shown therein, even though terms of sale required bidder to state amount of any real estate commission to be deducted from purchase price. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

7. Brokers ⇐40

A "listing" is at most an offer to use services of broker which can be accepted by rendering the services impliedly requested.

See publication Words and Phrases, for other judicial constructions and definitions of "Listing".

8. Brokers ⇐43(2)

Recovery of real estate broker's commission cannot be predicated on a listing of property with broker, unless such listing satisfies the statute of frauds. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

9. Brokers ⇐43(2)

Vendors were not estopped from invoking the statute of frauds to defeat recovery of real estate broker's commission. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

10. Brokers ⇐43(2)

Even where broker renders his services in reliance on an express oral employment and owner takes advantage of such services, the statute of frauds prevents recovery of broker's commission, in absence of written memorandum of agreement employing broker, and no estoppel to invoke the statute is recognized. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

Cushing, Cullinan, Duniway & Gorrill, San Francisco, for appellant.

Graham & Morse, San Francisco, for Jack Lewis.

Mark A. Hall, Los Angeles, for Lillian Borden, executrix, etc. and Charlotte Winston.

Heller, Ehrman, White & McAuliffe, San Francisco, for Harry Borden, Fitzwilliam Guerin, sued herein as Fitzhugh Guerin, Florence Guerin, Adelaide Beadon, May Winch and Hester B. Borden Collins, sued herein as Hester Borden Collins.

C. Ray Robinson and William B. Boone, Merced, for Juliet Borden Mayfield.

NOURSE, Presiding Justice.

This is an action by a broker to recover a commission on a sale of real estate. A general demurrer to his complaint was sustained without leave to amend and he appeals from the judgment entered accordingly. It is conceded that no further cause of action can be stated by amendment. The complaint contains in evidentiary detail all the facts on which plaintiff bases his right to commission, the correspondence between the parties being set out in haec verba. The substance of appellant's allegations is as follows:

Plaintiff is a licensed real estate broker doing business as such. In August of 1949 he completed an appraisal of "Victoria Island", the realty here involved, which was part of an estate in probate and of which the defendants were the owners in different fractional interests. Expecting that said owners would offer Victoria Island for sale, plaintiff in that month suggested to one J. L. Rudé, an investor, its possible purchase, showed it to him and gave him complete information about it. In September, 1949, said Rudé proposed to plaintiff to "flush out" the owners by an offer of one million dollars cash if plaintiff would cut in Rudé on the commission, but for the time being the matter rested when plaintiff explained that he was not allowed to share commissions with an unlicensed person. On February 2, 1950, plaintiff received a letter signed by F. M. McAuliffe, an attorney at law, stating that he represented certain of the legatees interested in selling the property, that he was advised that plaintiff was one of several who had made inquiries as to whether the property was for sale, and that if a fair offer was made he would try to induce the owners to consent to a sale. Data as to the property were enclosed. Plaintiff immediately informed Rudé of said

letter and told him that he was informed the owners were trying to obtain a price of $1,500,000, and what terms of payment they would expect. By letter of February 3, 1950, he informed Mr. McAuliffe that he had advised several clients of the opportunity to make offers and gave the names of three clients, among them Rudé, who had approached plaintiff on the matter and with whom he was now attempting to negotiate. By letter of February 8, 1950, Rudé informed plaintiff that to his people Victoria Island did not seem attractive at present price and terms, but he asked plaintiff to keep in touch with him. On June 22, 1950, plaintiff received another letter from Mr. McAuliffe reading:

"Enclosed find notice of sale of Victoria Island, which we are forwarding to you as our records show that you have indicated an interest in the purchase of this property." Attached to said letter was a "Notice of Sale of Victoria Island at Private Sale." It offered the property for sale to the highest bidder, sealed bids of not less than $1,250,000 to be accepted up to 2:00 p. m. on July 17, 1950, and contained full terms of sale of which the following must be noted: "Bidder shall state in dollars the amount of real estate commission, if any, that is to be deducted from the purchase price. The rate of such commission shall not be in excess of that customary in the sale of farm property in San Joaquin County." Plaintiff sent a copy of the notice to Rudé but there is no allegation of any reaction of Rudé. On July 24, 1950, plaintiff received a third letter from Mr. McAuliffe informing him that on July 17th no bids had been received, but that he had been advised by several parties that they would be interested in obtaining an option and that he believed an option would be granted to persons representing responsible purchasers if the price was fixed. Subsequent to July 25, 1950, Rudé, without consulting or informing plaintiff, made an agreement in writing directly with defendants for the purchase of Victoria Island for $1,250,000, which sale was completed. "Said agreement was made as a result of the services and activities of plaintiff herein, as herein set forth, acting to the knowledge of said defendants as a licensed real estate broker." It is concluded that in consequence of said stated facts defendants became obligated to pay to plaintiff $62,500 being the customary commission for a licensed broker on such sale.

Appellant's primary contention is that said complaint states a good cause of action for commission by a middleman employed only to bring buyer and seller together, not taking part in the negotiations, and leaving the parties to make their own contract. It is contended that an agreement employing such middleman is not an agreement authorizing or employing an agent or broker to purchase or sell real estate and therefore is not subject to the requirement of the statute of frauds that it or some note or memorandum thereof be in writing. § 1624, subd. 5, Civil Code; § 1973, subd. 5, Code of Civil Procedure. The contention is without merit.

[1, 2] The distinction between an intermediary acting as a middleman and one acting as an agent of either buyer or seller is generally recognized with respect to the question whether the intermediary is in a confidential relation to one of the parties and may not receive compensation from both without their knowledge. Clark v. Allen, 125 Cal. 276, 57 P. 985; King v. Reed, 24 Cal.App. 229, 141 P. 41; Carothers v. Caine, 38 Cal.App. 71, 175 P. 478; Williams v. Kinsey, 74 Cal.App.2d 583, 596, 169 P.2d 487. Some cases deal with the question whether under special statutes a broker's license is required for someone acting as a middleman. Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960; Davis v. Chipman, 210 Cal. 609, 620, 293 P. 40; Rhode v. Bartholomew, 94 Cal.App.2d 272, 280 et seq., 210 P.2d 768. (Appellant takes the position that under the present statute, sec. 10134, Business and Professions Code, which includes in the acts of a broker "listing or soliciting prospective purchasers of real estate" a broker's license is required to act as a middleman.) However appellant does not cite any case, nor have we found any, which holds that a middleman can sue for commission for his services as to the sale of real estate without showing an agreement which satisfies the statute of

frauds. To the contrary this proposition has been expressly rejected in Ryan v. Walker, 35 Cal. App. 116, 119, 169 P. 417. Other cases are to the same effect. In Cram v. McNeil, 32 Cal.App. 101, 162 P. 140, it was held that an oral promise to pay commission for information as to the identity and residence of a person, who was not willing to deal through any real estate agent, but to whom defendant would himself sell his property was unenforceable under the statute as the intermediary in such case is an agent or broker within the meaning of the statute. In Kornman v. Nelson, 83 Cal.App. 616, 257 P. 150, the defendant, the owner of the realty, promised orally to the plaintiff that if she would show the property to prospective purchasers while occupying it as a tenant and would place intended purchasers in touch with him, he would pay her a commission of five per cent of the selling price in the event that a sale of the property was made to any such person. It was held that the oral contract was void under the statute. In each of these cases the intermediary was not employed to negotiate or conclude a sale but only to bring the prospective buyer in contact with the seller who would himself make the contract. The rule is stated as follows in Duckworth v. Schumacher, 135 Cal.App. 661, 666, 27 P. 2d 919, 921, a case which as to its facts is not so directly in point as the preceding cases: "If one assists either in the purchase or sale of real estate on a contract for compensation either by commission or salary, he falls within the inhibitions provided in said section [1624, C.C.] to the same extent and in the same manner as though he had been the sole and exclusive medium through which the purchase or sale was made. We think that the terms 'employed to sell or purchase' should and does include to aid and assist in the purchase or sale * * *." In the same opinion it is said in 135 Cal. App. on page 665, 27 P.2d at page 921, "To hold otherwise would give rise to a practice of ingenious forms, without substance in fact, and thus avoid the very salutary rule of law as declared in section 1624 of the Civil Code, and open the door to fraud, long closed by said statute, and would in effect abrogate such statute of frauds." We consider this language applicable to the distinction proposed by appellant and in accordance with our duty to construe the statute so as to effect its object, the protection against unfounded claims, Egan v. Pacific Southwest Trust & Sav. Bk., 92 Cal.App. 1, 5, 267 P. 719; Toomy v. Dunphy, 86 Cal. 639, 642, 25 P. 130, we reject the distinction.

Moreover the allegations of the complaint do not even show that appellant's function was that of such a middleman, assuming for the moment that an invitation by defendants to some intermediary activity of plaintiff was alleged. Appellant in his briefs bases his right to commission more specifically on the letter of Mr. McAuliffe of June 22, 1950, which he considers a "listing" of the property with appellant. (It is conceded that the letter of February 2nd is not sufficient for that purpose and no activity whatever of appellant in response to the letter of July 24th is alleged.) But said letter of June 22nd, if it were intended to invite any activity of plaintiff, would require him to persuade his client to accept the owners' offer of a private sale on their stated conditions by bidding within the time limit given not less than the stated minimum price. Thereafter there would be no room for any negotiation or making of contract between the parties themselves. By persuading his client to send in the highest bid appellant would have effected the sale as completely as if he had transmitted to his client a direct offer to sell and had persuaded him to accept it. Compare Dolan v. O'Toole, 129 Cal. 488–490, 62 P. 92.

[3–5] There is therefore no doubt that the complaint states a cause of action only if the manner in which appellant's services allegedly were engaged satisfies the statute. 12 C.J.S., Brokers, § 107, p. 244. Appellant argues that if he is subject to such requirements they are fulfilled by the alleged letter of June 22nd together with the Notice of Sale. The authorities do not support the contention. The chief element required to be shown in writing is the fact of authority or employment to act as intermediary. Toomy v. Dunphy, supra, 86 Cal. 639–642, 25 P. 130; Moore v. Borgfeldt, 96 Cal.App. 306, 309, 273 P. 1114. "The rule is settled

that in a suit by a broker to recover a real estate commission in order to show compliance with the statute the writing signed by the party to be charged or his agent must unequivocally show on its face the fact of employment of the broker". A writing from the owner to a broker which merely states that the former will sell certain property on certain conditions is insufficient because it does not show employment. Blanchard v. Pauley, 92 Cal.App.2d 244, 247, 206 P.2d 864, 865, and earlier cases there cited. See moreover Herring v. Fisher, 110 Cal.App.2d 322, 326, 242 P.2d 963; Egan v. Pacific Southwest Trust & Sav. Bk., supra, 92 Cal.App. 1, 3, 267 P. 719. A statement that the regular commission will be paid as part of the condition on which the owner is willing to sell does not make the writing sufficient to satisfy the statute, Morrill v. Barneson, 30 Cal.App.2d 598, 600, 86 P.2d 924. Although according to Justice Carter, dissenting in Marks v. Walter G. McCarty Corp., 33 Cal.2d 814 at page 830, 205 P.2d 1025, these rules may be somewhat modified where the writing is the memorandum of an oral agreement of employment, there is no doubt that they are fully applicable where, as in this case, there has been no personal contact and the writings must constitute the agreement itself.

[6-8] The letter of June 22nd together with the Notice of Sale does not show an intention to employ appellant as an intermediary unequivocally or at all. The letter shows that the Notice of Sale was sent to appellant "as our records show that you have indicated an interest in the *purchase* of this property." (Emphasis ours.) As said in Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 539, 120 P. 444, the language does not show that the intervention of a broker or any other third party was necessarily intended, but the offer of a private sale might have been directly submitted by the defendants to an intending purchaser. The commission clause in the Notice of Sale, on which appellant strongly relies, negatives rather than shows the intention of the owners to employ themselves any intermediary. It asks the *bidder* to state the amount of commission, *if any,* to be deducted from the purchase price. The obvious sense of this clause is that, as it is customary that the sellers pay the commission of the intermediary, they will do so but only if the bidder has engaged the services of one. Rudé, the purchaser, did not bid and did not claim commission for appellant and appellant does not even contend that he is entitled to commission because he was engaged as intermediary by Rudé. Under the authorities cited the letter and Notice of Sale are clearly insufficient to satisfy the statute. The other correspondence cannot add anything which results in an unequivocal statement of employment. It shows the same deficiency as the main letter and more so. Appellant's contention that the letter of June 22nd constitutes a "listing" of the property with appellant has no separate significance. A listing is at most an offer to use the broker's services which can be accepted by rendering the services impliedly requested, 12 C.J.S., Brokers, § 61, p. 139. To base an action for commission on it, it must satisfy the statute, as has been shown hereinbefore.

[9, 10] Appellant's contention that respondents were estopped to invoke the statute is wholly without merit. Even where an intermediary has rendered his services in reliance on an express oral employment and the owner has taken advantage of these services the statute prevents recovery of commission and no estoppel is recognized. Hicks v. Post, 154 Cal. 22, 28, 96 P. 878; Colburn v. Sessin, 94 Cal.App.2d 4, 209 P. 2d 989 and cases there cited. Here no action whatever of defendants is alleged which can give their recourse to the statute the slightest taint of fraud. Respondents argue that even apart from the statute no employment sufficient for an action for commission has been alleged, citing Morrill v. Barneson, supra, 30 Cal.App.2d 598, 603, 86 P.2d 924. This may well be so, but, as the authorities with regard to the requirements of a showing of employment are much more specific where the statute is applicable than where it is not, we prefer to base our affirmance on the failure to satisfy the statute without deciding the other point.

Judgment affirmed.

DOOLING, J., concurs.

115 Cal.App.2d 48

MEYER v. MEYER.

Civ. 19110.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1952.

Rehearing Denied Jan. 12, 1953.

Proceeding upon divorced husband's motion for recall of execution and for annulment of order for its issuance. The order was issued in proceeding wherein divorced wife charged that divorced husband had failed to comply with order for child support. The Superior Court, Los Angeles County, Daniel N. Stevens, J., granted divorced husband's motion, and divorced wife appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain order.

Order affirmed.

1. Divorce ⇐311

In proceeding by divorced husband for recall of execution on an annulment of order determining husband to be in arrears on previous order for child support, order granting husband's motion was sustained by evidence.

2. Execution ⇐161

A writ of execution may be recalled and quashed where the issuance was improperly or inadvertently made.

3. Appeal and Error ⇐1024(5)

Where the trial court's decision on motion for recall of execution and annulment of order for its issuance is based upon conflicting evidence, the appellate court will not interfere.

Carl Yanow, Los Angeles, for appellant.

Henry B. Nathan, San Francisco, for respondent.

MOORE, Presiding Judge.

From an order granting defendant's motion for recall of execution and for annulment of the order for its issuance comes this appeal.

[1] Prior to 1939 the parties were husband and wife. On July 26, 1938, the wife was awarded an interlocutory decree of divorce based upon substituted service. Notwithstanding the lack of personal service of summons, respondent was ordered to pay $40 per month toward the support of two minor children. At the instance of appellant and pursuant to her affidavit charging that respondent had wholly failed to comply with the order for child support, an execution was issued directing the sheriff to collect the sum of $2,400, the arrearage for the preceding five years. Respondent thereupon moved to recall the execution, to vacate the order for its issuance and to quash the writ on the grounds that the amounts allegedly due on the judgment had "been paid and satisfied."

Contemporaneously with his motion, respondent submitted two affidavits in which he deposed that commencing in 1944 after his discharge from the army he had begun making payments toward his children's support to the best of his ability. At the time of the hearing on his motion he introduced into evidence cancelled checks drawn subsequent to 1947 which totalled $3,025.80. Such checks, he averred, were drawn in favor of the children and sent directly to them, but that the endorsements thereon revealed that many of them, though endorsed in the names of the children, appeared to be in appellant's handwriting. In addition to the sums called for by the checks, respondent averred that he had made additional payments for the support of his son while the latter was in attendance at the University of California during the summer and fall of 1950; also, that all such sums were paid pursuant to an agreement made with appellant and her new husband when the three conferred at a San Francisco hotel in 1944. Appellant submitted affidavits contradictory of many of the averments of respondent. The basis of her position was that any sums paid by respondent were outright gifts to the children and not as contributions toward their support.

However, upon a review of the conflicting affidavits as to payment of the sums claimed, wholly apart from the jurisdictional question which is not necessary to this decision, it is clear that the court's action based solely upon proof of payment was proper.

[2, 3] A writ of execution may be recalled and quashed where the issuance was improperly or inadvertently made. Creditors Adjustment Co. v. Newman, 185 Cal. 509, 511, 197 P. 334. Where the trial court's decision on such a motion is based upon conflicting evidence, the appellate court will not interfere. Nichols v. Davis, 168 Cal. 570, 571, 143 P. 758; Fickeisen v. Peebler, 77 Cal.App.2d 148, 152, 174 P.2d 883; Fuller v. Lindenbaum, 29 Cal.App.2d 227, 230, 84 P.2d 155.

Order affirmed.

McCOMB and FOX, JJ., concur.



114 Cal.App.2d 787

PEOPLE v. BONFIGLIO et al.

Cr. 4853.

District Court of Appeal, Second District, Division 3, California.

Dec. 18, 1952.

Accused was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of possessing marihuana in violation of statute and he appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Poisons ⇐9

In prosecution for possessing marihuana in violation of statute, evidence was sufficient to identify defendant, who had been passenger in automobile, as person who had possession of marihuana cigarettes when defendant and driver of automobile were searched by police officers, and evidence sustained conviction. Health and Safety Code, § 11500.

2. Criminal Law ⇐982

Under section of Health and Safety Code prohibiting granting of probation to a person convicted of violating specified sections of Code or of committing any offense referred to in such sections, one of which sections prescribed punishment to be imposed upon a person convicted of possessing a narcotic, a person who was convicted of possessing marihuana in violation of statute could not be granted probation. Health and Safety Code, §§ 11500, 11715.6.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By information Charles R. Medley and Donald E. Bonfiglio were charged with possession of marihuana in violation of Health and Safety Code section 11500. After trial to the court, the cause being submitted on the transcript of the preliminary hearing, and neither defendant testifying, defendant was found guilty as charged while defendant Bonfiglio was found not guilty. Defendant was denied probation and sentenced to 90 days in jail.

When arrested Bonfiglio and Medley were riding together in the former's automobile. Officer Barber testified that the police car in which he was riding stopped behind the defendants. Officer Benavidez, who was driving the police car, and Barber got out of the police car on their respective sides and approached the defendants. Barber approached Medley and Benavidez approached Bonfiglio. Barber further testified that two marihuana cigarettes were found in the possession of Medley.

[1] Defendant contends that the evidence was insufficient to connect him with the crime. Barber testified: "The defendant Bonfiglio was the driver, and Medley was the passenger. * * * I got out on the passenger's side, and we quickly approached the car; and I took Medley from the driver's side of the car, and my partner Benavidez took Bonfiglio from the other side. I searched Medley, and I found a brown wrapped paper cigarette in his right hand and upon further searching him I found another one in his left shirt pocket."

This witness also testified that he talked with defendants after their arrest and that Medley said they had bought the cigarettes in the Rose Hill area but that he did not remember just where or from whom they had bought them. These were proved to contain marihuana. Defendant argues that Officer Barber did not identify either Medley or Bonfiglio in the courtroom and that his testimony must mean he took the cigarettes from the man he removed from the driver's side, Bonfiglio, and thus there was no evidence to sustain the conviction. There was an obvious inconsistency in Barber's testimony that Medley was the passenger, but that he took him from the "driver's side", searched him and found the cigarettes. The witness was not cross-examined and the apparent contradiction was not explained. The point was not called to the attention of the trial court by objection, argument or mention at the time of sentence. It is undisputed that the automobile belonged to Bonfiglio and he was driving. Officer Barber testified Medley was on the passenger side of Bonfiglio's car and he was on the passenger side of the police car; that he got out of the police car and walked forward to the other car, took Medley from the car and searched him, finding two marihuana cigarettes. At most there was conflicting evidence, consisting of the apparent contradiction in the testimony of Officer Barber. We cannot resolve the conflict but must accept the testimony which tends to support the judgment. This was sufficient to identify Medley as the one who had possession of the cigarettes. The evidence was sufficient to sustain the conviction.

[2] Defendant makes one other point. The court was of the opinion that section 11715.6 of the Health and Safety Code precluded probation for a violation of section 11500. The former section reads: "In no case shall any person convicted of violating Sections 11712, 11713, 11714, 11715, or of committing any offense referred to in those sections be granted probation by the trial court, nor shall the execution of the sentence imposed upon such person be suspended by the court." Section 11712 reads in part: "Any person convicted under this division for having in possession any narcotic, or of violating the provisions of Sections 11530 or 11557 shall be punished by imprisonment in the county jail for not less than 90 days nor more than one year, or in the State prison for not more than six years." The court correctly held that since the crime of possession is specifically mentioned in this section probation is forbidden by section 11715.6.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



114 Cal.App.2d 819

GOSS v. FANOE et al.

No. 15275.

District Court of Appeal, First District, Division 1, California.

Dec. 22, 1952.

Action by employee against employer for injuries sustained in fall which allegedly was a direct result and grew out of the negligence of the employer. The Superior Court, County of Monterey, Anthony Brazil, J., entered judgment for plaintiff and ordered new trial limited to the issue of damages, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that when statutory presumption that injury to employee was direct result and grew out of negligence of employers had been raised by failure of employers to procure payment of workmen's compensation, general finding in accord with statutory presumption was sufficient in absence of evidence dispelling presumption, notwithstanding fact that specific acts of negligence were alleged.

Judgment affirmed except as to amount of damages, and order granting new trial, limited to that issue, also affirmed.

1. Workmen's Compensation ⇐2140

Where complaint for injuries to practical nurse retained for defendant's infant son alleged injury from fall while acting within scope of employment and failure of

defendants to comply with provision of labor code requiring employers to secure payment of workmen's compensation, statutory presumption that injury to employee was direct result and grew out of negligence of employer made general finding in terms of statute that nurse's injury was direct result and grew out of negligence of defendants, a sufficient finding in absence of evidence dispelling such presumption, notwithstanding fact that specific acts of negligence were pleaded. Labor Code, §§ 3700, 3706, 3708.

2. Pleading ⇐63

Generally it is sufficient to frame a pleading in the language of the statute germane to the action.

3. Appeal and Error ⇐219(2)

Where no request was made to trial court, in action by employee against employers for injuries sustained in course of employment, that there be specific findings on specific acts of negligence alleged in the complaint, objection to absence of such findings could not be made on appeal. Labor Code, §§ 3700, 3706, 3708.

4. Workmen's Compensation ⇐2136

Statutory presumption that an injury to an employee was a direct result and grew out of the negligence of the employer, which arises from failure of employer to secure payment of workmen's compensation, in itself amounts to evidence, which raises a conflict, and may outweigh positive evidence adduced to rebut it. Labor Code, §§ 3700, 3706, 3708.

5. Workmen's Compensation ⇐2136

In action by practical nurse who had been employed by defendants to care for their infant son, to recover for injury sustained in fall caused by abrupt drop in elevation of floor from bedroom to another dimly lighted room, evidence, including statutory presumption that injury was direct result and grew out of negligence of employers, was sufficient to sustain finding in accord with presumption.

6. Workmen's Compensation ⇐2110

Where employee brings action against employer after failure of employer to procure payment of workmen's compensation for injuries arising in course and scope of employment, it is not a defense to the employer that the employee was guilty of contributory negligence. Labor Code, § 3708.

7. Evidence ⇐53, 595

A presumption is evidence, and it remains in the case to be weighed with conflicting evidence, and may support a finding in the face of contradictory evidence.

8. Workmen's Compensation ⇐2141

Where action by employee against employers for injuries was tried upon theory that employers had failed to secure payment of workmen's compensation, failure of employers to secure such payment would be assumed on appeal. Labor Code, § 3700.

9. Damages ⇐132(15)

Where injuries to practical nurse consisted of impacted fracture of neck of right humerus near shoulder, and resulted in restriction of motion, and medical testimony which was in conflict placed permanent impairment at from 50% to 10% permanent impairment of motion, grant of new trial on ground that award of $2000 damages was inadequate was not an abuse of discretion. Code Civ.Proc. § 662.

10. New Trial ⇐6

Fact that trial court awarded new trial restricted to issue of damages because of inadequacy of same instead of modifying judgment as it might have done did not of itself establish abuse of discretion. Code Civ.Proc. § 662.

Raymond W. Shellooe, Salinas, for appellants.

Bardin & Cunningham, Salinas, for respondent.

FRED B. WOOD, Justice.

This is an action brought by an injured employee against her employers as authorized by section 3706 of the Labor Code when the employer fails to secure the payment of workmen's compensation. The case was tried without a jury.

The court found (1) plaintiff was employed by defendants as a domestic and practical nurse for the care of defendants'

infant child at the home of defendants, (2) while acting within the course and scope of her employment, plaintiff received an injury, (3) the injury was a direct result and grew out of the negligence of the defendants, (4) plaintiff suffered general damages in the sum of $2000, special damages in the sum of $417.09 and loss of wages in the sum of $40, and (5) at the time of the injury defendants were subject to the workmen's compensation insurance and safety laws of the state and failed to comply with the provisions of section 3700 of the Labor Code. Judgment was entered accordingly.

Plaintiff moved for a new trial. In granting that motion the court limited the new trial to the sole question of damages upon the ground that the amount awarded was inadequate. The defendants have appealed from that order and from the judgment.

In support of their appeal appellants claim (1) the finding of negligence in general terms was insufficient when, as here, the complaint alleged specific acts of negligence, (2) the finding of negligence is not supported by the evidence, (3) the presumption of negligence afforded by section 3708 of the Labor Code, was wholly rebutted, (4) the finding that defendants failed to secure payment of workmen's compensation is not supported by the evidence, and (5) the court abused its discretion in granting a limited new trial. A brief summary of the evidence which tends to support the finding of liability and the evidence bearing upon the extent of plaintiff's injuries, will facilitate the discussion of these points of law.

The main entrance to defendants' home is into the living room. A hall leads from the living room to a bedroom which served as a nursery and plaintiff's principal place of employment. The hall also opens on to a den and the door on the opposite side of the den opens into the kitchen. The floor of the den is 6⅛ inches lower than the floor of the hall and the floor of the kitchen. Plaintiff commenced work as soon as she arrived at defendants' home, about 4 p. m. on March 9, 1950. At about 6 p. m. she left the nursery to go to the kitchen and prepare the baby's formula. In passing from the hall into the den on the way to the kitchen she failed to observe the difference in floor elevation and fell, sustaining the injuries of which she complains.

Prior to this fall plaintiff had been in the living room and the nursery but not in the den. Mrs. Fanoe, who received plaintiff that day and gave her her instructions, had not told plaintiff of the step down into the den. Plaintiff said that when she started toward the kitchen, she thought all the floors were on the same level. There was no light burning in the den but she could see a dim light or reflection from the kitchen. She could not remember seeing anything in the den except a big object which was the bookcase she fell against; that after the accident Mrs. Fanoe told her several times it was Mrs. Fanoe's fault and that she should have pointed out the step to plaintiff. The floor of the den was the same color as that of the hall, a "light mahogany."

Plaintiff's injuries consisted of an impacted fracture of the neck of the right humerus near the shoulder. She was in the hospital about a week and had a cast on her arm for nearly a month. There is some restriction of motion in the shoulder joint. Movements are better than 50% normal but no improvement may be expected. This will interfere with her employment as a practical nurse.

[1] (1) *Was the finding of negligence in general terms insufficient* when, as here, the complaint alleged specific acts of negligence? No.

The complaint alleged and the court found that plaintiff was injured while acting within the course and scope of her employment by the defendants and at a time when the defendants were subject to the state workmen's compensation insurance and safety laws and had failed to comply with the provisions of section 3700 of the Labor Code requiring them as employers to secure the payment of workmen's compensation. Those facts brought into play the provisions of the statute. Labor Code, § 3706, which authorized the bringing of this action. In such an action there is the stat-

utory presumption "that the injury to the employee was a direct result and grew out of the negligence of the employer * *." Labor Code, § 3708.

Accordingly, the court found that plaintiff's "injury was a direct result and grew out of the negligence of the defendants." It is this finding which defendants claim is too general to qualify as a finding of fact, especially when the complaint alleged negligence in the specific terms of the abrupt and unguarded step down from hallway to den, inadequate illumination, knowledge thereof by the defendants and their failure to warn plaintiff.

[2] But for the statutory presumption the questioned finding might be insufficient. It does not mention any act of the defendants which they negligently performed or any dangerous condition which they negligently created or suffered to develop. It has been said that "while negligence may be pleaded in general terms, the plaintiff must indicate the acts or omissions which are said to have been negligently performed. He may not recover upon the bare statement that the defendant's negligence has caused him injury." Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 101, 114 P.2d 1, 4. The same would be true of a finding of fact. But in our case an exception must be recognized in view of the statutory presumption that the injury was the result of the employer's negligence. If upon a trial facts are proven which bring the statutory presumption into play and the evidence does not dispel the statutory presumption, it would seem quite appropriate to use the language of the statute when finding the employer negligent. Indeed, it would be virtually necessary to do so whenever the evidence neither dispels the presumption nor characterizes a particular act or omission of the defendant as negligent. "Ordinarily, it is sufficient to frame a pleading in the language of the statute germane to the action." Quinn v. Mathiassen, 4 Cal.2d 329, 332, 49 P.2d 284, 285. See also Fair v. Home Gas & Electric Co., 13 Cal.App. 589, 591–592, 110 P. 347.

[3] Accordingly, if defendants desired findings concerning specific acts of negligence alleged in the complaint, they should have made appropriate request therefor to the trial court. The record does not show that they made any such request and upon oral argument their counsel conceded that none was made. Their objection, now made upon appeal, comes too late. La Vigne v. La Vigne, 96 Cal.App.2d 531, 535–536, 216 P.2d 75; Haskins v. Certified Escrow & Mortgage Co., 96 Cal.App.2d 688, 690, 216 P.2d 90; Matlin v. Crescent Commercial Corp., 93 Cal.App.2d 8, 12, 207 P.2d 873; Tooke v. Allen, 85 Cal.App.2d 230, 238–239, 192 P.2d 804; Estate of Wacholder, 76 Cal.App.2d 452, 456, 173 P.2d 359, and Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644–645, 171 P.2d 34.

Defendants cite Frascona v. Los Angeles Ry. Corp., 48 Cal.App. 135, 191 P. 968, as holding that a finding of negligence couched in general terms is insufficient in response to a complaint which alleges a specific act of negligence. That case does in fact so hold; i. e., that such a finding is not responsive to the issue tendered. The reported decision is silent on the question whether or not the defendant in that case had presented that point to the trial court. We deem it appropriate to follow the cases, above cited, in which the decision turned upon the fact that the point was being urged for the first time upon appeal. Defendants also cite San Jose Abstract & Title Ins. Co. v. Elliott, 108 Cal.App.2d 793, 240 P.2d 41, but that is a case in which a finding upon one of the material issues was entirely lacking.

(2) *Was the finding of negligence supported by the evidence?* We find that it was.

[4, 5] The statutory presumption "that the injury to the employee was a direct result and grew out of the negligence of the employer" Labor Code, § 3708 "in itself amounts to evidence, which raises a conflict, and may outweigh positive evidence adduced to rebut it. [Citation.]" Grady v. Canfield, 9 Cal.App.2d 341, 342, 49 P.2d 902, 903. In addition, there was the evidence of the abrupt drop from the floor of the hallway to the floor of the den, inadequate lighting of the area, and the

failure of the defendants to inform plaintiff of those conditions. Evidence tending to show that the lighting was adequate or that plaintiff was reading a newspaper at the time (she denied that she was) merely created a conflict which the trier of the facts resolved in favor of the plaintiff. Nor does the evidence that the differing floor levels were in conformity with safety laws and architectural practice demonstrate, as a matter of law, that defendants were not negligent. Wukaloff v. Malibou Lake Mountain Club, 96 Cal.App.2d 147, 151–152, 214 P.2d 832.

[6] Defendants direct attention to certain remarks made by the judge during the course of the trial and would infer therefrom that the judge tried the case upon some erroneous theory to the prejudice of the defendants. Defendants' position in this regard is not entirely clear. Their apprehension evidently stems from reading those remarks out of context. Those remarks were: "It seems to me there can be no negligence of the kind you claim in this case at all. You are limited to showing there is no negligence on the part of the owner. What she [plaintiff] knows and what she did is really of not much value," and "I think the examination is limited to whether she was hurt in the scope of her employment, not how." Viewed out of context these remarks might be difficult of comprehension but they were part of a discussion between court and counsel during the course of which the court also said "I mean her negligence is not a factor" and concluded "You are entitled to examine her [the plaintiff] under § 2055 [Code Civ.Proc.]. I have explained myself on the situation, go ahead." Counsel for defendants did go ahead. The court was quite right in observing that contributory negligence was not a factor. "It is not a defense to the employer that the employee was guilty of contributory negligence * * *." Labor Code, § 3708.

[7] (3) *Defendants' claim that the statutory presumption of defendants' negligence was rebutted,* is based upon a theory that the presumption was overcome and dispelled when evidence contrary to the presumption was introduced. That is not the law.

A presumption is evidence. It remains in the case to be weighed with conflicting evidence and may support a finding in the face of contradictory evidence. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Grady v. Canfield, 9 Cal.App.2d 341, 342, 49 P.2d 902. That is this case. None of plaintiff's evidence is "wholly irreconcilable with the presumption" which she invokes; hence, the presumption is not "dispelled," does not disappear from the case. See Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 9, 210 P. 269. Here, also, there is evidence that supports the presumption as well as some that tends to controvert it. Accordingly, the finding of negligence can not be disturbed by a reviewing court.

[8] (4) *Is there evidence to support the finding that defendants failed to secure payment of workmen's compensation* as required by § 3700 of the Labor Code? Defendants are precluded from raising this question.

At the very beginning of the trial, the court asked: "Any issue on the proposition whether the defendant had sufficient insurance?" Plaintiff's counsel responded "That has been determined, that he did not have it." Defendants' counsel said nothing. Thereupon the first witness was called and the trial proceeded and was conducted upon the theory that defendants had failed to secure payment of workmen's compensation. "'* * * When a case is tried upon the theory that certain facts exist, even though they are put in issue by the pleadings, their existence will be assumed on appeal.'" Handy v. Fitschen, 9 Cal.App.2d 637, 640, 50 P.2d 1059, 1061. See also Meyer v. Guardian Trust Co., 8 Cir., 296 F. 789, 791, 35 A.L.R. 856.

[9, 10] (5) *Did the court abuse its discretion in granting a new trial limited to the issue of damages?* It did not.

The only evidence bearing upon the adequacy or inadequacy of the $2,000 award of general damages, to which defendants direct attention, is the opinion of defendants' medical expert that if plaintiff will exercise

her arm in a normal fashion by nursing or housekeeping she will get 90% of the normal function. They overlook other medical testimony to the effect that she has sustained permanently a 50% loss of motion of the right arm and that this condition will limit and impair her opportunities for employment in the future. We can not predicate an abuse of discretion upon that record.

Defendants further contend that the court should have modified the judgment under the authority given by § 662 of the Code of Civil Procedure instead of ordering a limited new trial. The mere fact that the court in its discretion chose one of two alternative remedies accorded by the law does not of itself spell an abuse of discretion.

The judgment, except as to the amount of damages, is affirmed. The order granting a new trial limited to the issue of damages is also affirmed.

PETERS, P. J., and BRAY, J., concur.



115 Cal.App.2d 8

PEOPLE v. JORDAN.

Cr. 2869.

District Court of Appeal, First District, Division 2, California.

Dec. 22, 1952.

Defendant was convicted in Superior Court, City and County of San Francisco, Milton D. Sapiro, J., of contributing to delinquency of a minor, and he appealed. The District Court of Appeal, Nourse, P. J., held that where, in misdemeanor prosecution, court informed defendant of his right to counsel in same manner as required in felony prosecutions, and defendant waived right to counsel and entered plea of guilty, defendant's right to counsel was fully protected.

Judgment and order affirmed.

Criminal Law ⇐264

Where court in misdemeanor prosecution informed defendant of nature of charge against him and of his right to counsel in same manner as required in felony prosecutions, and defendant waived right to be represented by counsel and entered plea of guilty, defendant's right to counsel was fully protected. Pen.Code, § 1018.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of State, David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant appeals from a judgment sentencing him to serve one year in the county jail and denying his request for probation. The appeal presents no legal difficulties. Defendant was charged with a violation of section 702 of the Welfare and Institutions Code—contributing to the delinquency of a minor. The minor was a boy of sixteen years. Defendant had previously served five and one-half years in the state penitentiary for violations of sections 288 and 288a of the Penal Code. He was an old offender and hence familiar with court procedure.

When called for arraignment he informed the court that he had no lawyer. The court continued the hearing and told him it would call in the public defender. At the second hearing he told the court that he did not want a lawyer—that he would plead guilty. The court then informed him of the nature of the charge and of his right to counsel. We quote from the reporter's transcript:

"The Court: This being a misdemeanor, you are, if you desire, entitled to the advice of an attorney. We would have the Public Defender out here Monday if you want, but if you are satisfied that you understand the nature of the charge you are not required necessarily to have an attorney, it being a misdemeanor; but of course it is your privilege. Do you want to waive the right to be represented by an attorney in this misdemeanor proceeding? The Defendant: Yes, I will do that. The Court: And you

know the nature of the charge that I just read and you desire to enter a plea at this time? The Defendant: I will enter a plea of guilty."

The appeal is based upon a false premise. Appellant rests on the provisions of section 1018 of the Penal Code which declare that no plea of guilty "of a felony" shall be received where the defendant is not represented by counsel unless the court shall first inform the defendant of his right to counsel and unless the defendant shall state in open court that he does not desire counsel. Though the section applies only to a felony plea the procedure was carefully followed in this case.

There is nothing in People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829 which is contrary to this conclusion. There the defendant had been charged with thirty-two felonies and entered the guilty pleas because of misrepresentations of the public defender.

Judgment and order affirmed.

DOOLING, J., concurs.



115 Cal.App.2d 60

DALZELL v. KELLY et al.

Civ. 19401.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1952.

Rehearing Denied Jan. 12, 1953.

Motion to vacate sheriff's entry of full satisfaction of judgment for costs on appeal awarded plaintiff by appellate court. The Superior Court, Kern County, R. D. Lambert, J., entered an order denying the motion to vacate, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that judgment for costs on appeal did not bear interest prior to date of filing of cost bill.

Order affirmed.

1. Appeal and Error ⇐786

Appellate court has inherent power to dismiss an appeal where examination of the judgment roll demonstrates that appeal is frivolous.

2. Interest ⇐39(3)

A judgment for costs bears interest from date of entry.

3. Costs ⇐279

Execution for costs allowed by an appellate court cannot issue prior to order taxing the amount of such costs or until the time for taxing such amount has expired. Code Civ.Proc. § 1034.

4. Interest ⇐39(2)

Judgment for costs on appeal awarded by appellate court did not bear interest prior to date of filing of cost bill. Code Civ.Proc. § 1034.

William Campbell Dalzell, in pro. per.

Mack & Bianco, Bakersfield, for respondents.

MOORE, Presiding Justice.

This matter involves only costs on appeal. It comes here after plaintiff had obtained a reversal by the Fourth Appellate District of the judgment in his action with an award of "costs on appeal." After he had caused an execution to be levied by the sheriff, that officer entered a full satisfaction of the judgment for such costs. Thereupon, plaintiff moved the trial court to vacate the sheriff's entry. From the trial court's order denying such motion, plaintiff appeals.

After the remittitur had been filed on July 9, 1951, plaintiff filed his cost bill on July 30. Pursuant to a motion to retax costs, the trial court after a hearing, denied the motion on August 13, 1951. Thereafter, under execution on March 4, 1952, the sheriff made his return showing he had collected $244.43 including his fees in the sum of $3.12 which when deducted left $241.31, the exact amount of the judgment for costs. Plaintiff refused to receipt for such sum, but the sheriff entered a "full satisfaction" of the judgment. Thereupon, plaintiff on March 5, 1952, moved the court to vacate the "full satisfaction" of the sheriff on the grounds that

(1) the clerk failed to include a computation of interest and costs of issuance of the execution; (2) the sheriff failed to collect accrued interest and costs of execution; and (3) the sheriff had no authority to execute the satisfaction. The court denied the motion on condition that defendants pay plaintiff $11.30. That sum having been promptly paid, the court made its order finally and firmly denying the plaintiff's motion.

[1] This matter deserves to go the way of all frivolous appeals: a cryptic order of dismissal imposing an appropriate fine. If plaintiff could show a right of recovery, he could not have a judgment in excess of $1. An appellate court has inherent power to dismiss an appeal where an examination of the judgment roll demonstrates the appeal to be frivolous. In re Estate of Wunderle, 30 Cal.2d 274, 279, 181 P.2d 874. However, inasmuch as the fight has uncovered the fang, we shall pay respect to the quarrel which flits at our threshold.

Notwithstanding the fact of the payment of the amount which the court had calculated to be the balance due from defendants, plaintiff brings the matter here with the declaration that "thus the sheriff collected no interests, or costs of execution." He does not say what amount of interest is unpaid or for what period the interest accrued in addition to that considered by the trial court when it calculated the balance due was $11.30. However, plaintiff disclosed what might have been the basis of his appeal by his statement that in making its order with respect to the computation, the court said, "The judgment bears interest from the date the cost bill was filed." Apparently plaintiff deems himself aggrieved because the court did not figure interest on the judgment for a period prior to July 30, 1951, the date of the filing of the cost bill. Because the remittitur from the Fourth District Court of Appeal was filed in the county clerk's office on July 9 plaintiff evidently concludes that his judgment for costs bore interest from that day. There is neither reason nor authority to support such contention. How could the cost bill, contemplated by the remittitur, bear interest before it was filed? For 21 days the clerk's office awaited its coming. If it had not come at all there would have been no judgment for costs. There is no provision for a retroactive action of the cost bill. Its filing contemplates a modification of the memorandum for costs. Code Civ.Proc. sec. 1034. If at the time of filing there was a doubt as to what amount would be ultimately allowed and because such amount was in doubt until the order taxing costs was entered, there was no liquidated sum on which interest could have been computed until the court retaxed the costs or finally denied the motion to tax. But inasmuch as the court computed interest from the date the cost bill was filed, it made a generous award.

[2–4] Plaintiff's sole argument is that "a judgment for costs bears interest from the date of entry." That is an established rule fixed by statute and decision. Los Angeles Rock & Gravel Company v. City of Los Angeles, 132 Cal.App. 262, 264, 22 P.2d 541. But plaintiff has presented no authority holding that the filing of a cost bill is the equivalent of an "entry" of judgment. It would be a more reasonable construction to say that the order entered upon the motion to tax costs or upon the lapse of five days after the filing of the cost bill without a motion's having been filed to retax, is tantamount to the "entry of judgment" in a civil action. Execution for costs allowed by an appellate court cannot issue prior to the order taxing the amount or until "the time for taxing the same has expired". Code Civ.Proc., sec. 1034. If costs cannot be collected by judicial process prior to the expiration of 30 days after the remittitur has been filed, or until the costs have been fixed pursuant to the motion to retax (Ibid.) it cannot with reason be said that there is a judgment prior to the filing of a bill for costs awarded by the appellate court.

Order affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

114 Cal.App.2d 810

In re KEMMERRER.

RHINE v. KEMMERRER.

Civ. 19132.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1952.

Proceedings in the matter of a decedent's estate, wherein the Superior Court, Los Angeles County, Victor R. Hansen, J., denied a petition that the entire state of decedent be set aside to the decedent's widow, and she appealed. The District Court of Appeal, White, P. J., held that claims for expenses of decedent's last illness and burial had been entitled to payment out of the decedent's estate.

Affirmed.

1. Executors and Administrators ⇐214

Money paid for funeral expenses by one not acting officiously, if reasonable, must be repaid by decedent's estate. Probate Code, §§ 640–646, 645.

2. Executors and Administrators ⇐217

An heir who has an interest in an estate and pays claims against estate for medical and funeral expenses is not a "volunteer" within rule that volunteer is not entitled to subrogation. Probate Code, § 645.

3. Executors and Administrators ⇐217

Decedent's mother, who paid funeral expenses, and his sole beneficiary, who paid expenses of decedent's last illness, were not "volunteers", "intermeddlers", or "persons acting officiously", within intent and purpose of equitable policies governing application of doctrine of subrogation. Probate Code, § 950; Health and Safety Code, §§ 7100, 7101.

4. Subrogation ⇐1

"Subrogation" is a creature of equity, having for its purpose the working out of an equitable adjustment and the doing of complete and perfect justice between the parties by securing the ultimate discharge of a debt, by the person who in equity and good conscience ought to pay it, and by preventing the sweeping away of the fund from which in good conscience the creditor ought to be paid.

5. Executors and Administrators ⇐221(4)

Evidence established reasonableness of claims for expenses of decedent's last illness and funeral.

Allan L. Leonard, Los Angeles, for appellant.

Bart F. Wade, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from that portion of an order of the Superior Court of Los Angeles County, sitting in probate, by which the court denied a petition that the entire estate of decedent be set aside to the appellant widow pursuant to the provisions of sections 640 to 646, inclusive, of the Probate Code. By these sections it is provided, in substance, that if the estate of the decedent at the date of his death does not exceed $2,500 in value and the decedent leaves a surviving spouse or minor children who do not have other property or assets exceeding $5,000 in value, then upon appropriate allegations in a petition for letters of administration or probate of will, or by a separate petition, the entire estate may be set aside to such widow or minor children.

Section 645 of the Probate Code specifically provides in part as follows: "If, upon the hearing of any petition provided for by this article, the court finds that the net value of the estate over and above all liens and encumbrances of record at the date of the death of the decedent does not exceed the sum of two thousand five hundred dollars, *and that the expenses of the last illness, funeral charges and expenses of administration have been paid,* it shall, by decree for that purpose, assign to the surviving spouse of the decedent, if there be a surviving spouse, or, if there be no surviving spouse, then to the minor child or children of the decedent, if any, the whole of the estate, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of the decedent." (Emphasis added.)

V. A. Kemmerrer died testate, survived by his widow (appellant herein), two

daughters, a son, and his mother. By his will he left all his estate to his friend, Jane Grant, and expressly disinherited the widow, from whom he had been estranged. He made no provision for his children, stating that they were amply provided for by his life insurance. The will was admitted to probate and respondent herein, Bertrand Rhine, was appointed executor. The estate consisted of something over $400 in cash, an automobile appraised at $200, and accounts receivable totaling $1,441.73.

The mother of decedent paid the sum of $335 toward the funeral expenses and filed a creditor's claim therefor, which was allowed and approved. Jane Grant also filed a claim for $816.75, which was allowed and approved, representing money paid out by her for hospital and nursing services during the last illness of decedent.

The executor filed a "petition for instructions and first account", showing that, contingent upon a proposed sale of the automobile, there would be in his hands approximately $500 cash and accounts receivable totaling $1,344.50 which might or might not be collectible. The executor requested permission to pay attorney's fees and to pay the claims for expenses of funeral and last illness on a pro rata basis. He further sought instructions with respect to the further and final disposition of the estate. Appellant widow filed objections, asserting that the payments made by Jane Grant and decedent's mother for expenses of last illness and funeral were voluntary, and requesting that the balance of the estate, after payment of proper expenses, be set aside to her. The trial court approved the executor's account except in minor particulars not here material, overruled the widow's objections thereto, and denied her petition to set aside the estate.

The main question presented by this appeal relates to the status of the claims of Jane Grant and Mrs. A. L. Kemmerrer, mother of decedent, for their advances. Appellant argues that the court erred in impliedly holding that these claimants are entitled to reimbursement for their voluntary advances, stating: "These items were admittedly paid by volunteers to the primary creditors. This constitutes payment within the language of Probate Code, section 645." Further, it is urged, section 645 of the Probate Code, requiring that funeral and last illness expenses be *paid* before an estate may be assigned to the widow or children, contains no requirement of reimbursement to those who have voluntarily paid such expenses as a prerequisite to such assignment.

[1] In other words, according to appellant, if the doctors, the nurses, the hospital and the undertaker have received their money and therefore have no claim against the estate, then such expenses are to be deemed "paid' within the meaning of section 645 and the surviving widow is entitled to receive the estate free of the claims of those who assumed to arrange for the care of the decedent during his last illness and for his decent burial. If law and good morals should be one and inseparable, it necessarily follows that the contentions of appellant cannot be upheld. That the appellant's claim herein is not the law was the holding in Estate of Hincheon, 159 Cal. 755, 763, 116 P. 47, 50, 36 L.R.A.,N.S., 303, where funeral expenses were paid by a devisee under the will, and the court said: "It is not questioned by the respondents that money paid for funeral expenses by one not acting officiously, if reasonable considering the estate of the deceased and the circumstances surrounding the death and burial, will be repaid by the estate to the party paying them. 2 Woerner on American Law of Administration, 2d Ed., § 357; [In re] France's Estate, 75 Pa. 220. This is a proper, and, indeed, a necessary rule in view of the fact that the burial must often be provided for before an executor or administrator can be appointed." And as was said in Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 98, 141 P. 922, 924, 52 L.R.A.,N.S., 1152, "It is seemly and proper, indeed necessary, that decent burial should be given to the body of a deceased person within a very short period after death. Ordinarily, arrangements for such burial must be made, and the expense incurred, before the appointment of an executor or administrator."

[2] With respect to both of the claims, for funeral expenses and for expenses of

the last illness, we are in accord with the language used in Andrade v. Azevedo, 9 Cal.App.2d 495, 496, 498, 50 P.2d 80, 81, as follows: "Moreover, an heir who has an interest in an estate and pays claims of this character against the estate does not act officiously, and is not a 'volunteer' within the rule that a volunteer is not entitled to subrogation. This being so, the estate should repay him."

[3] We perceive no difficulty in applying the doctrine of subrogation to the two claims presented in the instant cause. To the contention that the claimants are mere "volunteers", the answer we think is clear that they were neither "volunteers", "intermeddlers", nor "acting officiously", within the intent and purpose of the equitable policies governing the application of the doctrine.

[4] "Subrogation", as is stated in 50 Am.Jur. 683, quoting from cited cases, "is a creature of equity, having for its purpose the working out of an equitable adjustment and the doing of complete and perfect justice between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it, and preventing the sweeping away of the fund from which in good conscience the creditor ought to be paid. * * *."

Again quoting from American Jurisprudence (Vol. 50, sec. 7, p. 685): "The doctrine of subrogation is not a fixed and inflexible rule of law or of equity. It is not static, but is sufficiently elastic to take within its remedy cases of first instance which fairly fall within it. Equity first applied the doctrine strictly and sparingly. It was later liberalized, and its development has been the natural consequence of a call for the application of justice and equity to particular situations. Since the doctrine was first ingrafted on equity jurisprudence, it has been steadily expanding and growing in importance and extent, and is no longer, as formerly, limited to sureties and quasi sureties, but is now broad and expansive and has a very liberal application. As now applied, it is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. Its use to enforce restitution in order to prevent unjust enrichment has elsewhere been pointed out." See 50 Am.Jur., secs. 2, 4.

"The doctrine of subrogation embraces all cases where, without it, complete justice cannot be done. Bottomed on this premise, there is, it has been said, no limit to the circumstances that may arise in which the doctrine may be applied. * * *."[1]

Aside from the California cases to which we have heretofore referred, it is noted in American Jurisprudence (Vol. 50, p. 610) as follows: "Devisees have an interest in the property of a decedent and so are generally entitled to the rights of the creditor where they furnish funds to discharge debts or claims against the estate. The same is true of legatees. Thus, a legatee whose legacy has been absorbed in the payment of debts of the testator may have it out of the undivided realty by subrogation. Devisees and legatees discharging mortgages on the estate may be substituted to the mortgagee's rights. An heir paying debts or claims against the estate may be entitled to subrogation. So, a widow will be subrogated to the rights of her husband's creditors against his estate to the extent that she has paid such indebtedness from her own means." As heretofore noted, the claimant who paid the expenses of decedent's last illness was the sole beneficiary under his will.

[5] The funeral expenditures made by the mother appear on their face to be reasonable, and the record presents no basis for a contrary conclusion. Nor does the record disclose any foundation for a conclusion that the expenses of the last illness were not reasonable and necessarily incurred. The mother, after the surviving spouse or children, is liable for the rea-

1. Citing Federal Land Bank v. Godwin, 107 Fla. 537, 136 So. 513, 145 So. 883; Wyoming Bldg. & Loan Ass'n v. Mills Const. Co., 38 Wyo. 515, 269 P. 45, 60 A.L.R. 418.

sonable cost of interment, Health & Safety Code, sec. 7100. Further, section 7101 of the same code provides that the estate of a decedent in this state shall be charged with the reasonable cost of interment, and a suitable family plot and memorial proportionate to the value of the estate and in keeping with the standard of living adopted by the decedent. By the Probate Code, expenses of the last illness and interment are preferred charges against the estate and have priority over a family allowance. Prob.Code, sec. 950. The clear policy of the law as expressed in the enactments of the Probate and Health and Safety Codes referred to in this opinion is that funeral and last illness expenses shall be borne by the estate of the decedent. Any other policy would penalize those who step forward with financial assistance in the hour of need, and who do so with no hope of personal gain but with the highest of motives, based upon the real philosophy of human relations. The law countenances no such unjust and inequitable policy.

In view of the foregoing, other points raised do not require discussion.

That portion of the order from which this appeal was taken is affirmed.

DORAN and DRAPEAU, JJ., concur.



115 Cal.App.2d 142

CALIFORNIA COMPENSATION INS. CO. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 19166.

District Court of Appeal, Second District, Division 3, California.

Dec. 29, 1952.

As Corrected March 24, 1952.

Workmen's compensation proceeding for injuries sustained by church employee on a day other than a day for which he was to be paid. The insurance carrier of the church petitioned for review of the award. The District Court of Appeal, Shinn, P. J., held that since the record did not show whether the employment contract required employee to furnish services gratis on such day, the matter would be referred to the Industrial Accident Commission so that terms and conditions of employment might be shown and findings made.

Matter referred.

1. Workmen's Compensation ⇐604

An injury is compensable where employee is at time thereof engaged in doing something he might reasonably have been expected to do while in performance of his duties.

2. Workmen's Compensation ⇐237

Whether injury received by church employee while he was donating his services was compensable depended upon whether, under agreement of employment, it was understood that in addition to work for which employee would be paid, employee would furnish his services gratis on such day.

3. Workmen's Compensation ⇐1439

In workmen's compensation proceeding for injuries sustained by church employee on day of week other than one for which he was to be paid, employee's testimony that he was donating his services on such day was insufficient to prove arrangement with church as to whether employee was to furnish services gratis on such day.

4. Workmen's Compensation ⇐1949

Where record in workmen's compensation proceeding for injuries sustained by church employee while working on a day for which he was not to be paid did not show whether employment contract required employee to furnish services gratis on such day, matter would be referred to Industrial Accident Commission so that terms and conditions of employment could be shown and findings made.

Kearney, Scott & Clopton, Los Angeles, for petitioner.

Kenneth Sperry, Long Beach, for respondent Smith.

Edmund J. Thomas, Jr., Alvin L. Dove, San Francisco, for respondent Industrial Accident Commission.

SHINN, Presiding Justice.

The insurance carrier of First Church of the Brethren petitions for review of an award of compensation to respondent Clarence O. Smith for injuries received while he was working on church property as a carpenter. Statements of the evidence have been filed by petitioner, by the Commission and by Smith. They contain a full report of the evidence with respect to the manner in which Smith was rendering his services. He worked for the church several days a week at a wage of $2.125 per hour, and was paid his wages. Usually on Saturdays, sometimes on other days, he worked but was not paid wages. He testified that he "donated" his services on those days and that he had no understanding with the church as to the number of days he should work for nothing. He received injuries in his work on a Saturday, when he was not being paid. A primary question is whether an employee relationship to the church existed on the days he worked for nothing. Was he acting within the scope of his employment or did his testimony that he was "donating" his services prove that he was a mere volunteer?

The question is somewhat novel and is an important one to churches or other organizations which receive the benefit of services such as those rendered by Smith, for which no compensation is paid. There was no evidence of any arrangement made with anyone representing the church for Smith's services, nor of the existence of any special custom or practice in such matters which was known to the parties.

[1–3] It is well settled that an injury is compensable if the employee is at the time engaged in doing something he might reasonably have been expected to do while in the performance of his duties. Satchell v. Industrial Accident Comm., 94 Cal.App.2d 473, 210 P.2d 867. Under this rule it was necessary to determine whether, under the agreement of employment, it was understood by the parties that in addition to the work for which he would be paid Smith would be furnishing his services gratis on other days. His testimony that he was "donating" certain services fell short of proving any arrangement with the church as to what he undertook to do or what was expected of him.

[4] The final decision in this proceeding will serve as a guide to employers and employees in similar situations. This makes it especially desirable that the facts as to the scope of Smith's duties be established by direct evidence and not be left to inference or speculation. We therefore do not undertake to render a decision on this question upon a record so obviously incomplete.

The matter is referred to respondent commission for the purpose of taking evidence as to the terms and conditions of Smith's employment, including evidence of a custom or practice of the church in such matters, if any, which was known to the parties, and to return a transcript thereof to this Court.

VALLÉE and PARKER WOOD, JJ., concur.



114 Cal.App.2d 782

DOBSON v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8311.

District Court of Appeal, Third District, California.

Dec. 17, 1952.

Workmen's compensation proceeding, wherein the Industrial Accident Commission denied the application on the ground that the employee's injury in an automobile collision had resulted solely and proximately from his own intoxication, and the employee appealed. The District Court of Appeal, Van Dyke, J., held that the evidence would not sustain the finding that the injury to the employee had been caused by his intoxication

Order annulled and cause remanded with directions.

1. Trial ⇐53

Evidence draws no weight merely because it is received.

2. Workmen's Compensation ⇐1604

In workmen's compensation proceeding, failure to identify sample as blood of employee rendered testimony as to alcoholic content of blood sample of no evidentiary value.

3. Evidence ⇐188, 557

A specimen taken from a human body for purpose of analysis must be identified before such specimen, or analysis made from it, attains standing as evidence of condition of person whose conduct is questioned.

4. Evidence ⇐14

It is matter of common knowledge that drunk drivers drive erratically just as drunk men walk erratically.

5. Evidence ⇐472(1)

In workmen's compensation proceeding wherein defense of intoxication was interposed, where no attempt was made to qualify witness as capable of determining intoxication by observing a driving pattern, except his testimony that he had done patrol work on highway for ten years and that during that time he had observed many motorists operating motor vehicles and watched their behavior, and witness did not testify that he had ever seen a drunken person driving, to permit such witness to state his conclusions as to ultimate issue to be determined was to permit him to usurp functions of triers of fact.

6. Evidence ⇐587

Fact that circumstantial evidence is consistent with a number of hypotheses, including that contended for by party relying upon such evidence, does not render it sufficient to support finding of truth of hypothesis necessary to establish liability.

7. Workmen's Compensation ⇐1604

In workmen's compensation proceeding, evidence would not sustain Industrial Accident Commission's finding that injuries sustained by employee in automobile collision had resulted from his own intoxication.

8. Evidence ⇐98

If existence of essential fact upon which party relies is left in doubt or uncertainty, party upon whom burden rests to establish that fact should suffer, and not his adversary.

9. Evidence ⇐597

Judgment cannot be based on guesses or conjectures, and a finding of fact must be an inference drawn from evidence rather than on mere speculation as to probabilities without evidence.

McKenzie & Arata, Santa Rosa, for appellant.

Edmund J. Thomas, Jr., San Francisco, for I. A. C.

Leonard, Hanna & Brophy, San Francisco, for other respondents.

VAN DYKE, Justice.

This is a proceeding to review a decision of the respondent Industrial Accident Commission denying an application for adjustment of claim. Petitioner Dobson, while in the employ of Edgar H. Holton, was injured in a collision between an automobile he was driving and another vehicle. His application was denied by the respondent Commission upon the ground that the injury was caused solely and proximately by the intoxication of petitioner. Whether or not this finding has substantial support in the record is the sole question presented.

Applicant testified that some time before the accident he had taken a glass of port wine, but had consumed no other alcoholic liquor. He had drunk the wine to relieve gas pains from which he was suffering. He drove 30 to 40 miles to the point of the accident, continuously suffering pain. His last clear recollection before the collision was feeling severe pain near his left lower ribs after which he had no memory of seeing or doing anything. He believed he had become unconscious. A deputy sheriff out of Tulare County, returning thereto, observed Dobson's driving for a distance of about a mile, and for a time approaching a

minute, before the accident. He saw Dobson's car go off onto the right shoulder, back until the left wheels were over the center line of the highway, which maneuver occurred two or three times, then he saw the car cross the line and get entirely into the opposite lane where a head-on collision occurred with an approaching vehicle. A collision with a truck had been narrowly avoided during this interval. The officer said he believed Dobson was drunk driving, but also said that although he talked with him after the collision, while Dobson was pinned in his car and was close to him, he did not smell liquor on Dobson's breath. He added that he did not attempt to do so. Save for the testimony of a toxicologist, which we will discuss later, the foregoing is the whole of the proof upon the issue of intoxication.

To support its affirmative defense of intoxication Holton's insurance carrier presented Doctor Charles H. Hine as its witness. He was a specialist in toxicology. He stated that he had analyzed a blood specimen which he had received through registered mail. It was contained in a bottle on which was a label whereon was typed the statement that the specimen had been taken some ten days before the analysis at Santa Rosa General Hospital by Doctor C. M. Fleissner, witnessed by Patrolman Cunningham. The sample was in a bottle like those the witness said he provided to district attorneys and hospitals for blood sampling purposes. Objection was made that no proper foundation had been laid for the reception of testimony concerning the alcoholic content of the blood sample in that there was no evidence that it was Dobson's blood. Thereupon opposing counsel stated that he would ask a further hearing so he could produce as witnesses those who had taken the sample and in the meantime wanted the doctor's testimony accepted subject to such further proof. However the record does not disclose that any further proof of the identity of the blood sample was made. The doctor testified that bottles for blood sampling purposes were given by him to district attorneys with a small envelope in which the bottle could be placed and sealed. A space for writing information was provided on the envelope. Along with this material was sent instructions for the information of anyone drawing the specimen so that it would be satisfactorily drawn from a medical and legal standpoint. These instructions were distributed, with the bottles and and shipping containers, to hospitals, and were carried by highway patrolmen in their cars. The doctor said that he did not have the bottle, contents of which he had analyzed on the assumption that it was Dobson's blood but that it was under lock and key in the coroner's office in San Francisco and was available. It was never produced. The witness had never seen Dobson. No witness testified that a sample of Dobson's blood had been taken and of course there was no testimony as to the way it had been taken nor as to whether or not the instructions for taking such samples had been followed. Stripped to its essentials, the testimony of Doctor Hine was that he received by registered mail a bottle bearing a label on which was typed a statement that the bottle contained the blood of Dobson, which had been drawn by Doctor Fleissner with Cunningham standing by as a witness. Doctor Hine analyzed the blood in the bottle and found therein an alcoholic content of 0.207% which the Doctor said would in eighty per cent of all people indicate gross drunkenness. From this premise and from the testimony of the erratic driving pattern of Dobson just before the collision the witness said he believed the accident was caused by Dobson's intoxication.

[1–3] We need not concern ourselves we think with the admissibility of the testimony as to the alcoholic content of the blood sample analyzed by Doctor Hine. Evidence draws no weight merely because it is received. We think the doctor's testimony constituted no proof whatever that Dobson was intoxicated. This is so because there was no proof that the blood sample the doctor analyzed was Dobson's blood. That at some time, someone's blood, sampled somehow, contained alcohol, afforded no proof that Dobson was intoxicated.

"It is rudimentary that a specimen taken from a human body for the pur-

pose of analysis must be identified before such specimen or any analysis made from it attains standing as evidence of the condition of the person whose conduct is questioned. Without identification, there is no connection between the two. Reason dicates that the testimony of a witness that a blood sample contains alcohol without some evidence to show that the blood is that of the person charged amounts to no proof at all." American Mut. etc., Co. v. Industrial Acc. Commission, 78 Cal. App.2d 493, 496, 497, 178 P.2d 40, 42.

Reference has been made to Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569, but we think the decision inapplicable here. In that case it was held that under Sections 1953e to 1953h of the Code of Civil Procedure the contents of a record of a coroner's office could be testified to, or if that method of proving it were objected to, then the record could be introduced in evidence, where a proper foundation had been laid, that is to say, where a custodian or other qualified witness had testified as to its identity as a record and the mode of its preparation and that it was made in regular course at or near the time of the condition it was intended to prove. The Supreme Court held that the proper foundation had been laid. But the foregoing premises do not exist in this case. No one testified that the legend upon the label found upon the bottle received through the mail by Doctor Hine possessed any of the necessary qualifications of a record admissible in evidence.

[4–9] The remaining question is as to whether the testimony of the deputy sheriff, the only other evidence in the record tending in any wise to show intoxication on the part of Dobson, is sufficient to support the Commission's determination that he was intoxicated and that his intoxication was the proximate cause of his injuries. The witness' conclusion from what he observed as narrated by him that Dobson was drunk-driving may be dispensed with. That drunk drivers drive erratically just as drunk men walk erractically is a matter of common knowledge. No attempt was made to qualify the witness as capable of determining intoxication by observing a driving pattern except to have him testify that he had done patrol work on the highway for 10 years and during that time had observed many motorists operating motor vehicles and watched their behavior. Such observations, however, are common to millions of licensed drivers. The witness did not say that he had ever seen a drunken person driving. Under such circumstances to permit an unqualified witness to state his conclusions as to the very ultimate issue to be determined is to permit him to usurp the functions of the trier of fact. Moore v. Norwood, 41 Cal.App.2d 359, 106 P.2d 939. The support of the respondent Commission's finding as to intoxication is thus reduced to the testimony of the deputy sheriff that for a short time and for a short distance before the accident Dobson's car was observed to go over onto the right shoulder of the road, back across the center stripe, again over to the shoulder and back across the center stripe, turning to avoid collision with an approaching truck and then later again crossing completely over the center stripe so as to collide head-on with an approaching car. This circumstantial evidence is consistent with a condition of intoxication, with a loss of sensory and muscular coordination due to sickness, with the same loss due to hypnotic drugs or to drowsiness. It is also consistent with ordinary neglect. Court records of numberless cases can be found where head-on collisions following erratic driving have occurred from ordinary neglect. But to say that circumstantial evidence is consistent with a number of hypotheses, including that contended for by the party relying upon such evidence, is not to say that it would support a finding of the truth of the hypothesis necessary to establish liability. We think that all that can be said in respect of this situation is that it furnished no more than a basis for speculation as to whether or not, by reason of the irregular driving pattern observed by the officer witness, Dobson might have been intoxicated. We think the case comes within the rule declared in Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933, that if the existence of an essential fact upon which a party relies is left in doubt

or uncertainty the party upon whom the burden rests to establish that fact must suffer, and not his adversary; that a judgment should not be based on guesses or conjectures, and that a finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. See, also, McKellar v. Pendergast, 68 Cal.App.2d 485, 489, 156 P.2d 950.

The order under review is annulled and the cause is remanded to respondent Commission for further proceedings.

SCHOTTKY, J. pro tem., and PEEK, J., concur.



114 Cal.App.2d 796

DANIGER et al. v. HUNTER et al.

Civ. 4473.

District Court of Appeal, Fourth District, California.

Dec. 18, 1952.

Action by sellers to foreclose a mechanic's lien and to recover judgment for purchase price of sink units, installed in premises owned by defendants. The Superior Court, Orange County, Kenneth E. Morrison, J., entered judgment for plaintiffs for purchase price and impressing realty with mechanic's lien and decreeing foreclosure thereof, and defendants appealed. The District Court of Appeal, Mussell, J., held that units consisting of stove, sink and refrigerator, so constructed as to be easily disconnected and removed without damage to realty or units themselves, were not fixtures, precluding mechanic's lien, but that evidence supported judgment for plaintiffs for purchase price of goods sold.

Affirmed in part and reversed in part.

1. Fixtures ⇐2

Generally, gas stoves or ranges, when installed in a dwelling, are not fixtures.

2. Fixtures ⇐7

Electrical appliances such as refrigerators and stoves are personal property and do not become a part of the realty where they are movable and can be disconnected by merely pulling a plug or unscrewing a gas connection.

3. Fixtures ⇐7
Mechanics' Liens ⇐30, 31

Units consisting of stove, sink and refrigerator, so constructed as to be easily disconnected and removed without damage to the realty or units themselves, were not "fixtures", precluding mechanic's lien for purchase price on premises wherein such units were installed.

See publication Words and Phrases, for other judicial constructions and definitions of "Fixtures".

4. Sales ⇐52(5)

In action on implied contract to recover purchase price of kitchen units sold and delivered, evidence sustained finding that units sold were furnished by sellers with the authority, knowledge and consent of buyers, and justified judgment for sellers.

Dahl & Barnes, Santa Ana, for appellants.

Lester Van Tatenhove and C. Arthur Nisson, Jr., Santa Ana, for respondents.

MUSSELL, Justice.

This is an action to foreclose a mechanic's lien and to recover judgment for the purchase price of three "sink" units installed in premises owned by the defendants in Costa Mesa. Defendants appeal from the judgment and decree of foreclosure.

The defendants employed a contractor to remodel their house and garage into four apartments. The contractor agreed to install certain kitchen units similar to those here involved. Subsequently, three sink units were delivered to defendants' premises by the plaintiffs. The contractor who had commenced the remodeling job ceased his operations on February 27, 1950, and one Charles Lusk was employed by the defendants to finish the job. The units were then installed by Lusk.

Each sink unit consisted of a gas stove, a sink and a refrigerator, the three fitting together as one unit. The stove was not connected to the sink and was not connected to the building in any manner except by a gas pipe connection. The sink was connected to the building by the usual plumbing connections and the refrigerator by an electric plug. The unit was so constructed that the drainboard of the sink extended over the refrigerator and was supported by it.

Some time after the installation of these appliances, plaintiffs demanded payment for the purchase price thereof and after payment was refused by the defendants, plaintiffs filed for record a notice of mechanic's lien and thereafter commenced this action. The complaint contained two causes of action: one for foreclosure of lien and the other on the theory of implied contract.

The trial court found that the defendants were indebted to the plaintiffs in the sum of $1,195.83 for the three sink units; that said units were actually used in the construction and remodeling of said building and that said sink units, after being installed, became an actual part of the apartment building. The court concluded that the plaintiffs were entitled to judgment against defendants for the above-stated sum, with interest, and that plaintiffs had a lien upon the real property, which lien they were entitled to foreclose for the sum found due them.

Appellants present two arguments on appeal. They first contend that "appliances" such as kitchen ranges, refrigerators and sinks not attached to the dwelling are not materials furnished within the meaning of the mechanic's lien law and the furnishing of the same does not give rise to the right to a mechanic's lien; and second, that the court erred in rendering judgment on the common count.

The principal question here involved is whether the sink units were fixtures.

In Andrews v. First Realty Corp., 6 Cal. App.2d 407, 44 P.2d 628, it was held that refrigerator equipment in an apartment house was not a fixture where it could be removed without damage and the coil was affixed to the refrigerator box by four removable bolts.

In Commercial Finance Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814, 816, 64 A.L.R. 1219, it is said:

> "Electrical refrigerators are somewhat in the nature of machinery, and yet have something of the quality of furniture. Although they are attached by wires and pipes to the building, and may even be placed upon specially constructed bases or foundations, they are usually regarded by the trade as chattels".

[1] Generally, gas stoves or ranges when installed in a dwelling are not fixtures. Hanson v. Vose, 144 Minn. 264, 175 N.W. 113, 7 A.L.R. 1578; 22 Am.Jur. 770; Orbon Stove Co. v. Schroeder, 241 App.Div. 832, 271 N.Y.S. 242, 243; Modern Security Co. v. Thwaites, 138 Misc. 469, 246 N.Y.S. 405; 36 C.J.S., Fixtures, § 5, p. 910.

[2, 3] It seems quite clear that electrical appliances such as refrigerators and stoves are personal property and do not become a part of the realty where, as here, they are movable and can be disconnected by merely pulling a plug or unscrewing a gas connection. In the instant case the units sold were of three items: a stove, a sink and a refrigerator, so constructed as to form one unit, conserving floor space. While ordinarily a sink is "built in" and made a part of the building, in the instant case it is part of a unit which is so constructed as to be easily disconnected and removed without damage to the realty or the article itself. Under such circumstances we conclude that these units were chattels and not fixtures.

[4] It is alleged in the second count of the complaint that the defendants were indebted to plaintiffs in the sum of $1,195.83 for goods sold to the defendants and that defendants promised to pay said sum therefor. The court found that the units sold were furnished by plaintiffs with the authority and knowledge and consent of the defendants and rendered judgment for the purchase price of the goods sold. There is substantial evidence to support the trial

court's findings and this provision of the judgment. Hayward Lumber & Investment Co. v. Lyders, 139 Cal.App. 517, 34 P.2d 805.

The judgment against the defendants for the sum of $1,195.83, with interest, is affirmed, and that portion of said judgment impressing defendants' realty with a mechanic's lien and decreeing foreclosure thereof is reversed. Respondents to recover costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



115 Cal.App.2d 50

KRAFT et al. v. NEMETH et al.

NEMETH et al. v. KRAFT et al.

Civ. 19184.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1952.

Rehearing Denied Jan. 12, 1953.

Hearing Denied Feb. 19, 1953.

Two actions for personal injuries, consolidated for trial, resulting from collision between two automobiles. From judgments of Superior Court, Los Angeles County, Samuel R. Blake, J., in favor of respondents, appellants appealed. The District Court of Appeal, Moore, P. J., held that trial court's designation of appellants as defendants was a proper exercise of its discretion.

Judgment affirmed.

1. Appeal and Error ⇐969
Trial ⇐18

Trial court has wide discretion in the conduct of a trial and unless it can be shown that there was an abuse of discretion, appellate court will not interfere.

2. Trial ⇐2

In two actions consolidated for trial, where parties stipulated for designation of respondents as plaintiffs; respondents' action was first suit filed; trial court gave appellants' instruction that the designation of appellants as defendants was for convenience only; and appellants made no claim that the two cases were not properly consolidated or objected to the procedure of trial court, designation of appellants as defendants was a proper exercise of discretion.

3. Trial ⇐295(2)

In two consolidated actions for personal injuries resulting from collision between two automobiles, where court gave some of the instructions offered by appellants and by respondents and also gave instructions on its own motion, most of which were taken from the book of approved jury instruction, taking instructions as a whole the trial court's action did not constitute an indiscriminate use of the book of approved jury instructions.

4. Automobiles ⇐246(21)

In two consolidated actions for personal injuries resulting from collision between two automobiles, instructions to jury on doctrine of imminent peril were correct.

5. Trial ⇐229, 260(1)

It is not error to refuse instructions which are repetitious in substance and would serve only to emphasize unduly a party's theory of the case and which so far as they contain correct statements of the law, are adequately covered by the instructions given.

6. Appeal and Error ⇐699(1)

Although appellants asserted there was an understanding between them and the court that the instructions on damages would be impersonal but the court gave instructions reciting the items for which named respondents could recover, where appellants did not contend that the instructions were incorrect and there was no record of the alleged understanding in the record, there was no error.

7. Negligence ⇐141(11)

In two consolidated actions for personal injuries resulting from collision between two automobiles, trial court properly refused instructions to the effect that wife of owner and passenger of the automobile driven by one of the appellants could not be contributorily negligent.

Bauder, Gilbert, Thompson & Kelly and Neil G. Locke, Los Angeles, for appellants.

Spray, Gould & Bowers, and Thomas D. Kelly, Los Angeles, for respondents.

MOORE, Presiding Justice.

This is an appeal from two judgments entered upon verdicts in two actions arising from an automobile accident. They were consolidated for trial.

The accident occurred on the morning of July 16, 1950, on Highway No. 6 just north of the intersection with Angeles Crest Highway which joins it from the east at a "Y" angle. Immediately prior to the collision, the automobile occupied by appellants was travelling north on Highway No. 6. The car occupied by respondents, driven by Mr. Nemeth, was travelling south on the same highway. It was Mr. Nemeth's intention to make a left turn onto Angeles Crest Highway. The two vehicles collided on the southbound portion of the highway. Skidmarks left by appellants' car started on the northbound lane and swerved left into the southbound lane for a distance of 134 feet to the point of impact. The two automobiles were badly damaged and personal injuries were sustained by all the parties.

Appellants concede that the evidence is conflicting and base their appeal solely upon the ground that the trial court "so mishandled procedure of trial, and so misdirected the jury, that appellants were deprived of a fair trial."

The trial procedure of which appellants complain was the designation of respondents as plaintiffs and the designation of appellants as defendants. Appellants contend this was prejudicial to them because it gave respondents the opportunity to examine the jury first, to make the first opening statement, to produce the first witnesses and permitted them to make both the opening and closing arguments to the jury.

[1, 2] The trial court has wide discretion in the conduct of a trial and unless it can be shown that there was an abuse of discretion, an appellate court will not interfere. Ferguson v. Dam, 140 Cal.App. 701, 703, 35 P.2d 1072. Appellants admit that they stipulated to this arrangement, but now contend their stipulation was only with respect to the order of exercising peremptories and selection of the jury. Respondent's action was the first suit filed. The trial court's ruling was a proper exercise of its discretion. Appellants make no claim that the two cases were not properly consolidated for trial and have not pointed to any place in the record wherein they objected to the trial procedure. Furthermore, the trial court at appellants' request gave the following instruction which made it very clear that the designation of appellants as defendants was for convenience only:

"A number of the general instructions which I will give you will refer to the terms 'plaintiff' and 'defendant.' We are here considering an original action (the Nemeth complaint), a cross-complaint (by Mr. Kraft and Mr. Woodhead), and an independent action against Mr. Nemeth (by occupants of the Cadillac automobile).

"Unless the instructions I will give you are expressly limited by their terms to the legal relationships between particularly named parties, you must consider these instructions as applying to the operators of both vehicles involved in the accident.

"In other words, when an instruction refers to the word 'plaintiff' and defines his rights or duties, you must apply that instruction both to Mr. Kraft and to Mr. Nemeth. Similarly, by a reference to a 'defendant,' the Court intends that the instruction will apply to Mr. Nemeth and to Mr. Kraft. The courtroom designation of the Nemeths as 'plaintiffs' and the Kraft-Woodhead group as 'defendants' was only for convenience in my administering of the procedural aspects of the trial.

"It follows that, in your consideration of the issues between the several parties, such as negligence, contributory negligence, you should apply my instructions to the evidence you find to be true, considering one driver as the 'plaintiff' and the other as the 'defend-

ant'; and you should also reconsider the same instructions, but reversing the parties' positions as 'plaintiff' or 'defendant.'"

In view of appellants' stipulation, their failure to object and the trial court's instruction, which was given at their request, appellants' contention that they were prejudiced by the trial procedure is without merit.

[3] Appellants assert that notwithstanding the fact that they offered, and the court gave, some of the instructions in BAJI [1] and also gave other BAJI instructions offered by respondents and gave still others on its own motion, such conduct was an indiscriminate use of such instructions which resulted in prejudicial error. Appellants complain that 79 of the 89 instructions given were "from or based upon BAJI." However, 40 of the 79 were given either at appellants' request or at the request of all of the parties. Of the 26 BAJI instructions given on the court's own motion, one was modified by the court and four were modified by agreement. But no prejudice is demonstrated. Taking the instructions as a whole it cannot be said that the court's action constituted an indiscriminate use of BAJI instructions.

[4] Appellants contend that the trial court did not adequately instruct the jury on "imminent peril," which was their theory of the cases. At appellants' request the court gave the following instruction: "A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer."

[5] The foregoing is a clear and correct statement of the law and adequately instructed the jury on the doctrine of imminent peril. Appellants' contention that they were prejudiced because the court did not follow this instruction with other, more specific instructions referring to only one party, is untenable. It is not error to refuse instructions which are repetitious in substance and would serve only to emphasize unduly a party's theory of the case and which so far as they contain correct statements of the law are adequately covered by the instructions given. Nelson v. Colbeck, 94 Cal.App.2d 792, 797, 211 P.2d 878.

[6] It is insisted that there was a misinstruction of the jury on damages to appellants' prejudice. They assert that there was an understanding between counsel and the court that the instructions on damages would be impersonal, but that the court gave a number of instructions specifically reciting the items for which respondents who were mentioned by names could recover. Appellants do not contend that the instructions given were incorrect or that any instructions on damages offered by them were erroneously refused. There is nothing in the record of the alleged agreement and since the instructions given on damages were correct, there was no error.

[7] Finally, appellants assert that the court erred in refusing to give an instruction offered by them to the effect that Mrs. Woodhead, wife of the owner of the car driven by Mr. Kraft, could not be contributorily negligent. This instruction was properly refused. Silva v. Market Street Railway Co., 50 Cal.App.2d 796, 123 P.2d 904; Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10.

The judgments are affirmed.

McCOMB and FOX, JJ., concur.

1. Book of Approved Jury Instructions.

ALLEN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 19304.

District Court of Appeal, Second District, Division 3, California.

Dec. 16, 1952.

Hearing Granted Feb. 11, 1953.

Original proceeding by defendant in an automobile accident case to prohibit the Superior Court, in and for the County of Los Angeles, from proceeding further because of lack of personal jurisdiction. The District Court of Appeal, Second Appellate Division, Division Three, Vallée, J., held that Code of Civil Procedure, Section 417, providing for personal jurisdiction by personal service outside state where jurisdiction has already been obtained by publication of summons, affected a substantive right and would not be construed retrospectively to confer jurisdiction over the petitioner.

Writ granted.

1. Process ⇐96(4)

In order to obtain jurisdiction over a person outside the state by publication of summons, it must appear by affidavit that the person on whom service is to be made resides outside the state or has departed therefrom and that, on basis of the affidavit, an order has been made for service by publication of summons, among other things. Code Civ.Proc. §§ 412, 413.

2. Judgment ⇐17(9)

Process ⇐96(5)

If the affidavit on which an order for publication of summons is made is insufficient, the court does not acquire jurisdiction and the order and any judgment based on such service is void. Code Civ. Proc. §§ 412, 413.

3. Process ⇐96(4)

If statements in an affidavit for service by publication of summons warrant the conclusion that defendant resides outside the state at time of application, an order for publication is authorized. Code Civ. Proc. § 412.

4. Automobiles ⇐235

In automobile accident case, affidavit sufficiently showed that defendant was residing outside the state so as to authorize order for service by publication of summons. Code Civ.Proc. §§ 412, 413.

5. Statutes ⇐262

The word "retroactive", as used in statute declaring provisions of Code of Civil Procedure not to be, is synonymous with the word "retrospective." Code Civ. Proc. § 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Retroactive" and "Retrospective".

6. Statutes ⇐261

A "retrospective law" is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to adoption of statute. Code Civ. Proc. § 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Retrospective Law".

7. Statutes ⇐263

Statutes are not given a restrospective operation unless it is clearly made to appear, either expressly or by necessary implication, that such was the legislative intent. Code Civ.Proc. § 3.

8. Statutes ⇐263

A statute should not be construed to give it retrospective effect so as to affect pending litigation, unless a clear intent to the contrary is plainly manifest, either by express declaration or necessary implication. Code Civ.Proc. § 3.

9. Statutes ⇐267(1)

The presumption against restrospective operation of statutes does not apply to statutes relating merely to remedies and modes of procedure. Code Civ.Proc. § 3.

10. Statutes ⇐267(1)

If substantive changes are made in a statute ordinarily classifiable as procedural, the statute will be construed to operate only in future unless legislative intent to contrary clearly appears. Code Civ.Proc. § 3.

11. Constitutional Law ⇐106, 169

Under guise of mere change of procedure or substitution of remedies, vested

* Subsequent opinion 259 P.2d 905.

rights may not be destroyed or the obligations of contracts impaired, as where the right and remedy are so closely connected that any alteration in the remedy may adversely affect the right.

12. Statutes ⇐267(2)

If a statute creates a new right or obligation it will not be construed to affect remedies or procedures as to causes of action arising before its passage.

13. Courts ⇐1

One of the jurisdictional requirements is jurisdiction over the person.

14. Courts ⇐1

"Lack of jurisdiction" in its fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Lack of Jurisdiction".

15. Statutes ⇐268

The Legislature is without power, by subsequent legislation, to cure defects and omissions which go to the very jurisdiction of the court to act and which make its action void.

16. Statutes ⇐267(2)

A statute enlarging the jurisdiction of a court will not be construed as retrospective so as to operate on pending cases.

17. Process ⇐151½

Where by reason of noncompliance with law regulating constructive service, jurisdiction has not attached, a retroactive statute cannot cure the defect.

18. Constitutional Law ⇐189

A law which conflicts with a right secured by a constitutional guaranty will not be construed as retrospective.

19. Constitutional Law ⇐92

A "vested right," as used in relation to constitutional guaranties, implies an interest which the state may recognize and protect and which the individual may not be deprived of arbitrarily without injustice, as determined by the courts.

See publication Words and Phrases, for other judicial constructions and definitions of "Vested Right".

20. Constitutional Law ⇐305

A vested right to an existing defense may not be destroyed by legislative enactment without violating the due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

21. Statutes ⇐267(1)

A statute which permits a recovery in cases where a recovery could not have been had before, and which takes away from defendant a defense to disprove the right of action, will not be construed as retrospective.

22. Automobiles ⇐235

Nonresident motorist acts and amendments thereto, providing for service of process on a nonresident absent from the state, are not to be given retrosepctive application. Vehicle Code, § 404.

23. Automobiles ⇐235
Judgment ⇐17(3)
Process ⇐85

A statute providing for personal service and personal judgment against a nonresident, where jurisdiction has been acquired by publication of summons, confers personal jurisdiction where none existed before and is therefore substantive and would not be construed retrospectively to apply to an automobile accident action brought before enactment of the statute. Code Civ.Proc. §§ 3, 412, 413, 417; U.S.C.A.Const. Amend. 14.

24. Prohibition ⇐29

Where Superior Court denied motion to quash service and did not pass on question of whether the action should be dismissed, the District Court of Appeal, in disposing of defendant's proceeding for writ of prohibition, would not command dismissal of the action. Code Civ.Proc. § 581a.

25. Prohibition ⇐10(2)

Where defendant in an action arising out of an automobile accident, which occurred prior to passage of statute permitting personal service outside the state,

was not personally served within the state, writ would issue prohibiting the Superior Court from proceeding with the case. Code Civ.Proc. § 417.

Stephen J. Grogan and Henry N. Cowan, Los Angeles, for petitioner.

No appearance for respondent.

Engelhardt, Campbell & Singer and Leon I. Singer, Los Angeles, for real parties in interest.

VALLÉE, Justice.

This is an original proceeding for a writ to prohibit the superior court from taking further proceedings in an action entitled Bromberg v. Cayton, No. 547103, on the ground it has not acquired jurisdiction of Robert W. Allen, the only defendant in the action, petitioner here.

Action 547103 was filed July 12, 1948. It is for damages for personal injuries resulting from an automobile collision. The accident occurred on November 1, 1947. On July 12, 1948, a summons was issued. On December 9, 1949, an alias summons was issued. On March 25, 1952, a second alias summons was issued. On April 29, 1952, on an affidavit therefor made by the plaintiff Irving Bromberg, an order for publication of summons was made. The order stated it appeared to the court that defendant Robert W. Allen "resides out of California, and cannot after due diligence be found within State of California," and that defendant resides in Oregon. The defendant was served personally with the summons and complaint in the state of Oregon on May 3, 1952.

On May 29, 1952, the defendant appeared specially by filing a notice of motion 1) to quash the order for publication of summons on the ground it was in excess of the power of the court, and 2) to quash the service of summons on the ground the court had not acquired jurisdiction of the defendant because the action was *in personam*. In support of the motion, the defendant filed his affidavit which stated: 1) On November 1, 1947, the date of the accident, he was a resident of Los Angeles, California. 2) He continued to reside in Los Angeles until June 3, 1949. 3) From June 3, 1949, until September 1, 1951, he resided in Oakland, California. 4) On September 1, 1951, he moved to, and has since resided in, Oregon. 5) He registered as a voter in Oregon about May 1, 1952. 6) He has leased a home in Oregon. 7) Since removing from California to Oregon, he and his wife have resided in Portland. 8) He does not intend to return to California, and has had no such intention since moving to Oregon. 9) At the time he moved to Oregon, he transferred his business activities to that state, and ever since has conducted his business activities in and from Oregon. 10) Since he moved to Oregon, his family has resided with him there. 11) He maintains his bank account in Oregon.

In opposition to the motion, the plaintiffs filed an affidavit of a deputy sheriff of Multnomah County, Oregon, to the effect that on April 30, 1952, another deputy, in an endeavor to serve the defendant, ascertained he had left Portland the day before, stating he was going to Tillamook, Oregon, and would be at the hotel there. The defendant was served in Tillamook on May 3, 1952. At the hearing of the motion, it appeared without contradiction that at the time the order for publication of the summons was made, and at the time the defendant was served, he was a resident of, and domiciled in, the state of Oregon. The motion was denied.

In 1951, the Legislature enacted section 417 of the Code of Civil Procedure, which reads: "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."[1]

[1] In order that jurisdiction be acquired over a person who is outside of this

1. Stat.1951, ch. 935, p. 2537. Effective September 22, 1951.

state in accordance with sections 412 and 413 it must appear by affidavit that the person on whom service is to be made resides out of the state, or has departed from the state; and on the basis of the affidavit, that an order has been made that the service be made by the publication of the summons, among other things.

[2–4] The first point pressed upon us by petitioner is that the affidavit was insufficient to support the order for publication. As we have said, the order for publication was made on the grounds that defendant "resides out of California, and cannot after due diligence be found within State of California." If the affidavit on which an order for publication of summons is made is insufficient, the court does not acquire jurisdiction and the order and any judgment based on such service is void.[2] If the statements in the affidavit were sufficient to warrant the conclusion that the fact was that the defendant resided out of the state at the time of the application, the order for publication is authorized under section 412.[3] The affidavit on which the order was made satisfies the requirements of section 412. While it is inartificially drawn, and contains much hearsay, it clearly appears therefrom that defendant was then residing in Portland, Oregon. We conclude that the affidavit for publication of summons was sufficient to warrant the order.

Petitioner asserts section 417 does not apply retrospectively to actions commenced before its enactment. The real parties in interest say the section is procedural only, and that it is applicable to both pending and future actions. Petitioner does not question the constitutionality of section 417. In view of petitioner's position, and our conclusion, for the reasons to be stated, that section 417 does not apply retrospectively, we assume for the purpose of this opinion that it is constitutional and do not inquire into or decide that question.[4]

Prior to the enactment of section 417, it was impossible to acquire jurisdiction *in personam* of a nonresident not present in this state, or of a resident of this state while he was absent from the state.[5]

[5–8] Section 3 of the Code of Civil Procedure reads: "No part of it [Code Civ. Proc.] is retroactive, unless expressly so declared." This rule applies to amendments.[6] The words "retroactive" and "retrospective" are used synonymously.[7] "A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist

2. In re Behymer, 130 Cal.App. 200, 202, 19 P.2d 829.

3. Porter v. Superior Court, 30 Cal.App. 608, 611, 159 P. 222.

4. See: Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057; Mullame v. Central Hanover B. & T. Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Commercial Solvents Corporation v. Jasspon, D.C.N.Y., 92 F.Supp. 20; Ace Grain Co. v. America Eagle Fire Ins. Co., D.C.N.Y., 95 F.Supp. 784; Kimbel v. Osborn, 61 Wyo. 89, 156 P.2d 279, 158 A.L.R. 1079; 21 State Bar Jour. 169, 170; 22 State Bar Jour. 261; 23 State Bar Jour. 196; 25 State Bar Jour. 287; 1951 Progress Report of Senate Interim Judiciary Committee, 37; Opinion of the Honorable William T. Sweigert, Judge of the Superior Court of the City and County of San Francisco, published in the San Francisco Recorder, June 20, 1952; Restat.—Conflict of Laws, §§ 74, 77, 79, 84; 14 So.Cal.L.Rev. 488; 37 Cal.L.Rev. 84; 40 Cal.L.Rev. 156; 23 Ill.L.Rev. 427; 13 Rocky Mt.L.Rev. 253; 8 U.Chi.L.Rev. 596; 20 Tex.L.Rev. 99; 2 Mont.L.Rev. 112; 29 Georgetown L.Jour. 784; 40 Columb.L.Rev. 724; 21 Neb.L.Rev. 336; 13 Albany L.Rev. 63; 24 Notre Dame L.Rev. 126; Annotations 126 A.L.R. 1474; 132 A.L.R. 1361.

5. De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82; Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 55 P.2d 203; Merchants' Nat. Union v. Buisseret, 15 Cal.App. 444, 446, 115 P. 58. There is dictum in Pinon v. Pollard, 69 Cal.App.2d 129, 158 P. 2d 254, to the same effect.

6. In re Estate of Whiting, 110 Cal.App. 399, 404, 294 P. 502.

7. City of Los Angeles v. Oliver, 102 Cal. App. 299, 309, 283 P. 298.

prior to the adoption of the statute." [8] Statutes are not given a retrospective operation unless it is clearly made to appear, either expressly or by necessary implication, that such was the legislative intent.[9] In determining such intent the courts have evolved a strict rule of construction against a retrospective operation and indulge in the presumption that the Legislature intended statutes, or amendments thereof, to operate prospectively only, and not retrospectively.[10] A statute should not be construed as to give it retrospective effect so as to affect pending litigation, unless a clear intent to the contrary is plainly manifest, either by express declaration or necessary implication.[11]

[9–12] The presumption against retrospective operation does not apply to statutes relating merely to remedies and modes of procedure.[12] Such statutes are not in fact retrospective; they operate only when and if the remedy or procedure is invoked, and thus, if the trial postdates the enactment, they operate in the future regardless of the time of occurrence of the events giving rise to the cause of action.[13] Mr. Chief Justice Gibson, speaking for the court, in Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388 at page 394, 182 P.2d 159, at page 162, said that "This reasoning, however, assumes a clear-cut distinction between purely 'procedural' and purely 'substantive' legislation. In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." [14] Under the guise of a mere change of procedure or substitution of remedies vested rights may not be destroyed or the obligations of contracts impaired.[15] Oftentimes the right and the remedy are so closely connected that any alteration in the remedy may adversely affect the right.[16] If a statute creates a new right or obligation it will not be construed to affect remedies or procedures as to causes of action arising before its passage.[17] In its final analysis, therefore, it is the operation of a statute which determines its character.[18]

[13–17] One of the jurisdictional requirements is jurisdiction over the person.[19] "Lack of jurisdiction in its most funda-

8. Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 391, 182 P.2d 159, 160.

9. Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 393, 182 P.2d 159; Jones v. Union Oil Co., 218 Cal. 775, 777, 25 P.2d 5; Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 77 A.L.R. 1327; Security First Nat. Bank v. Sapkin, 19 Cal.App.2d 224, 226, 64 P.2d 1097, 66 P.2d 656.

10. Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 77 A.L.R. 1327; 50 Am.Jur. 494, § 478.

11. People v. Allied Architects Ass'n, 201 Cal. 428, 435–437, 257 P. 511; Montecito Co. Water Dist. v. Doulton, 193 Cal. 398, 403, 224 P. 747; State Commission in Lunacy v. Welsh, 20 Cal.App. 624, 629–639, 124 P. 974.

12. Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 394, 182 P.2d 159.

13. Idem.

14. Jones v. Union Oil Co., 218 Cal. 775, 777, 25 P.2d 5 [change in procedure to obtain judgment liens]; In re Cate, 207 Cal. 443, 448, 279 P. 131 [change in reinstatement procedure by enactment of State Bar act]; Pignaz v. Burnett, 119 Cal. 157, 160, 51 P. 48 [change in time of appeal].

15. Norton v. City of Pomona, 5 Cal.2d 54, 66, 53 P.2d 952; Thompson v. County of Los Angeles, 140 Cal.App. 73, 76, 35 P.2d 185; City of Los Angeles v. Oliver, 102 Cal.App. 299, 315, 283 P. 298.

16. Crawford, The Construction of Statutes, 586, § 287.

17. Vanderbilt v. All Persons, etc., 163 Cal. 507, 513, 126 P. 158; 59 C.J. 1174, § 700; 50 Am.Jur. 505, § 482.

18. See Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 182 P.2d 159; Winfree v. Northern P. R. Co., 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed. 518; McGirr v. Pritchard, 258 Ill.App. 467.

19. Vasquez v. Vasquez, 109 Cal.App.2d 280, 283, 240 P.2d 319.

mental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." [20] The Legislature is without power by subsequent legislation to cure defects and omissions which go to the very jurisdiction of the court to act and which make its action void.[21] If originally there was a failure of jurisdiction in judicial proceedings no subsequent law can confer it.[22] A statute enlarging the jurisdiction of a court will not be construed as retrospective so as to operate on pending cases.[23] "[W]here, by reason of noncompliance with the law regulating constructive service, jurisdiction has not attached, a retroactive statute cannot cure the defect." [24] In Taylor v. Datig, 123 Cal. App.Supp. 782, 11 P.2d 98, the municipal court had no jurisdiction of the action at the time it was begun. Before the case was tried, the law was amended so that at the time of trial it was within the jurisdiction of that court. After an exhaustive review of the authorities, the court, in a scholarly opinion written by Judge Hartley Shaw, held that the amendment did not apply to pending cases, and that the municipal court did not thereby acquire jurisdiction.

[18–21] A law which conflicts with a right secured by a constitutional guaranty will not be construed as retrospective.[25] A vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. The question of what constitutes such a right is confided to the courts.[26] A vested right to an existing defense may not be destroyed by legislative enactment. To do so is in violation of the due process clause of the Fourteenth Amendment.[27] As stated in McGirr v. Pritchard, 258 Ill.App. 467, 473: "The right to a defense to an action is as much 'property' within the meaning of the constitution as the right to maintain such an action itself, and to deprive a person of either, by retroactive legislation, would be to deprive that person of his property without due process of law." A statute which permits a recovery in cases where a recovery could not have been had before, and which takes away from the defendant a defense to disprove the right of action, introduces a new policy, radically changes existing laws, and will not be construed as retrospective.[28]

[22] The authorities uniformly hold that the nonresident motorist acts, and amendments thereto, providing for service of process on a nonresident absent from the state, similar to Vehicle Code, § 404, are not to be given retrospective application.[29] Such cases as have arisen under statutes providing for service of process on a nonresident outside of the state, in suits on

20. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288, 109 P.2d 942, 947, 132 A.L.R. 715.

21. Miller v. McKenna, 23 Cal.2d 774, 782, 147 P.2d 531; Texas Co. v. Bank of America etc. Ass'n, 5 Cal.2d 35, 43, 53 P.2d 127; People v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97; Pryor v. Downey, 50 Cal. 388, 400; In re Estate of Schwartz, 87 Cal.App.2d 569, 573, 197 P.2d 223; Jones v. Walker, 47 Cal.App.2d 566, 569, 118 P.2d 299; 5 Cal.Jur. 758, § 149; 11 Am.Jur., p. 1208, § 379, p. 1212, § 382, and cases there collected.

22. Pryor v. Downey, 50 Cal. 388, 404.

23. Wheaton v. Superior Court, 108 Cal. App. 702, 292 P. 499.

24. 12 C.J. 830, § 307; 16 C.J.S., Constitutional Law, § 128, page 319.

25. Miller v. McKenna, 23 Cal.2d 774, 782, 147 P.2d 531.

26. Miller v. McKenna, 23 Cal.2d 774, 783, 147 P.2d 531.

27. 11 Am.Jur. 1207, § 378.

28. Winfree v. Northern P. R. Co., 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed. 518.

29. Paraboschi v. Shaw, 258 Mass. 531, 155 N.E. 445; Kurland v. Chernobil, 260 N.Y. 254, 183 N.E. 380; Green v. Brinegar, 228 Iowa 477, 292 N.W. 229; Hughes v. Lucker, 233 Minn. 207, 46 N.W.2d 497; Ashley v. Brown, 198 N.C. 369, 151 S.E. 725; Hartley v. Utah Const. Co., 9 Cir., 106 F.2d 953; Schaeffer v. Alva West & Co., 53 Ohio App. 270, 4 N.E.2d 720; Sanders v. Paddock, 342 Ill.App. 701, 97 N.E.2d 600; Continental Casualty Co. v. Nelson, 147 Misc. 821, 264 N.Y.S. 560; Fritchey v. Sum-

causes of action arising from activity within the state other than use of a highway, apply the same principle.[30]

No express provision was made in section 417 for its application to pending actions or to prior acts or omissions. A legislative intent in favor of the retrospective operation of the statute cannot be implied from the mere fact that the statute is remedial. It must be assumed that the Legislature not only had in mind the well-established rules with respect to the noneffectiveness of substituted service upon a person not within the state, but also the consequences which attached to a retrospective statute conferring jurisdiction where none had previously existed. It also must be assumed that the Legislature was acquainted with the settled rules of statutory construction, and that, if it could have done so constitutionally, it would have expressly provided for retrospective operation of section 417 if it had so intended.[31]

[23] As we have said, prior to the enactment of section 417, jurisdiction *in personam* could not be acquired over a person by service of process outside this state. To apply the section retrospectively—to hold that a court had acquired jurisdiction in an action *in personam* of a person served with process outside of this state in an action pending at the time the section became effective—would be to ignore the settled principles of law we have stated. Prior to the enactment, a plaintiff had no right to maintain an action *in personam* against a defendant served with process outside of this state unless he voluntarily appeared, and such a defendant had an absolute defense to such an action. The section creates a new right in a plaintiff, and deprives a defendant of an existing right. Such a statute will not be construed retrospectively. Under the decisions in this state prior to the enactment of section 417, the right of a person served with process outside of this state in an action *in personam*, to the absolute defense of lack of jurisdiction over his person, was a substantial one, secured to him by the constitutional guaranty of due process. Retrospective application of the section would deprive a defendant of a substantial right in violation of the Fourteenth Amendment. If the section were held to be retrospective, the effect would be to give jurisdiction where it did not exist before; it would give a right of recovery where none existed before; it would infuse life, vitality, and validity into a proceeding which, without such aid, prior to the enactment of the section, would be wholly void and a nullity.

We conclude that section 417 is substantive in its effect, that its operation is prospective, and that the superior court has not acquired jurisdiction of petitioner in action No. 547103.

[24] Petitioner suggests we should command dismissal of the action under section 581a of the Code of Civil Procedure. There is nothing before us which would warrant such an order. The motion denied was to quash the service of summons. So far as appears, the superior court has not passed on the question whether the action should be dismissed pursuant to section 581a.

[25] Let a peremptory writ of prohibition issue prohibiting the superior court from taking further proceedings at the be-

mar, D.C.Ark., 86 F.Supp. 391; Fidler v. Victory Lumber Co., D.C.Fla., 93 F. Supp. 656; Gender v. Rayburn, 194 A. 441, 15 N.J.Misc. 704. Some of these decisions are grounded on the theory that a nonresident motorist using a highway impliedly consents to service of process and that such consent cannot be given retrospectively; others are grounded on the theory that activity within a state which gives rise to a cause of action subjects the nonresident to service of process, and that to apply such a statute retrospectively would destroy a constitutional right existing before the enactment of the statute. See: 1 Ark.L. Rev. 201. Also: Doherty & Co. v. Goodman, 294 U.S. 623, 55 S.Ct. 553, 79 L. Ed. 1097; Sugg v. Hendrix, 5 Cir., 142 F.2d 740; Restat.—Conflict of Laws, § 87.

30. Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d 212; Fairclough v. Southern Pac. Co., 171 App.Div. 496, 157 N. Y.S. 862; McGirr v. Pritchard, 258 Ill. App. 467.

31. Aetna Cas. & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 396, 182 P.2d 159.

hest of the plaintiffs in the action entitled Bromberg v. Cayton, No. 547103, against the defendant Robert W. Allen, until he has been served with process within this state.

SHINN, P. J., and WOOD, J., concur.



114 Cal.App.2d 790

HILLMAN et ux. v. SNYDER et ux.

Civ. 4468.

District Court of Appeal, Fourth District, California.

Dec. 18, 1952.

Rehearing Denied Jan. 9, 1953.

Hearing Denied Feb. 16, 1953.

Action for treble damages under the Federal Housing and Rent Act for rental overcharges. From a judgment of the Superior Court of Orange County, Raymond Thompson, J., for defendants, plaintiffs appealed. The District Court of Appeal, Griffin, J., held that rental of the furnished apartment involved to plaintiffs being the first rental thereof after the effective date of the 1947 Housing Act, plaintiffs could not recover three times the amount of rent paid in excess of the maximum rental fixed by the rent director for the apartment unfurnished before such date.

Judgment affirmed.

1. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐209

Though landlord, renting furnished apartment for first time after effective date of 1947 Federal Housing Act, prior to which apartment was leased unfurnished at maximum rent fixed by Housing Expediter for such housing accommodation, is required by housing regulations to register accommodation within thirty days after new renting and rent received is subject to refund of any excess over rental later fixed by Expediter's order, first rent for furnished apartment remains established maximum until Expediter orders otherwise. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.; Housing and Rent Act of 1947, § 1 et seq., 50 U.S.C.A. Appendix, § 1881 et seq.

2. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐216

Persons to whom furnished apartment was rented for first time after effective date of 1947 Federal Housing and Rent Act could not recover damages from landlord in three times amount of rent paid in excess of maximum rental fixed for apartment unfurnished under 1942 Emergency Price Control Act before such date, in absence of order by rent director fixing maximum rental of furnished apartment, which was not same housing accommodation as unfurnished apartment. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.; Housing and Rent Act of 1947, §§ 1, 204, 205, 50 U.S.C.A. Appendix, §§ 1881, 1894, 1895.

3. Appeal and Error ⇐110

An attempted appeal from order denying new trial must be dismissed.

James E. Walker, Santa Ana, for appellants.

Arthur M. Bradley, Santa Ana, for respondents.

GRIFFIN, Justice.

Action to recover treble damages claimed under Federal Housing and Rent Act of 1947, 50 U.S.C.A. Appendix, § 1881 et seq. Plaintiffs and appellants, husband and wife, alleged in 12 separate causes of action that beginning October 18, 1949, they rented an apartment owned by defendants and respondents for a period of 12 months and paid rental therefor at the rate of $100 per month, when in fact the maximum rental for such housing accommodations allowable under the act had been fixed by the rent director of that area in 1942, at $30 per month. Treble the amount of the difference is sought against defendants by way of damages, totaling $2,565, plus attorneys' fees.

The answer denies, as to each cause of action alleged, that such rental payment as was received exceeded the maximum legal rent for such housing accommodations.

As a separate defense it is alleged that if any overcharge was made by defendants, or either of them, such overcharge was not wilful and not the result of failure to take proper precaution against the occurrence of an overcharge, and that plaintiffs' cause of action is barred by the provisions of section 205 of the Housing and Rent Act of 1947, as amended, 50 U.S.C.A. Appendix, § 1895.

The court found generally in favor of defendants, and as to each cause of action found that defendants were the owners of the property, consisting of a lot improved with a dwelling house and a duplex; that plaintiffs orally leased the dwelling, equipped with furniture and furnishings, on October 18, 1949, on a month to month basis; that on said date the maximum rent for said housing accommodations was not fixed at the sum of $30 per month by any order of the rent director; that there was no order fixing the rental as such, continuing in effect from October 18, 1949, to and including September 30, 1950, as alleged by plaintiffs; that the maximum legal rent upon the accommodations then existing (unfurnished) was, in 1942, fixed at $30 per month by the area rent director; that the first rental after the effective date of the Housing and Rent Act of 1947, occurred when defendants rented said housing accommodations to plaintiffs on October 18, 1949, at which time said housing accommodations were first rented completely furnished; that it was not true that for the rent period from October 18, 1949, to November 18, 1949, plaintiffs paid to defendants any sum exceeding the maximum legal rent for such housing accommodations, and that plaintiffs are not allowed any penalty for overcharge under the provisions of section 205, supra. The court concluded that the housing accommodations rented to plaintiffs were different housing accommodations (i. e., fully furnished) and not the same accommodations controlled by the order fixing the maximum legal rent in 1942, for said housing accommodations unfurnished. Judgment was for defendants. Plaintiffs appealed.

From the evidence it appears that a Mrs. Scott who, in November, 1942, owned the property, registered the dwelling No. 428 here in question, as well as the duplex on the lot. She therein claimed that on October 2, 1942, she first rented the dwelling for $50 per month unfurnished. The record shows that later, on October 22, 1943, the rent director reduced it to $30, effective as of the latter date. The escrow instructions for the sale of the property, signed by the parties on May 29, 1948, provide for apportionment of rents paid and indicate that the rental from dwelling No. 428 was $29, and the duplexes $24.50 and $17 respectively. It appears that defendants moved into the dwelling No. 428 as their home, made extensive repairs and improvements amounting to approximately $2,000, furnished it nicely, and equipped it as their home from August 1, 1948, until October, 1949; that in August, 1948, defendant Mrs. Snyder phoned the local rent director in regard to increasing the rent of one of the duplexes, requesting him to view the property to see if there couldn't be an increase in the ceiling on that rental; that a man came out and took the necessary measurements and made an investigation; that while he was there she asked him a question; that she said she thought Mr. Snyder, her husband, was being transferred from Escondido to Santa Ana, but if it should develop that he was not she would be forced to rent dwelling No. 428 although she had made extensive repairs in remodeling and had her own furniture in it; that she wondered if it would be possible for her to obtain $100 or $125 per month rent from it, and that the man replied: "Well, it is probably possible", and that the conversation was there dropped; that she was under the impression, gained from articles she read in the local newspapers about the change in regulations pertaining to rent control, that about the time she decided to rent her home it was unnecessary to register it when the owner had occupied it for one year and had remodeled and furnished it.

It does appear that defendant acted in good faith in calling the rent director in reference to the amount she might obtain for her future rentals and that she acted on knowledge she obtained from local

newspapers in reference to change of regulations. It is rather shocking to good conscience now, under these circumstances, that plaintiffs should seek to obtain treble damages from defendants for the consideration they gave plaintiffs and their children when they were in distress and in need of rental premises, all predicated upon a technical construction of the Housing and Rent Act of 1947, insofar as it may or may not have repealed certain provisions of the Act of 1942, and particularly section 1388.4(j), which provision was applicable at the time of the original registration.

Counsel for plaintiffs point out that in Lutz v. Bender, 340 Ill.App. 120, 91 N.E. 2d 459, it was held that under the 1947 Act, where an apartment was changed from an unfurnished to a furnished apartment, and where the plaintiffs were the first tenants to occupy it after the change, the landlord could not raise the maximum rent without an order from the rent director. To the same effect is Forde v. United States, 1 Cir., 189 F.2d 727; and Dauksewicz v. United States, 1 Cir., 194 F.2d 52. The effect of the rent regulations issued under the Emergency Price Control Act of 1942 was not presented nor discussed in the case of Lutz v. Bender, supra. Forde v. United States, supra, is not in point because it involved a maximum rent ceiling which was fixed on September 1, 1947, after the Housing and Rent Act of 1947 went into effect. Dauksewicz v. United States, supra, does not present the question of a ceiling established on unfurnished accommodations under the Act of 1942, and a later rental after the Act of 1947 went into effect on furnished premises. In that case it was conceded that the maximum rent for the apartment in question was originally established at $8.50 per week, and it was stipulated that the maximum rent of $9.25 was thereafter established and carried over automatically and became the starting maximum rent under the Act of 1947.

Certain cases are cited wherein it is held that an owner, in order to lawfully collect increased rental, must petition for and obtain an order from the rent director allowing such increase. In those cases a maximum rental for certain accommodations had been fixed by the director and the holding therein was to the effect that maximum rents once fixed can be increased only by order of the director upon petition of the owner.

Section 205 of the Housing and Rent Act of 1947, provides that:

> "Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands * * * such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded * * * exceed the *maximum rent* which could lawfully be demanded * * *."

The applicable portion of section 204, above mentioned, provides:

> "* * * no person shall demand, accept or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the *Emergency Price Control Act of 1942*, as amended, and in effect with respect thereto on June 30, 1947".

Section 825.4, subsections (a) and (c) of Rent Regulations Under the Housing and Rent Act of 1947, provides:

> "Section 825.4(a) *Maximum rents—Maximum rents in effect on June 30, 1947.* Except as otherwise provided in this section, the maximum rent for any housing accommodations subject to Secs. 825.1 to 825.12, shall be the maximum rent which was in effect on June 30, 1947, as *established under the Emergency Price Control Act of 1942*, as amended, and the applicable rent regulation issued thereunder * * *."
>
> "(c) First Rent after June 30, 1947. For controlled housing accommoda-

tions first rented on or after July 1, 1947, the maximum rent shall be the first rent for such accommodations * * *."

Section 1388.4(j) of the Rent Regulations issued under the Emergency Price Control Act of 1942, provides:

"For housing accommodations changed on or after July 1, 1943, or the effective date of regulation, whichever is the later, from unfurnished to fully furnished, the *first rent for such accommodations after such change.*" (Italics ours.)

It is provided expressly by these regulations that the *maximum rent* fixed was for an unfurnished accommodation and that if the housing accommodations should be fully furnished the rent would be established on a *first rent basis,* subject to reduction by the area office. It therefore does not appear that a *maximum rent* was at any time established under that act on furnished housing accommodations.

Krim v. Severance, 112 Cal.App.2d 353, 245 P.2d 1111, involves a question similar to that presented in the instant case. There, in 1948, plaintiff leased from defendant a *furnished* dwelling for $250 per month. Defendant occupied it until March, 1950. The rent fixed by the rent director for the same house, *unfurnished,* was $125 under the 1942 Emergency Price Control Act, which, by amendment, provided that housing accommodations which were not rented for 24 consecutive months commencing February 1, 1945, were not controlled housing accommodations. There, the house being owner-occupied, the rent director, upon application of the owner, made an order approving decontrol. The 1942 act was superseded by the 1947 Act. Plaintiff, the tenant, sought treble damages for claimed overcharge between the unfurnished and furnished price, claiming that upon recontrol, the maximum rental was $125 per month, and since defendants did not obtain an order from the rent director increasing said maximum rental to $250, the original amount of $125, the unfurnished price, remained the maximum rental price, whether furnished or unfurnished.

The court held that the *maximum rental* as a *furnished* dwelling, had not been fixed; that the collection of rental of $250 after recontrol on April 1, 1949, was tentative, was subject to readjustment by the rent director, and was not unlawful; that the circumstances are the same as accepting rent when property is first rented, and before a maximum rent has been fixed by the rent director, citing Woods v. Stone, 333 U.S. 472, 68 S.Ct. 624, 92 L.Ed. 815; and Parshalle v. Curl, 90 Cal.App.2d 641, 649, 203 P.2d 802. Plaintiff was denied judgment.

[1] In De Antueno v. Agostini, D.C.S. D.N.Y., 94 F.Supp. 957, 958, the plaintiff, in September, 1947, sublet a furnished apartment from the defendant, who had leased the same apartment unfurnished from the owner of the building. The court said:

"The furnished apartment sublet to the plaintiff was not the housing accommodation leased to the defendant by the owner. It was a new housing accommodation. * * * The maximum rent for the furnished apartment was the first rent for the same. Though the landlord is required by the regulations to register the accommodations within thirty days after the new renting and the rent received is subject to refund of any excess later fixed by order, the first rent remains the established maximum until the Expediter orders otherwise." See, also, Tomazich v. Padis, 72 Idaho 77, 237 P.2d 1071; and Lyon v. Thompson, 199 Misc. 527, 99 N.Y.S.2d 922, 925.

[2, 3] These cases sufficiently dispose of the question here presented. The attempted appeal from the order denying a new trial is dismissed. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; EDMONDS, CARTER, and SPENCE, JJ., dissenting.

114 Cal.App.2d 758

PEOPLE v. DOWNS.

Cr. 2800.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1952.

Hearing Denied Jan. 12, 1953.

Prosecution for burglary and robbery. The Superior Court, Santa Clara County, William F. James, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that the forcible taking of money owned by telephone company from the possession of two janitors constituted the crime of robbery.

Affirmed.

1. Criminal Law ⇐741(2)

In prosecution for burglary and robbery, sufficiency of identification of accused was for jury.

2. Criminal Law ⇐547(3)

Where testimony given at a previous trial is material, it is not necessary to produce the transcript, but any person who heard or gave testimony at the previous trial is competent to testify to the testimony that was given there.

3. Criminal Law ⇐351(8, 10)

The attempt to manufacture or suppress evidence may always be proved against a party as showing a consciousness of guilt.

4. Criminal Law ⇐549

In prosecution for burglary and robbery, evidence was sufficient to show that accused had fabricated evidence to prove an alibi at the first trial.

5. Criminal Law ⇐396(1)

Where accused testified at length that after his last release from prison he had given up his criminal ways and had led a completely law abiding life, accused opened the door to any competent evidence calculated to disprove his assertion of reform, and evidence tending to show that an arsenal of firearms and burglar tools was found in accused's possession when he was apprehended was properly admitted.

6. Criminal Law ⇐1186(4)

If evidence becomes properly admissible in rebuttal, it is not reversible error merely that it was improperly admitted on the People's case in chief. Const. Art. 6, § 4½.

7. Criminal Law ⇐1186(4)

Some special injury must be shown to justify the reversal of a case merely because evidence was received at the wrong time. Const. Art. 6, § 4½.

8. Criminal Law ⇐1169(2)

Where accused's extensive criminal career was amply disclosed by competent testimony and was no secret to jury, evidence that accused's wife had left him and that several of his former criminal associates had been killed and others were in prison was not prejudicial.

9. Criminal Law ⇐789(2), 823(15)

Instruction that a reasonable doubt is one that is reasonable, one that is based on sound reasoning, was not an adequate instruction on reasonable doubt, but when construed with statutory instruction on reasonable doubt was not prejudicial. Pen. Code, § 1096.

10. Criminal Law ⇐823(10)

Where trial court instructed upon difference between preponderance of evidence and proof beyond a reasonable doubt, instruction that jury should sit upon the facts of the case and decide them using, under the court's guidance in matters of law, the common sense and sound judgment which jury would use in deciding important matters arising in their own affairs, instruction was not prejudicial.

11. Criminal Law ⇐784(4)

Where trial court had instructed that circumstantial evidence must not only be consistent with the theory of defendant's guilt, but inconsistent with any other reasonable hypothesis, and further instructed that circumstantial evidence may be as conclusive in its convincing force as testimony of direct witnesses to the overt act and is frequently more reliable and that circumstantial evidence may be sufficient to justify conviction where the circumstances

are such as to preclude any other reasonable theory than that of the guilt of the accused, jury was properly instructed on circumstantial evidence and could not have been mislead into placing undue weight on the circumstantial evidence.

12. Criminal Law ⇐407(1)

Silence in the face of an accusatory question or statement may be considered by the jury as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.

13. Criminal Law ⇐1172(2)

Where accused testified at length at trial, instruction that a defendant in a criminal action cannot be compelled to be a witness for or against himself and that a person arrested for a criminal offense has a right to refuse to answer questions asked by police, mere fact that he refuses to answer such questions or to discuss with police any circumstances surrounding arrest or charge is not proof of his guilt, nor does it necessarily raise any inference or presumption of his guilt, but the failure of the accused to answer such questions and offer any explanation of his actions may be commented on by Counsel and Court and given due consideration by the jury was not prejudicial error warranting reversal.

14. Robbery ⇐9

Forcible taking of money owned by telephone company from possession of two janitors constituted robbery.

Nathan C. Coghlan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of State, David K. Lener, Deputy Atty. Gen., N. J. Menard, Dist. Atty. of Santa Clara County and L. P. Bergna, Asst. Dist. Atty., San Jose, for respondent.

DOOLING, Justice.

The defendant was convicted of burglary and robbery. He appeals from the judgment of conviction and from an order denying his motion for new trial.

On June 3, 1948 shortly before midnight two men entered a building of the Pacific Telephone & Telegraph Co. in San Jose. While these men were engaged in taking money from a safe two janitors employed by the company entered the room and were compelled by the burglars to lie down on the floor where they were securely bound. The two burglars then took from the safe $3,500 belonging to the company.

One of the janitors was unable to identify the burglars because, except for such light as came from the street through closed venetian blinds, the room was in darkness. The other janitor's testimony given at the preliminary hearing was read to the jury because of his death before the trial. This witness testified that "to the best of my knowledge" the defendant (Downs) is one of the men who was in the room, that he heard Downs talk that night, remembers his voice and the voices "were the same, the best I can tell."

Several witnesses testified to seeing a tan convertible automobile with a light top parked in front of the burglarized building; one saw a man leave the building with a waste-basket under his arm and enter this car which then drove away; another saw a man's leg going in the door while the car was driving away. The operator of a motel near San Jose testified that on June 1, 1948 appellant stayed one night at her motel and that he was driving a tan convertible automobile. Appellant and his sister testified that appellant's convertible automobile had a black top and the dealer who sold the car to appellant testified: "I believe the top was black." In answer to a leading question he said that at the previous trial he had testified that the top was black.

[1] Upon the basis of the qualified identification by the janitor, the disagreement between the prosecution witnesses' testimony as to the light color of the top of the car seen leaving the building and that of the defense witnesses that the top of appellant's car was black, and a discrepancy between appellant's height and the height of the man seen leaving the building

as given by a prosecution witness, it is argued that there was not sufficient evidence to identify appellant as one of the participants in the crime. "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if any there were, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial." People v. Waller, 14 Cal.2d 693, 700, 96 P.2d 344, 348.

In weighing the evidence of identification, both direct and circumstantial, the jury was entitled to give its due weight to the testimony of witnesses, about to be discussed, from which it might reasonably find that at a previous trial in which the jury had disagreed appellant produced manufactured evidence in an effort to prove an alibi.

A police officer testified that at the previous trial appellant had given testimony that on the night of the burglary appellant was in Portland, Oregon. A private detective testified that he was working for a detective agency about the time of the first trial, that he was sent to Portland to determine if a Charles Murphy (an alias used by appellant) was registered in any hotel in that city on June 3, 1948, that at the Senator Hotel in Portland he found a registration card of that date with the signature Charles Murphy, that the hotel proprietor refused to allow him to take the card, but that he was called as a witness for the defense and testified at the first trial to finding this registration card in the Senator Hotel. A desk clerk from the Senator Hotel testified that he was persuaded by some person at a time long after the date it bore to insert this particular registration card in the records of the hotel. The proprietor of the hotel and the man who printed the cards testified that the particular card was of a type not used in the hotel on June 3, 1948, but only purchased for and used in that hotel at a later date. A handwriting expert testified that the signature "Charles Murphy" on this card was identical with exemplars written by appellant.

[2, 4] It was not necessary to produce the transcript of the testimony of appellant and Harris at the previous trial. Any person who has heard or given testimony is competent to testify to the testimony that was there given. People v. Shortridge, 179 Cal. 507, 509, 177 P. 458; Meyer v. Foster, 147 Cal. 166, 169, 81 P. 402; People v. Curtis, 50 Cal. 95; 4 Wigmore on Evidence, 3d Ed., sec. 1330, pp. 651–652. The attempt to manufacture or suppress evidence may always be proved against a party as showing a consciousness of guilt. (8 Cal.Jur.Criminal Law, sec. 157, p. 42.) The evidence while largely circumstantial was almost conclusive that appellant had fabricated evidence to prove an alibi at the first trial.

[5] Appellant was apprehended in Florida. What is described in his briefs as "an arsenal" of firearms and burglar tools was found in his possession. These were introduced over his objection. The cases appear to be in some disagreement as to whether weapons found in the possession of a defendant at the time of his arrest may be placed in evidence without any showing tending to connect them with the commission of the crime charged. See, for example, People v. Richardson, 74 Cal. App.2d 528, 540–541, 169 P.2d 44, relied on by appellant and People v. Beltowski, 71 Cal.App.2d 18, 23, 162 P.2d 59 cited by the People. We do not find it necessary to decide this interesting question which the cases seem to leave in some confusion. Appellant in his own defense, in an effort to explain his habitual use of assumed names, testified that because he was an ex-convict he had been persecuted by the police and that his use of aliases was solely to avoid this persecution. He further testified at length that after his last release from prison he had given up his criminal ways and led a completely law abiding life. Appellant thus opened the door to any competent evidence calculated to disprove his sweeping assertion of reform. In People v. Westek, 31 Cal.2d 469, at page 480,

190 P.2d 9, at page 16 the defendant charged with criminal actions with certain boys "volunteered the sweeping statement that he had never, at any time or at any place, committed upon any boy any such sexual crime as was charged." In rebuttal the People proved the commission of such crimes with boys not named in the information. The court held this proper saying at 31 Cal.2d at page 481, 190 P.2d at page 16 "Appellant himself 'opened the door for the admission of such evidence, and he is therefore in no position to complain of its reception * * *.'"

[6, 7] The possession of an "arsenal" of firearms and burglar's tools at the time of his arrest tended to disprove appellant's testimony that he had abandoned his criminal ways, and while the "arsenal" was admitted on the People's case in chief, even before the adoption of sec. 4½, art. VI of the State Constitution it was well settled that if evidence becomes properly admissible in rebuttal it is not reversible error that it was improperly admitted on the People's case in chief. (8 Cal.Jur., Criminal Law, sec. 302, p. 233.) In People v. Yokum, 118 Cal. 437, at page 439, 50 P. 686, at page 687 the court said: "But some special injury must be shown to justify the reversal of a case merely because evidence was received at the wrong time."

[8] Appellant complains that much irrelevant and incompetent testimony was admitted from a police officer who accompanied appellant from Florida to California as to conversations with appellant, questions asked him and answers given by appellant. Much of this evidence was admitted without objection and as to all such evidence appellant cannot now complain. Specifically certain evidence was admitted over objection, of statements that appellant's wife had left him and that several of his former criminal associates had been killed and others were in prison. In view of the entire case we can find no prejudice in the admission of the particular evidence to which objection was made. The appellant's extensive criminal career was amply disclosed by other testimony and was no secret to the jury.

[9] Appellant further complains of certain instructions. The court after giving the statutory instruction on reasonable doubt, Pen.Code, § 1096, added: "Shortly, a reasonable doubt is one that is reasonable; one that is based on sound reasoning." While standing alone this language would not constitute an adequate instruction on reasonable doubt, we can find no prejudice in it, in view of the fact that the jury had just been given the statutory instruction.

[10] The jury was also instructed:

> "I might here properly caution you against adopting a hypercritical attitude in analyzing the facts of this case. You're not expected to act as lawyers. The theory of the law by which a case is tried before a jury is that 12 responsible citizens, who have a stake in their community and have a general understanding of the affairs of life, and a sense of practical values, should sit upon the facts of the case and decide them, using therefor under the Court's guidance in the matters of law, the common sense and sound judgment which they would use in deciding important matters arising in their own affairs."

This instruction does not run counter to People v. Brannon, 47 Cal. 96. There "(t)he jury were told that it was their duty to convict if they should 'be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life.'"

The court in that case said: "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence." In the case before us the jury was properly instructed in the statutory language as to what constitutes reasonable doubt. They were further instructed: "Each and every element of each crime charged must be proved to this extent; that is to say, beyond a reasonable doubt and to a moral certainty as I have defined those terms to you." The court then pointed out the difference between preponderance of evidence which is sufficient in a civil case and proof beyond a reason-

able doubt which is required in criminal cases. In the face of these instructions the jurors must have understood the difference between preponderance of evidence and proof beyond a reasonable doubt and could not have understood that they might convict on a mere preponderance of evidence. The criticized instruction only asked the jurors to bring to the determination of the question of proof beyond reasonable doubt the common sense and sound judgment that they would use in deciding important matters of their own. No conscientious juror should do less than that.

[11] Complaint is also made of the following instruction:

> "Now, the view is occasionally heard expressed that a conviction should not be had on circumstantial evidence. This is in direct conflict with the law, and is not supported by human experience. Circumstantial evidence may be as conclusive in its convincing force as the testimony of direct witnesses to the overt act and is frequently more reliable. Circumstances very largely control the conduct of men in the most important affairs of life and may be sufficient to justify the conviction of crime where they are such as to preclude any other reasonable theory than that of the guilt of the accused."

This instruction followed immediately the approved instruction that such evidence "must not only be consistent with the theory of the defendant's guilt, but inconsistent with any other reasonable hypothesis. This rule is applicable not only to the entire case, but also to each material fact attempted to be proved by the party relying on such indirect evidence."

Under the charge as a whole the jury was correctly instructed on the use of circumstantial evidence and cannot have been misled into giving such evidence greater weight than it was entitled to be given under the law.

[12, 13] The court instructed that: "A defendant in a criminal action cannot be compelled to be a witness for or against himself. It is his absolute right to take the stand in his own behalf and testify, or to refuse to be sworn and to refuse to give any testimony in such a case and a person arrested for a criminal offense charged has a right to refuse to answer questions propounded to him by the police. The mere fact that he refuses to answer such questions or to discuss with the police any circumstances surrounding the arrest or charge is not proof of his guilt, nor does it necessarily raise any inference or presumption of his guilt.

> "However, the failure, if any, of the defendant to answer such questions or to offer any explanation of his actions or attitude in relation to the charges made against him may be commented on by Counsel and the Court and given due consideration by the Jury."

This instruction does, as pointed out by appellant, tend to confuse the right of a defendant not to testify with his conduct in the face of questions asked of and accusatory statements made to him by the police. However in view of the fact that appellant did testify at length at the trial and the settled rule that silence in the face of an accusatory question or statement may be considered by the jury "as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt" People v. Simmons, 28 Cal.2d 699, 712, 172 P.2d 18, we can find no prejudice to appellant in the instruction given.

[14] The conviction of robbery depended on the forcible taking of the money of the company from the possession of the two janitors. Appellant argues that the janitors had no such possession of the money as would support a conviction of robbery.

In Neufield v. U. S., 73 U.S.App.D.C. 174, 118 F.2d 375, 388 the court said of the possession necessary to support a robbery conviction:

> "We think that the word 'possession' in this statute is not used in the strict larcenous sense, as a result of which, although custody or control may be in a servant or agent, legal possession is said to be in the master. Larceny is an offense against the possession; robbery,

against the person. The local robbery statute in our view uses the word 'possession' in a colloquial sense, meaning nothing more than custody or control."

The leading case on the subject is probably Brooks v. People, 49 N.Y. 436. The facts in that case are stated by the court: "Margaret Purcell was a child eleven years of age * * *. On the evening of the 7th of April, 1871, the parents left home to attend church, leaving the child Margaret the sole occupant of the apartments * * while the parents were absent, the defendants * * * came to the apartments, and while Williamson held a pistol to Margaret's head * * * Brooks took from a trunk * * * the property * * *. The property taken was articles of clothing etc., purchased by John Purcell for his wife." The court held that as against the robbers the child's custody was sufficient to support a conviction of robbery.

In Reese v. State, 91 Tex.Cr.R. 457, 239 S.W. 619, 621 one Williams the night clerk and telegraph operator at a railroad station did not know the combination of the safe or put money into it. The day man had charge of the safe and money. Nevertheless it was held robbery where the defendant using force against the night clerk took money belonging to the Company and the day agent from the safe. The court affirmed a conviction of robbery saying:

"From what has been said, it follows that, in our judgment, the relation of Williams to the property was such as to characterize the assault upon him to obtain the property and its acquisition thereby as robbery."

It is said in State v. Adams, 58 Kan. 365, 49 P. 81:

"As against the robber, a servant has the same right, and rests under the same duty, to preserve and defend his possession of the property, that the owner has. He is the custodian, and has a right to oppose the violence offered by the robber with violence, if necessary. * * * The principles governing civil actions for the recovery of property wrongfully taken have no application in a case of robbery."

See also People v. Dean, 66 Cal.App. 602, 226 P. 943 and the cases collected in the note in 123 A.L.R. commencing at page 1102 under the heading: "Various types of servants and agents have been held to have had possession of property taken, for the purposes of the question here discussed."

We regard it as no undue extension of the robbery statute to hold it applicable to any servant or servants left in sole occupation of the premises or particular part thereof by the employer.

The judgments and order denying a new trial are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.



115 Cal.App.2d 186

PEOPLE v. RUBIN.

Cr. 4862.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1952.

An accused was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., under counts charging accused with receiving, holding or forwarding money at result of a horse race or purported horse race, and he appealed from the judgment and from an order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that evidence justified conviction.

Affirmed.

Gaming ⇐98(1)

Evidence justified conviction for receiving, holding or forwarding money on result of a horse race or purported horse race. Pen.Code, § 337a, subd. 3.

Russell E. Parsons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a trial to the court Max Rubin was convicted on two counts of violation of section 337a, subd. 3, of the Penal Code. Defendant's motion for a new trial was denied and he appeals from the judgment and the order, attacking the sufficiency of the evidence to sustain the conviction.

Peter Janowicz, a Los Angeles vice squad officer, was the only witness for the People. He testified that on October 25, 1951, with another officer, he entered a cafe on West Sixth Street and watched defendant, who was walking among the customers, and on occasions was approached by and conversed with unknown persons. They would then look at a scratch sheet and at the end of the conversation money would pass. On the preceding day he observed defendant for an hour and one-half in the same cafe and again on numerous occasions defendant was approached by unknown persons; they would look at a scratch sheet and money would be transferred. On one occasion an unknown person said "Five across on Moon Tip, fourth at Tan" and gave defendant $15. Another man said to defendant "Five across on La Jolla Hiker" and handed defendant $15. A third person said to defendant "Four and Four on Dan Shamrock" and handed defendant some money. After the conversations defendant would go to a telephone, deposit something in the coin box and carry on a conversation. Moon Tip and Dan Shamrock were horses running at Tanforan on October 24, 1952.

Defendant testified that he took no bets but did talk to several people in the busy bar and that $15 was given to him by a Mr. Josephi. Mr. Josephi testified that he gave defendant $15 in repayment of a loan. The officer had no conversation with defendant, nor did he find any scratch sheets or betting markers in defendant's possession, and he heard none of the telephone conversations.

Defendant cites People v. Rabalete, 28 Cal.App.2d 480, 487, 82 P.2d 622, and People v. King, 111 Cal.App.2d 201, 244 P.2d 20, contending the evidence here was no stronger than in those cases in which it was held to be insufficient. The evidence in defendant's case was clearly free from the infirmities pointed out in the Rabalete and King cases. There was no idle conversation or ambiguous discussion between defendant and the horse players.

The material elements of the offenses charged in both counts are that defendant received, held or forwarded money on the result of a horse race or purported horse race. In determining whether the evidence offered in support of these elements was legally sufficient, we need only refer to our previous recital of the testimony.

The officer's testimony was sufficient, if believed, to prove the offenses. Nothing more was required to place a bet than for a bettor to say "Five across" or "Four and four", naming a horse entered in a race, accompanied by the delivery to the addressee of the money. It was for the trial court to choose between the testimony of the officer and the denials of the defendant and his witness.

The judgment and the order denying motion for a new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

WOTTON et al. v. BUSH et al. *
Civ. 19012.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1952.

Rehearing Denied Jan. 6, 1953.

Hearing Granted Feb. 11, 1953.

Action for declaratory relief as to constitutionality of provision of Public Resources Code, constituting portion of Spacing Act, and providing that provisions of Chapter did not apply to any field producing oil or gas on August 14, 1931. The Superior Court of Los Angeles County, Jesse J. Frampton, J., entered judgment upholding validity, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that absence of definition of term "field" rendered provision void for uncertainty, and as an attempt to delegate legislative powers, and that invalidity of such provision rendered balance of Spacing Act invalid, notwithstanding existence of separability clause.

Judgment reversed.

1. Boundaries ⇐37(1)

In action by owner of parcel of land in oil field to have section of Public Resources Code providing that Chapter did not apply to any field producing oil or gas on August 14, 1931, declared unconstitutional, wherein expert testimony was conflicting as to whether plaintiffs' property was located in field producing oil prior to such date or new field, evidence sustained finding that plaintiffs' tract was located in new field discovered in 1947. Public Resources Code, § 3605.

2. Constitutional Law ⇐258

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law.

3. Statutes ⇐47

The word "field", as used in Spacing Act provision of Public Resources Code, exempting from effect of chapter, any field producing oil or gas on August 14, 1931, is of such vague and uncertain meaning that men of common intelligence must guess at its meaning, and such provision is consequently void for uncertainty. Public Resources Code, § 3605.

4. Constitutional Law ⇐62

The legislature alone has the power to make law, and it may not delegate such power to a board or officer, but administrative discretion conferred on board or officer, in order to be valid, can consist only in the filling in of the details of the legislatively determined policy as circumscribed by definite standards. Const. art. 3, § 1.

5. Constitutional Law ⇐62
Mines and Minerals ⇐92.4

In view of fact that Legislature has laid down no rules for determining or defining an "oil field", provision of Spacing Act excepting from operation of chapter, any field producing oil or gas on August 14, 1931, is void as an attempt to unconstitutionally delegate legislative power to administrative officers. Const. art. 3, § 1.

6. Statutes ⇐64(1)

Notwithstanding the existence of a separation clause in a statute, when provisions of statute are held unconstitutional, parts thereof cannot be held separable unless it appears that, standing alone, legal effect can be given to such provisions, and that the Legislature intended the provision to stand in the event others included in the act should fall because of unconstitutionality. Public Resources Code, §§ 3, 3600–3608, 3605.

7. Statutes ⇐64(2)

Invalidity of provisions of Spacing Act that chapter should not apply to any field producing oil or gas on August 14, 1931, rendered balance of Act unconstitutional notwithstanding existence of separation clause, since invalid provision was qualifying clause in absence of which, the application to fields producing to 1931 would have produced questions of due process and impairment of contractual obligations. Public Resources Code, §§ 3, 3600–3608, 3605.

Dolley, Knight, Woods & Hightower, Los Angeles and James M. Hall, Torrance, for appellants.

* Subsequent opinion 261 P.2d 256.

Edmund G. Brown, Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., for respondents.

William Kinley and Simpson & Wise, Long Beach, for amici curiae John C. Hunter, Marjorie M. Davis, Elizabeth Capobianco, Ruth Seeberg, Charles Burck, Ada Burck and Lidwina S. Seeberg.

McCOMB, Justice.

From a judgment in favor of defendants in an action for declaratory relief to have section 3605 of the Public Resources Code of the State of California declared unconstitutional as far as applicable to the facts of the present case, plaintiffs appeal.

Facts: Plaintiffs own a parcel of land less than an acre in size which they contend lies within the boundaries of the Rosecrans oil field in Los Angeles County, and that since the Rosecrans oil field was a field producing oil or gas on August 14, 1931, they are entitled to drill for oil or gas without complying with the spacing provisions of Chapter 3, of Division 3 of the Public Resources Code[1] because section 3605, Chapter 3 of the Public Resources Code provides: "The provisions of this chapter do not apply to any field producing oil or gas on August 14, 1931."

However, plaintiffs further contend that if their property is not within the Rosecrans field then section 3605 of Chapter 3, Public Resources Code, supra, is unconstitutional and being so the entire Spacing Act, Chapter 3, Public Resources Code, is unconstitutional.

[1] There being a conflict in the experts' testimony the evidence supports the trial court's finding that plaintiffs' property was not located in the Rosecrans oil field but within a new field known as the Howard Townsite field, the discovery of which was completed in 1947.

We are thus confronted with the question: *Is section 3605, Chapter 3 of the Public Resources Code, to wit, "The provisions of this chapter do not apply to any field producing oil or gas on August 14, 1931," unconstitutional?*

This question must be answered in the affirmative for two reasons:

(1) The section in question is void for uncertainty.

[2, 3] It is a settled doctrine of constitutional law that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.)

In the present case Dr. Robin Willis testifying as an expert witness for defendants said: "The term 'oil field' is used in practically the same sense by laymen and by technical men. A layman understands an oil field, as a general rule, to be all of a contiguous area, a general area, from which oil is produced. A technical man would be inclined to amplify that to say all of that area from which oil is, has been, or may in the future be produced from a single major causal geological feature."

Mr. John R. Pemberton, former Oil Umpire for the petroleum industry, defined an "oil field", for defendants, as follows:

> "My understanding of an oil field is that it comprises a distinct and isolated structural uplift of the type in which oil will accumulate. It is a recognizable unit, may contain a great many oil pools, may be all split up and chopped up, broken by faults of all kinds, thinning and thickening of sands, so that the resultant picture, after the field is completely developed, will be found to consist of a great many separate and distinct pools. An oil field, as such, is not entirely, but it is more or less, a geographical term. It refers to an area. Most oil fields you will find are named after some town or topographic feature, and they are usually fairly large areas. We have many very small oil fields, but generally speaking, an oil field is to an oil man a considerable area."

1. Division 3, Chapter 3 of the Public Resources Code contains sections 3600 to 3608 inclusive, and was passed by the Legislature effective July 18, 1947.

Mr. E. H. Musser testified for defendants thus: "For the purposes of our work, however we have taken an oil field to mean, in general, a producing area as it existed in 1931."

Mr. Luis E. Kemnitzer also for defendants testified: "In my estimation, the term 'oil field' should be governed by the economics of the situation, and that it should be considered as an area in which continuous and contiguous production is obtained, and that the limits of this oil field are those established by the dry holes or uneconomic production. The dry holes and the uneconomic production can be governed by the geologic conditions that are found underground."

Finally, Mr. John H. Wents, Jr. testifying on behalf of defendants, said, "I define an oil field as simply the surface area used in the exploitation of an underground pool or pools of oil. An oil field is bounded by an uneconomic production or dry holes."

In certain maps and publications of the Division of Oil and Gas, plaintiffs' property was included as part of the Rosecrans oil field. After plaintiffs' complaint was filed, the Division of Oil and Gas issued a map which did not include plaintiffs' property within the boundaries of the Rosecrans field.

Volume 2, 34th Annual Report, California Oil Fields, July-December, 1948 issue, published by the Division of Oil and Gas, says:

"In the Rosecrans oil field and the Northwest Rosecrans area, sixteen notices of intention to drill new wells were filed during the year. Of this number, eleven were for wells to be drilled in the area west of Vermont Avenue. Activity in this area was started by the successful completion of Shell Oil Company, Incorporated, well No. 'Union-Poindexter' 1, Sec. 12, T. 3 N., R. 14 W. It was completed in September, 1947, for approximately 200 barrels per day of 31.8-degree gravity oil. The next completion was in February, 1948. This well, Shell Oil Company, Incorporated, well No. 'Moser Community' 1, was completed for 435 barrels per day of 31.8-degree gravity oil and 190 Mef. of gas.

"Production is coming from the 'O'Dea,' or 7th zone, the top of which is at a depth of approximately 8,050 feet. The structure appears to be a faulted anticline with the accumulation against a NW-SE fault system. The accumulation is further controlled by cross-faulting.

"Inasmuch as several good producers were completed in the area during the year and development operations were still continuing at the close of the year, it is contemplated that the limits of the Rosecrans field will be extended to Western Avenue in order to include this area for statistical purposes."

On July 18, 1949, Mr. E. H. Musser wrote a letter to Mr. R. D. Bush in which he referred to Howard Townsite Area as part of the Rosecrans oil field. His letter read in part thus: "* * * The proposed location falls on two lots comprising less than one acre which are located in the northwest extension of the Rosecrans field. * * *

"In many respects this case is similar to the recent Lawndale case. Geological and paleontological data indicate that the zone being produced in the northwest extension is the 7th or O'Dea zone which is being produced in the main field. Mr. Hunter stated to Engineer Barton that Shell Oil Company, Incorporated, petroleum engineers testified before the Regional Planning Commission that their subsurface data shows that this area is a part of the Rosecrans field. He has a copy of these proceedings. In the event of a court action, Mr. Robin Willis would probably again testify that the area was a part of the same 'causal structure' as the main Rosecrans field. * * *."

In reply Mr. Bush said: "* * * You may approve the proposal as to casing program and method of drilling, with the usual provisions, and add the following note: 'This Division considers this portion of the Rosecrans field a separate structure similar to the area south of Rosecrans Avenue, which was deemed a separate structure by the Court and subject to the spacing law

Consequently, this location may be in violation of Section 3600 of the Public Resources Code.'

"I wish you would discuss the situation with Mr. Bowlby or Mr. Masters of Shell Oil Company, Inc., as an aid in deciding what action, if any, we could take in canceling the blanketing in of this parcel in case the well is drilled."

From the foregoing evidence it is clear that the word "field" as used in section 3605, Chapter 3 of the Public Resources Code is so vague and uncertain that not alone men of common intelligence must necesarily guess at its meaning and differ as to its application, but even experts are placed in the same position.

(2) The questioned section is void as an attempt, unconstitutionally, to delegate the legislative power.

[4] It needs no citation of authority that the legislature alone has the power to make law, and that it may not delegate its power to a board or officer. (Art. III, sec. 1, California Constitution.)

Justice Marshall in Wayman v. Southard, 10 Wheat. 1, 43, 6 L.Ed. 253, 262, stated that for administrative discretion to be valid, the legislature must determine the primary standards and leave to the executive agents the "filling in the details." In other words, the legislative policy must be manifested in a clearly understood statute which sets up definite standards of action and which leaves to the executive officers only the discretion of determining its application to particular factual situations. (In re Kinney, 53 Cal.App. 792, 794, 200 P. 966.)

In American Distilling Co. v. State Board of Equalization, 55 Cal.App.2d 799, at page 805, 131 P.2d 609, at page 612, the court said, "Clearly, the legislative body must declare the policy of the law and fix some kind of legal principles which are to control in given cases. It must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law. * * *" (See also People v. Kuder, 93 Cal.App. 42, 51, 269 P. 198, 630, to the same effect.)

In re Peppers, 189 Cal. 682, 209 P. 896, 897, it was held that section 10 of the California Fruit and Vegetable Standardization Act is unconstitutional insofar as the legislature authorized the Director of Agriculture to investigate and certify to shippers the quality and condition of the fruit under such rules and regulations as he might prescribe to carry out the provisions of the act, which stated in part, "oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped." St.1921, p. 1239, § 10. The court held that the act was an unconstitutional delegation of power. It said, 189 Cal. at page 688, 209 P. at page 898: "Conceding for the sake of argument, but not deciding, that the foregoing provisions of said act do embody a legislative attempt to confer upon the department of agriculture the power to make more certain the clause of said act declaring that 'oranges shall be [considered] unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped,' it is our conclusion that the Legislature had no power to thus delegate to an administrative board or officer its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful." A similar decision was reached in the United States Supreme Court in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570.

[5] The foregoing rules as applied to the present situation lead to the inevitable conclusion that the provision in question is void. The legislature has laid down no rules for determining "what is a field," nor has it given any definition thereof. That there was no guide provided by the legislature was further corroborated by the testimony of Mr. Musser on behalf of defendants. He said:

> "When the law was first passed, we were faced with the problem of trying to decide what the legislature meant by the word 'field' since there was no definition. It appeared to us that the entire purpose for the Spacing Act was

to prevent town lot drilling and to prevent the waste attendant thereupon. * * *

"* * * At the time the law was enacted, obviously there were certain producing areas, or fields, if you want to call them as such, but they were not defined in any way except by the actual productive limits of those fields at that time. We felt that the purpose of the exception to the law was to prevent inequities between vested rights of property owners, and therefore we tried insofar as it was possible to confine the fields to the area productive in 1931. However, as a practical matter, it was found necessary to expand those areas as the fields developed outward from the original producing area at that time. When the fields then reached their limits *as we decided the fields were limited,* we then, if a well were drilled beyond the productive area, applied the Spacing Act. The distance out from an area is not exact. It might be one or two or perhaps, in some cases, more locations away, which might, in some instances, be a few hundred feet, or it might be as much as six or seven hundred feet. There is no exact measure. There are cases where fields have overlapped. We have one very good example in the Los Angeles Basin, the Montebello field. The old field was pretty well defined at the time the Spacing Act was passed. Subsequently, however, a field underlying the Montebello field was discovered which only touched a very small portion of that old field. In effect, it is a new field, really, but because of the fact that the new field partially underlaid the old field, *we were unable to apply the Spacing Act in that instance.* We felt that the Court would probably not uphold us if we tried to set forth that new area as a new field in that case. * * *

"*The administration of the Spacing Act has been a very difficult thing because of the fact that the word 'field' is not defined,* and we have tried to prevent inequities between properties. The matter of drainage has been definitely considered. We feel in the case here at Rosecrans, that the Howard Townsite area is in no way connected structurally or by drainage with the old Rosecrans field, and therefore that no property rights have in any way been infringed. The subject property was never drained and could never be drained by any of the wells in the old field, or main portion of the Rosecrans field. *Therefore, we believe that it was our duty to call that a new field, simply because the town lot drilling is a bad thing.* Anyone conversant with the industry will tell you that. Any geologist or engineer will tell you town lot drilling is wasteful, that it is a bad method of drilling, and we feel that that is the thing, in a nutshell." (Italics added.)

In view of our conclusion we must determine this additional question: *Since section 3605 is void, does it render the entire spacing act unconstitutional so far as plaintiffs are concerned?*

The answer is yes. It is obvious the legislature could not have intended that the Well Spacing Act, (Chapter 3, Public Resources Code) should remain in effect under conditions such as presented here if section 3605 were to be declared unconstitutional. This is true even though section 18 of the Public Resources Code declares that if any provision of the Code is held invalid the remainder will not be affected thereby. Such provisions are only an aid to the courts in construing the statute.

[6, 7] It is the general rule that even where there is a separation clause parts of a statute cannot be held separable unless it appears that "standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall." (Williams v. Standard Oil Co., 278 U.S. 235, 241, 49 S.Ct. 115, 117, 73 L.Ed. 287, 309.) Section 3605 is a qualifying clause inserted in the act in order to insure validity to the well spacing provisions. It is apparent that if the provisions of Chapter 3 of the Public Resources Code were to

be applied to fields producing oil or gas prior to August 14, 1931, grave questions of due process of law and the impairment of contractual obligations might arise. Apart from the legality of such construction, it would be manifestly inequitable to give the act a retroactive application, and such a specific intention should not be imputed to the legislature as a result of the statement of general intention in section 18.

In Wills v. Austin, 53 Cal. 152, the constitutionality of section 3696 of the Political Code, which authorized the State Board of Equalization to determine the rate of taxes was in question. This section provided that the board should make an allowance for delinquency in the collection of taxes. The delinquency clause was declared void in Houghton v. Austin, 47 Cal. 646. In Wills v. Austin, supra, the Houghton case was held to render the whole of section 3696 unconstitutional. The court held the power of the board was to be exercised only on an invalid condition, and the condition having failed the power to determine the rate also failed, the court stating at page 179 of 53 Cal.:

"The rule applicable to this point is forcibly stated by Chief Justice Shaw in Warren v. Mayor [and Aldermen] of Charlestown, 2 Gray [Mass.], [84], 98, who, after stating the general proposition that some portions of a statute may be held to be constitutional, while another portion may be pronounced void, and that in certain cases the valid portion may stand and the other be rejected, proceeds to say that 'this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.' This case was quoted with approval in French v. Teschemaker, 24 Cal. [518], 548; and doubtless states the law correctly."

In the instant case section 3605 is a conditional clause. It is a qualification upon which the whole Well Spacing Act, so far as plaintiffs are concerned, depends for legality and certainly for equitableness. If it were held otherwise the act would apply to wells producing oil or gas before August 14, 1931, which is directly opposite to the express intention of the legislature.

An analogous result was reached in Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40. The Irrigation Act of 1919 provided for the formation of water districts and irrigation boards. It especially provided the act should not apply to any irrigation district situated wholly or in part within any county which adopted a charter pursuant to Article 11 of the Constitution prior to June 4, 1915. The Supreme Court held this saving clause was unconstitutional because it made an unreasonable distinction between counties with and without charters. The whole act was declared to be invalid as a result of the invalidity of the saving clause, the court saying, 183 Cal. at page 443, 192 P. at page 43:

"To put it concretely, for the courts to strike out from the California Irrigation Act the exception of the counties of Los Angeles and San Bernardino, for that is what the exception really is, would be for the courts themselves to extend the operation of the act to those counties, although the Legislature has expressly said that they shall not come within its operation."

Again in Re Wong Hane, 108 Cal. 680, 41 P. 693, a city ordinance which provided that "It shall be unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket * * *", was held unconstitutional because the qualifying clause shifted the burden of proof to defendant to prove himself innocent. The court held that it would not have been

passed without enacting the condition thereto. At page 683 of 108 Cal. at page 694 of 41 P., it is said:

"The same court also said in Spraigue v. Thompson, 118 U.S. [90], 94, 6 S.Ct. 988 [30 L.Ed. 115], where it was sought to apply the rule to certain illegal exceptions in a statute of the state of Georgia: 'The insuperable difficulty with the application of that principle of construction to the present instance is that, by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It forces upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions.' See, also, Cooley's Const.Lim. pp. 209–212; Warren v. [Mayor and Aldermen of] Charlestown, 2 Gray [Mass.], 84." (Cf. County of Los Angeles v. Jessup, 11 Cal.2d 273, 78 P.2d 1131.)

Judgment reversed.

MOORE, P. J., and FOX, J., concur.



115 Cal.App.2d 71

Ex parte VAN WYKE.

Cr. 4941.

District Court of Appeal, Second District, Division 3, California.

Dec. 23, 1952.

Habeas corpus proceeding to secure petitioner's release from imprisonment. The District Court of Appeal, Per Curiam, held that where rescission of order granting parole to petitioner and postponement for one calendar year of further consideration of release on parole, during which time petitioner would be detained for observation and treatment, were based on extensive medical examinations and reports of a disturbed mental condition suffered by petitioner, which fully justified such action, no legal ground existed for petitioner's release on habeas corpus.

Petition denied.

Habeas Corpus ⟹23

Where rescission of order granting parole to petitioner and postponement of further consideration of release on parole for one calendar year, during which time petitioner would be detained for observation and treatment, were based on extensive medical examinations and reports of a disturbed mental condition suffered by petitioner, which fully justified such action, no legal ground existed for petitioner's release on habeas corpus.

Arthur Van Wyke, in pro. per.

PER CURIAM.

The petition for writ of habeas corpus is denied.

On January 29, 1951, petitioner's terms of imprisonment were fixed by the Adult Authority, Department of Corrections, at five years on each of two counts commencing January 26, 1950, to be served concurrently, with the last three years on parole. At the expiration of two years no proper placement program had been developed for petitioner and it was determined by the authority that the interests of the petitioner and the public would not be served by the immediate release of petitioner on parole. Petitioner's case was reviewed by the medical authorities from time to time and on February 26, 1952, the action of January 29, 1951 granting parole was rescinded. On September 24, 1952, following several hearings, further consideration of release on parole was postponed for one calendar year. The action taken in each instance was based on extensive medical examinations and reports of a disturbed mental condition suffered by petitioner which fully justified rescission of the order granting parole and the further detention of petitioner for observation and treatment. No legal ground exists for petitioner's release on habeas corpus.

CRISCI v. SORCI et ux.

CRISCI v. CRISCI et al. (two cases)

CRISCI v. CRISCI.

BIANCHI et ux. v. CRISCI et al.

Civ. 15450.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1952.

Rehearing Denied Jan. 23, 1953.

Hearing Denied Feb. 19, 1953.

Cross actions between mother and son to quiet title to realty. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., rendered judgment favorable to the mother, and the son appealed. The District Court of Appeal, Bray, J., held that the evidence sustained the trial court's determination.

Affirmed.

1. Appeal and Error ⇐1008(1)
Trial ⇐382

It is duty of trial court to reconcile contradictions and inconsistencies in evidence, if it can, and appellate court will be bound by its findings, unless testimony which trial court relies upon is inherently improbable.

2. Appeal and Error ⇐931(1)

On appeal, evidence and reasonable inferences therefrom would have to be considered most strongly in favor of respondent.

3. Trusts ⇐89(2)

In cross actions between mother and son to quiet title to real estate, wherein son claimed that his money had been used to purchase property, and that his mother held property in trust for him, evidence sustained trial court's determination in favor of mother.

Morris Grupp, Richard M. Siegel, San Francisco, for appellants.

J. A. Pardini, Elda Granelli and F. Campagnoli, San Francisco, for respondent.

BRAY, Justice.

Joseph and Marie Sorci appeal from portions of judgments quieting title against them.

Record.

The sole question presented is the sufficiency of the evidence, based primarily upon the claim that Rosina's testimony is inherently improbable. Joseph Sorci, also known as Joseph Crisci, is the son of Rosina Crisci. Marie Sorci is his wife. Two actions to quiet title were tried together. One was brought by Rosina against Joe and Marie, the other by Joe and Marie against Rosina and the Bianchis who were purchasers from Rosina of one of the parcels. Cross-complaints were filed by the parties against each other. The gist of Joe's claim [1] is that Rosina holds title to three parcels of property, the purchase price of the property sold to the Bianchis, and the rents and profits on all four parcels, in trust for him. Rosina claimed title in herself. There is a boxful of exhibits and an 1893 page transcript of testimony. The court quieted Joe's title to one parcel, Bianchis' title to the parcel claimed by them, Rosina's title to three parcels and denied Joe's claim as to the purchase price of the property sold to Bianchis and to any rents and profits. Joe appeals from the portions of the judgments quieting title to the three parcels in Rosina, and denying an accounting of the moneys received by Rosina from the sale to Bianchis and the rents and profits on all the properties. There is no appeal from the portions quieting title in Joe to the one parcel, nor quieting title in the Bianchis.

Evidence.

[1, 2] Joe testified that it was his money which purchased the properties; that he put the title in the first acquired parcel in Rosina's name to avoid possible execution thereon by his first wife, Anna, for unpaid child support. Rosina denied this and claimed her money bought the properties. Most of the evidence was that of the moth-

1. As Marie did not testify and was joined as a party merely because of her marital relationship, reference generally will be made to Joe alone.

er and son. The testimony of each contains contradictions, discrepancies, and in some respects is not supported by the written documents. However, the trial court believed Rosina. Under the well known conflict of evidence rule it was its duty to reconcile these contradictions and inconsistencies, if it could. We are bound by its findings, unless, as claimed, Rosina's testimony is inherently improbable. Also, we have to consider the evidence, and the reasonable inferences therefrom most strongly in favor of Rosina. Rosina is approximately 59 years of age, semi-literate, thrifty, active and acquisitive, and fairly capable in business. Joe, now approximately 40 years of age, is her son by her first marriage and now her sole child. A daughter "disappeared" many years ago. Rosina came to this country prior to the first World War. Joe is apparently a jack of all trades, and unless the money which purchased the property was his (contrary to the finding of the court), not too successful at any of them. Rosina speaks broken English, and has been greatly dependent upon Joe to interpret for her. Mother and son were very close. He lived with her most of the time. He has been married three times. The first two marriages did not last long, and apparently were broken up by Rosina. She objected to the last marriage, that to defendant Marie. Joe charges the controversy between Rosina and him to this marriage and to his refusal to separate from Marie. Rosina's first husband and Joe's father died in 1915. She worked in a San Jose cannery and then in a San Francisco tailor shop. In 1917 she married Giovanni Crisci, her husband at the time of the trial. (He has since died.) At the time of marriage he had $10,000 and thereafter made money as a fisherman, between 1917 and 1937 making sometimes $40 and $50 per week. She continued to work in a tailor shop. In 1922 Giovanni bought two flats on Mason Street for about $6,000. The property was later changed from his name to his and hers. In 1947 they sold the property for $15,000, Rosina handling the transaction. In 1931 she bought a lot on Chenery Street for $1,000. With $9,000 cash she built a home on it. The house burned in 1937, and she got $1,700 from the insurance company. In 1935 she bought a lot at 317 Chenery Street for $1,124, taking title in her maiden name. She built two flats on it, financed by a loan of $6,000. This property was redeemed at tax sales by both mother and son at times. The court quieted title in the son to this property. Rosina did not appeal. In 1935 Rosina had a dress shop and a dressmaking shop. She claimed to have made a little money in these shops.

Joe is a licensed master electrician. He was a general contractor from 1935 until 1940. From 1940 to 1943 he worked nights as a longshoreman. He was injured in 1943. He worked in the grocery store at night, and in remodeling the building at 2100 Jones in the daytime. During 1949 he had a store which his wife ran. He also is a locksmith and at one time had a restaurant and another an electrical business which had four or five different locations. He has four automobiles. Why, does not appear. Rosina had a savings bank account in 1922–23 and small bank accounts in 1933 and 1936. Other than these, she had no bank accounts. Joe had bank accounts during most of the period involved, but he could trace none of the moneys going into the properties (other than two small amounts hereafter mentioned). As said in appellant's opening brief, "Each member of this family lays claim to having had a great deal of money which never saw a bank." With this background we come to the various properties involved. The first parcel to be purchased and the one which is the primary basis of Joe's claim is

801 Filbert Street.

It was purchased in 1936 for $7250 from the estate of a deceased person and the guardian of his minor children. The deeds dated March 27 were made to Rosina and bear revenue stamps. On April 23 Rosina and Giovanni executed a deed to Joe. This deed does not bear stamps. The three deeds were deposited in the same escrow and all recorded May 1. The purchase price was paid as follows: $5,000 borrowed from the Bank of America on a note secured by a deed of trust on the property, note and deed of trust signed by Rosina and Joe (January

9, 1937, this loan was renewed by a new deed of trust for $8,250. The note was signed by Joe as maker and Rosina as endorser.) Rosina assumed this loan February 8, 1938. Again on December 21, 1939, a $9,400 deed of trust was placed on the property. $1,000 was evidenced by a promissory note in that sum executed by Joe to one of the children of the deceased. This note was later paid by applying a $1,000 judgment which Joe had secured against one Gianfranchesci. $725 was in cash deposited with the attorney for the estate. $625 was a cashier's check of the Clay-Montgomery Branch of the Bank of America where the son had an account and where the mother had no account. $64.50 was a personal check on the Mission branch of that bank. As the mother had no account in that bank and Joe did, it is obvious that this must have been Joe's check. Monthly payments were required to be made on the deeds of trust. Only two payments can be traced. July 20 and August 3, 1936, the son's checks in the sum of $64.60 and $64.40 respectively made payments. Some of the later payments were in cash. Due to destruction by the bank of records, payments by check cannot be traced. Rosina testified that she advanced all the money for all the payments; that she gave Joe $60 per month to pay off the $1,000 note but instead of making payments on it he kept the money. She also testified that she paid $100 per month on the $9,400 loan. Joe claimed that he paid for the property. January 5, 1938, almost two years after the acquisition of the property, Joe deeded the property to his mother. The deed bore $1.50 in revenue stamps. That same year the property was sold to the state for delinquent taxes. In November Rosina redeemed it. October 15, she deeded an undivided one-half interest to Giovanni.

In November, 1932, Joe's first wife, Anna, obtained an order in her divorce action of $20 per month for support of their child. Joe was jailed one or two times for nonsupport. Joe testified that the title to the property was originally taken in the mother's name to prevent Anna from levying on it. Then he felt in danger of subjecting his property to Giovanni's marital rights so he had them sign the deed to him. Two years later he claims he heard that Anna was threatening to proceed against him so he transferred the property to his mother. Anna took out execution on the day prior to the date of the deed from Joe to Rosina. On the other hand, the mother testified that she was going to the hospital for a serious operation (removal of a kidney) and she told Joe she would give him the property "if I die," but if she came back from the hospital she would want it back again. The deed, however, was not executed until her return from the hospital. There was some contradiction in her testimony as to when she thought she made the deed and as to when she felt well and when she was worried about her health. She testified positively that the deed was executed to Joe on the condition that the property was to be given back if she got better.

Joe's claim that he placed the title originally in Rosina's name to prevent levy by Anna is open to considerable question. The amount due was comparatively small, $20 per month for about four years. Again Joe had and thereafter maintained several bank accounts in his own name. Why he would cover up his claimed interest in real property and yet leave bank accounts open to levy does not appear. Moreover, although on purchase of the property it was deeded to Rosina, before the purchase escrow was closed and any deeds recorded it was deeded to him and remained in his name for approximately two years. That hardly indicates any fear of levy by Anna. He testified that at this time she had gone back east and did not know where she was. There is no evidence that she had threatened enforcement of the order. The evidence shows that between 1936 and 1938 Joe was repairing the property. The money apparently came from funds loaned by the bank. Nothing had been finished at the time of the deed from Joe to Rosina. There were many mechanic's liens against the property and judgments against Joe on them. The property was in bad physical and financial condition. Rosina had repeatedly asked him to reconvey the property as agreed. He had paid nothing on the $1,000 note although she had given him $60

per month to pay on it. Rosina had hired Attorney Cosgrove to settle all the liens. Joe was about to be married. It was under these circumstances that Rosina insisted that Joe reconvey the property as agreed.

Joe places great reliance on the fact that he put revenue stamps on the deed and that in the first transfer from Rosina and Giovanni to Joe no stamps were placed on the deed. He contends that the purpose of the stamps was to indicate to Anna that a consideration had passed from Rosina to him for the property. While the presence of the stamps is subject to that interpretation, it does not compel the conclusion that his story of the transaction is true and Rosina's untrue. It is significant that when Rosina deeded half the property to her husband Joe took her to the notary to acknowledge the deed and made no objection to the transfer.

Tony Cefalu, Rosina's brother, testified that Rosina had told him that Joe was a good boy, he had "assigned" two apartments to her; also that she had said Joe bought her another property because he did not want to give any money to his first wife.

There is evidence that from May to December, 1937, the rentals were paid by the realtor to Joe and that Joe gave the real estate agent $35 for taxes. Rosina testified that she received all the rents and paid on the deed of trust from them and from other moneys; that both she and her husband from time to time gave Joe moneys to be used on the remodeling of the property as well as the moneys borrowed from the bank. Rosina paid all the real and personal taxes and insurance, although in many instances the payments were physically made by Joe with moneys given him by Rosina. The bank records show that on February 8, 1938, she assumed the then indebtedness. During the existence of the OPA there was "trouble in court" and with the OPA. Rosina hired lawyers. Joe went with her to talk because of her language difficulties. Throughout the handling of her properties Joe did the talking for her and in many instances acted, at her request, in her absence. Mother and son were very friendly and she trusted Joe, although she claims that in many instances he did not use the moneys she gave him for the purposes intended. Rosina signed the store lease on the property, paid for gas and electricity. At first Joe testified that his mother was not sick at the time of the deed to him; then he testified he did not remember if she was; finally he remembered her being in the hospital. He testified that he had given his blood for a transfusion for her. Then on being reminded that tests showed his blood was the wrong type, he admitted he had not and "this woman did."

While there are many inconsistencies and contradictions in Rosina's testimony (much of it can be attributed to the language difficulty) there are equally as many, if not more, in Joe's testimony. Joe was an evasive witness. Moreover he indicated that he enjoyed violating the law. On one occasion when he detailed how he acted in the electrical business the court commented, "You flaunted the law all the way along the line, didn't you?"

Joe's testimony concerning his earnings is quite unsatisfactory. As to profits of the business (grocery and chicken) he and his mother were conducting together, splitting the profits, he first testified that in the period 1943–45 the profit was $1,000 per month; later he changed it to $1,000 to $2,000. In the period 1945–47 he gave different versions of the weekly profits—it was $500, $600 and $700, $100 per week, then suddenly after 1947 there were no profits. Actually this business was bought in June, 1945, and sold in October.

Joe accounted for a $1,500 deposit in one of his bank accounts by saying it came from a plumbing job he did for Fung and Poo; then he testified it came not from these two but from different jobs including theirs. A few days later he testified that his mother gave him the $1,500. This source was corroborated by Rosina and her sister. He testified at some length about the moneys he made in the years 1935 to 1940; then that he did not earn enough in those years to file income tax reports. He kept no books or records.

The record shows that Joe's attitude on the witness stand at times was not too convincing. Sometimes he was evasive,

sometimes belligerent, and sometimes insolent. He admitted signing an affidavit for a final decree of divorce in which he stated he had complied with the terms of the interlocutory decree, when he had not paid the support therein ordered for his child. He admitted he did not file any income tax reports from 1935–40 because he wanted to evade payment of income taxes and the reports he did file, says his counsel, "like those of the other parties to this action * * * may be mistrusted." In none of his reports did he give any intimation that he had any interest in these properties. Joe was contradicted by several witnesses concerning a sale of a poultry store and lease by Joe.

Appellant contends that the following facts make the mother's story that her money was used to purchase the property inherently improbable: 1. The renewal of the $5,000 note was made by Joe as maker with Rosina as a guarantor only. (At this time the title was in Joe.) 2. The $1,000 note was signed by Joe alone and paid by him. 3. The only two payments on the $5,000 note which can be traced from any bank account came from Joe's bank account. (Many bank records of both parties were not available. Both parties agree that rentals were used in making monthly payments on the deeds of trust.) 4. The $625 cashier's check came from a branch in which the son had an account and the mother did not. 5. Presence of revenue stamps on the deed from the son to the mother when there were none on the deed from mother to son. 6. Anna took out execution the day before the deed from Joe to Rosina.

While these facts are persuasive, they do not make the mother's testimony inherently improbable nor necessarily inconsistent with all of the facts in the case.

745 Columbus Avenue.

This is the property which Rosina sold to the Bianchis. The court found that they purchased the property in good faith for value, and quieted their title to it. This finding is not challenged on this appeal. Appellant contends, however, that he was the owner and therefore is entitled to the proceeds of the sale and to an accounting by Rosina of the rents and profits. Rosina testified that the owner, Landucci, had offered to sell it to her about February 21, 1942. She gave him a check as a deposit. Before cashing it, Landucci died. His son returned her the check. She sent Joe to the office of Dreher, the attorney for the estate, with the money to pay a deposit, and she had Joe take care of all matters in connection with the escrow. Joe brought back the receipt made in her name. Dreher testified that Joe told him that his mother was buying the property. One of the heirs of the estate told Dreher to sell it to Rosina in place of another offeror. Dreher wrote letters to Rosina, not to Joe, concerning the payment of the balance of the purchase price. The purchase price and expenses of sale came to $5,063.99, of which $3,000 was secured by a deed of trust. Both parties claim that they paid the difference. No bank records were produced. Rosina testified that at the time, she had $16,000 either in her safe deposit box or at home and that the payments came from that source. The payments were made after threatening letters from Dreher as follows: $1,200 January 29, 1942; $200 February 16, and $163.99 February 20. Rosina testified that on the day of the confirmation of the sale she gave Joe $500 to pay into court. No sum was paid into court nor was there any $500 payment made. These facts are not so inconsistent with her having a large sum of money on hand that we can say the trial court must necessarily disbelieve her. A representative of the title company testified that Rosina ordered the title search. His records indicate that she put up the money. About a year after the purchase Joe opened a small grocery store there, transferring the stock from 801 Filbert. He ran it from 1943 to 1949. He received the profits, and the licenses were in his name. Rosina and her husband worked in the store and Joe paid her wages. He paid no rent although he had agreed to pay his mother rent. The bookkeeper to whom Joe had taken his mother to have her income tax reports prepared told her she would have to put the $30 per month rental in the report even though she did

not receive it. Apparently Joe lost money, for he abandoned it in 1949 whereupon Rosina reopened it. Mrs. Sacculo, Rosina's sister, testified that she helped Rosina run the store in the fall of 1949. She helped Rosina stock the store and kept the books. Joe asked Rosina for money to pay for paint on "the apartment." Rosina asked him when he would finish the work on the apartment and he said when "you give me more money." He then told Rosina that he "quit" and that she could get some one else to do the work for her. On one occasion after suit was started Joe told her in effect that he could not wait for the property until his mother died, he needed it now. Nor in his talks with her did he ever make any claim to the property involved until after suit was filed.

949 Filbert and 2100 Jones.

949 Filbert was bought in November, 1945, from Fogliotti, who was well known to Rosina. She was the grantee in the deed. The purchase price was $25,000. The down payment was by cashier's check for $2,000 and $500 cash. The balance was secured by deed of trust executed by Rosina and husband and covering four properties. Rosina testified she handled the purchase by herself. Prior to this time Rosina had loaned a cousin $9,000 secured by mortgage. This loan and the down payment on the Filbert Street property came from savings Rosina and her husband had accumulated, $9,000 of which was in her safe deposit box and $2,500 at home.

April 29, 1946, 2100 Jones Street was purchased. The record purchase price was $20,000 but the seller required payment of a secret additional $6,000.[2] Joe was present when this $6,000 was paid and wrote out a receipt for it in his mother's name which was signed by the seller. Rosina testified the $6,000 came from payments received by her from the $9,000 loan and from rents. She received $600 per month from rents. Rosina testified that the payment was wholly made with her money. Joe testified half was her money and half his, which he took from his safe deposit box. Joe claims that he is entitled to a one-half interest in 2100 Jones. As in the other properties, Rosina collected all the rents and paid all the taxes, paid for and obtained in her own name all insurance and permits for operating an apartment house, and did the janitor work. Rental notices were in her name. In court ejectment and in OPA proceedings, in Joe's presence, she testified that she was the owner. She received and answered tenants' complaints. She was named as lessor in leases of the stores in the building, and in Joe's presence told the lawyer preparing one of the leases that she was the owner. She employed attorneys in suits brought by her against tenants. Two of the attorneys in these actions testified that although Joe was a witness he did not claim to have any interest in the property. Joe testified that $3,500 was borrowed on the property for the purpose of remodeling; that Rosina agreed to allow him to take $100 per month for his work on the building "out of the construction money" to pay the rent where he was living.

Generally, Joe made the arrangements for title insurance and for the purchase of the various properties, was present at conferences of Rosina with the attorneys preparing eviction notices, at OPA hearings, collected some rentals, served eviction notices, physically made payments for her. Rosina purchased two properties other than those hereinbefore mentioned, 467 Chenery Street and 1851 Mason Street. On the first a house was built but apparently Joe had no part in building it, nor did he appear to assist Rosina in the management, collection of rents or sale of these properties, although he lived in each with Rosina. Appellant argues that the fact that he had practically nothing to do with these properties, to the proceeds of the sale of which he makes no claim, and did have considerable to do with the other properties, proves that he had an interest in the latter. This, like most of the contentions made by him on this appeal, would be persuasive to the trier of fact but not conclusive. While much of the evidence in the case is not inconsistent with appellant's claim, it likewise

2. There is some confusion between Rosina's and Joe's testimony as to whether the exact amount was $6,500, $6,000 or $5,700.

is consistent with Rosina's claim that, while Joe assisted her greatly, partially because of the necessity for him to do her talking for her, the money he used was actually hers.

[3] The record supports the trial court's conclusion that even though some of the money for the purchase of the 801 Filbert property may have actually been paid from Joe's bank account the moneys were actually Rosina's, that a mother-son relationship existed in which the son was assisting her in acquiring and improving property; that on the whole the mother was a shrewd business woman while he was not a shrewd business man; that he was in one business after another, not making a success of any, and therefore unable to acquire the moneys to purchase the properties (he worked nights as a longshoreman from 1940 to 1943, and then in 1949, but under his own testimony was looking for easy work, what he described as "the gravy boat"); that while he had some ability as a contractor he did not pay the liens arising from the work done by him; that while Rosina was in error in some respects as to the time and place when she made payments, her testimony on the whole was more reliable than Joe's. The record supports the inference that the bank loans which were obtained were due to Rosina's credit standing. The banker who handled them died before the trial and hence his testimony was not available. Rosina had many dealings with banks in her neighborhood, borrowing large sums on unsecured as well as secured notes, and as occasional guarantor of Joe in his many enterprises. In view of her frugality, hard work, income of herself and husband, we cannot say, in spite of some difficulty in reconciling figures in the case, that she could not have had the moneys which she testified went into the various properties. Apparently tenant trouble which developed at 801 Filbert and 2100 Jones was due to Joe's failure to finish repairs which he started and for which Rosina gave him moneys.

This case is one to which the conflict of evidence rule well applies. The trial court, which observed the actions of the parties on the stand and in court, is far better able to reconcile the contradictions and discrepancies in the testimony of both parties and to resolve the conflict between them, than can we from the cold record of many pages of transcript and many exhibits.

The judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



115 Cal.App.2d 196

KNOWLES v. ROBERTS-AT-THE-BEACH CO. et al.

Civ. 15197.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1953.

Rehearing Denied Jan. 31, 1953.

Action for injuries plaintiff patron of defendants' restaurant sustained when plaintiff participated in a hobbyhorse race organized by defendants for amusement of defendants' patrons. The Superior Court of the State of California in and for the City & County of San Francisco, Herbert C. Kaufman, J., rendered a judgment for defendants and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that evidence justified submission to jury of question of assumption of risk.

Affirmed.

1. Negligence ⇐136(2)

Normally assumption of risk is a fact question for jury in negligence action.

2. Negligence ⇐136(5)

In action for injuries plaintiff patron of defendants' restaurant sustained when plaintiff participated in a hobbyhorse race organized by defendants for amusement of defendants' patrons, evidence that master of ceremonies announced that some horses were wild and some tame, and that plaintiff saw horse before her and went six to eight feet on horse before falling, during which time plaintiff had opportunity to become

aware of way horse functioned, justified submission to jury of question of assumption of risk.

3. Appeal and Error ⇐882(14)

Where plaintiff in action for injuries offered an instruction on assumption of risk, which instruction as amended was given by court, plaintiff was precluded on appeal from adverse judgment from arguing that question of assumption of risk should not have gone to jury.

4. Workmen's Compensation ⇐2084

If plaintiff patron of defendants' restaurant, who participated in a hobbyhorse race organized by defendants for amusement of defendants' patrons, and was injured, thereby became an unpaid employee of defendants, Industrial Accident Commission would have exclusive jurisdiction of claim for injuries and plaintiff would not be entitled to maintain negligence action for injuries.

5. Negligence ⇐136(31)

Whether violation of city ordinance constitutes a proximately contributing cause of injury is ordinarily a question of fact and becomes a question of law only when it appears that but one inference can reasonably be drawn from evidence.

Richard J. Carew, Lorne M. Stanley, San Francisco, for appellant.

Boyd, Taylor & Reynolds, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff, Leitha R. Knowles, a woman of over thirty was injured when, dining as a patron in defendants' restaurant, she took part in a hobbyhorse race organized by defendants for the amusement of their patrons. The jury found for defendants and plaintiff appeals. She assigns two errors: (1) As a matter of law she had assumed no risk and it was therefore error to submit the issue of assumption of risk to the jury. (2) It was error to exclude evidence of violation by defendants of section 1049 of the Police Code of San Francisco which requires persons operating any "* * * swing, slide or mechanical amusement contrivance for the purpose of conveying human beings" to have it inspected by the Department of Public Works or a duly qualified safety inspector before a license therefor is granted.

[1, 2] Appellant contends that as a matter of law there can be no question of assumption of risk because the testimony of plaintiff is uncontradicted that plaintiff had never seen a hobbyhorse before, did not know the danger involved, and upon inquiry from an attendant was told there was no danger. The evidence does not support the argument. Testimony was given that before the race started an attendant announced through loud speakers: "Some of the horses are wild and some tame, take your own chances." Respondents point out that normally assumption of risk is a question of fact for the jury. Calame v. Stevens, 110 Cal.App.2d 45, 242 P.2d 109; DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 100, 92 P.2d 899. Plaintiff knew that she was entering a race with hobbyhorses on a dance floor in which there was some danger of injury; there was evidence that the master of ceremonies announced that some of the horses were wild and some tame, which circumstance could have put a woman of her age on notice of possible danger. She saw the horse before her and went six to eight feet on it before falling, during which time she had opportunity to become aware of the way the hobbyhorse functioned. There is then sufficient doubt to submit the matter to the jury.

[3] Moreover plaintiff herself offered an instruction on assumption of risk, which instruction as amended was given by the court. She is then precluded from arguing on appeal that the matter should not have gone to the jury. Ray v. Kennedy, 24 Cal. App.2d 583, 76 P.2d 147.

[4] Appellant also urges that by taking part in the race which was a floor show to amuse the patrons for the benefit of defendants she became their unpaid employee and that section 2801(a), Labor Code, excludes the defense of assumption of risk in a personal injury action of an employee. Appellant cites as only authority Edwards v.

Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729, a personal injury action by a radio actress, rendering gratuitous services as hostess at the Canteen, who was thrown to the floor by a service man who jitterbugged with her against her will. The case does not hold that she was an employee. It holds that with respect to workmen's compensation she was not an employee under section 3351, Labor Code, which requires an appointment or contract of hire, express or implied, and does not include voluntarily donated service, but that such is not decisive as to the question of assumption of risk. Section 2801(a) Labor Code. However the court did not decide whether she was an employee for that purpose because she could at any rate not have accepted the risk of the jitterbugging which took place against her will. The case is therefore not authority for appellant. Whether appellant was an employee with regard to section 2801 will depend on the definition of employment in section 2750, Labor Code, formerly section 1965, Civil Code, and the general rules of Master and Servant in 16 Cal.Jur. p. 958. It would seem that in a situation such as in this case there is neither subjection to direction of a master nor any intent to serve him, but only the intent of the patron to amuse herself. Furthermore, if she were an employee under the terms of the compensation act, she is now in the wrong forum. Her claim should have been made to the Industrial Accident Commission which would have exclusive jurisdiction.

The court sustained an objection to introduction in evidence as to a city safety ordinance on the ground that there was no evidence that violation of said ordinance could be a proximate cause of plaintiff's injury. The court expressly gave plaintiff opportunity to introduce evidence as to the causal relation, but no further evidence, except that no license was taken out and that the ordinance was in force, was offered.

[5] Whether the violation of an ordinance constitutes a proximately contributing cause of the injury is ordinarily a question of fact and becomes a question of law only when it apears that but one inference can reasonably be drawn from the evidence. Farole v. Eichman, 39 Cal.2d 822, 249 P.2d 261; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 590, 177 P.2d 279. Appellant relies on Andreen v. Escondido Citrus Union, 93 Cal.App. 182, 187, 269 P. 556, in which it was held that evidence that a fumigator had not taken out a license as required by statute was admissible as evidence of negligence in an action for fumigation damage to an orchard; and Cragg v. Los Angeles Trust Co., 154 Cal. 663, 667, 98 P. 1063, which held that the employment of an unlicensed elevator operator in violation of a municipal ordinance requiring examination and licensing was, except for excusing evidence, negligence per se. She further reasons that the ordinance is a safety ordinance and that it was reasonably possible that the safety inspector would have condemned the hobbyhorses as unsafe, in which case the accident could not have taken place. Respondents deny that the hobbyhorses were mechanical amusement contrivances coming under the ordinance, and relies on Strandt v. Cannon, 29 Cal.App.2d 509, 517–518, 85 P.2d 160, to the effect that lack of a driver's license is no prima facie evidence of incompetence of the driver or his negligence in causing the accident; Wysock v. Borchers Bros., 104 Cal. App.2d 571, 583 et seq., 232 P.2d 531 which holds reversible error to admit lack of driver's license in evidence in an intersection collision case and Moon v. Payne, 97 Cal.App.2d 717, 719, 218 P.2d 550, which reversed a judgment for plaintiff, a child who burned herself at a fire set by defendant without a license, which judgment was solely based on negligence per se on the ground that there was no evidence in the record to create a causal connection between the absence of a license and the injury. It is argued that there was no evidence that the hobbyhorses were in any respect dangerous or defective.

Summarizing, the horse race was conducted for the amusement of the patrons; a bottle of champagne was the prize for the winner; the contestants were all warned that there was some danger of falling off. The situation is the same as a bucking

bronco contest in a public rodeo. The contestants are all aware of some danger, but they assume the risk for the prize offered. The assumption of the risk herein is the controlling factor. The absence of an inspection was not a contributing cause in any sense of the word. The element of some danger was the attraction which moved the customers to participate in the contest. If the jury had found for the plaintiff on the sole ground of the absence of a license to operate, it would have been a clear miscarriage of justice.

Judgment affirmed.

DOOLING, J., concur.



115 Cal.App.2d 1

WOOLAMS v. WOOLAMS.

No. 15321.

District Court of Appeal, First District, Division 1, California.

Dec. 22, 1952.

Proceeding by 36 year old polio victim against her father for support. The Superior Court, County of Marin, Jordan L. Martinelli, J., entered judgment in favor of polio victim for $250 per month support, and father appealed. The District Court of Appeal, Bray, J., held that where divorced father of 36 year old polio victim had a gross income for eight years of $8,500 per year, physical assets of $21,000, and liabilities of $4,129.80 with a possible additional liability of $5,453.87 and still had earning capacity, trial court did not abuse its discretion in requiring father to pay $250 a month for polio victim's support notwithstanding that he was already required to pay $300 per month to his divorced wife.

Affirmed.

1. Parent and Child ⇐3(3)

In proceeding by 36 year polio victim against her father for support, evidence established that polio victim's divorced mother was devoting her entire time and resources to victim's care and that polio victim was exerting every effort toward her own rehabilitation. Civ.Code, § 206.

2. Parent and Child ⇐3(1)

A father may be required to provide additional care for invalid child in addition to necessaries normally required to be furnished a well child. Civ.Code, § 206.

3. Appeal and Error ⇐931(1)

The District Court of Appeal must consider evidence most strongly in favor of trial court's ruling.

4. Divorce ⇐324

Where divorced father of 36 year old invalid polio victim had a gross income for 8 years of $8500 per year, physical assets of $21,000, liabilities of $4,129.80, with a possible additional liability of $5,453.87, and still had an earning capacity, trial court did not abuse its discretion in requiring father to pay $250 a month for polio victim's support, notwithstanding that he was already required to pay divorced wife $300 a month. Civ.Code, § 206.

5. Appeal and Error ⇐991

When a father should be compelled to dip into his physical assets and for how much in order to support his children is primarily for the trial court. Civ.Code, § 206.

6. Parent and Child ⇐3(1)

Purpose of statute requiring parent to support an adult child unable to support himself is to protect the public from burden of supporting the person who was a parent able to support him. Civ.Code, § 206.

7. Parent and Child ⇐3(1)

In determining a child's support allowances, a court is entitled to make an allowance in view of a parent's earning ability, even though it may later turn out that because of circumstances the parent may not be able to realize the full value of that ability.

8. Parent and Child ⇐3(3)

Award granting child support is not final, and trial court entering decree retains

jurisdiction to modify its orders if circumstances warrant a change.

9. Parent and Child ⇐3(1)

Under statute providing that it is the duty of the parent to support the child to the extent of the parents' ability, the question is not the amount the parent has been paying the child but the extent of his ability to support the child. Civ.Code, § 206.

Phillip Barnett, San Francisco, for appellant.

Freitas, Freitas & Allen, San Rafael, for respondent.

BRAY, Justice.

Plaintiff, a polio victim 36 years of age, in an action brought under section 206, Civil Code, recovered judgment against defendant, her father, for $250 per month support. Defendant appeals.

Question Presented.

Did the trial court abuse its discretion?

Facts.

Defendant at the time of trial in 1950 was 63 years old. Prior to 1941 when plaintiff's mother divorced him, all three lived in affluence, defendant having an income of around $100,000 per year. October 7, 1939, plaintiff was stricken with poliomyelitis, and for approximately three years was confined to her bed. She is still crippled from the waist down, has to be lifted as she is unable to walk, and requires constant care and attention, medical and therapeutic treatment. She has no financial resources. Prior to the divorce defendant provided nurses and spent over $12,000 in medical and nursing care. In the divorce decree the mother was awarded $300 per month alimony, which according to their property settlement agreement included support and maintenance of plaintiff. This alimony is the mother's only financial resource. In 1942 plaintiff broke her hip. Defendant paid a $500 doctor's bill thereby incurred. There after until 1944 plaintiff was supported entirely by her mother out of this alimony. In December, 1944, apparently due to the urging of plaintiff's attorney, defendant started paying plaintiff $75 per month. Later, her attorney succeeded in getting this support raised to $100 per month. Approximately two years before the trial defendant gave plaintiff or her mother $1400 to pay back bills incurred by the mother. Defendant required plaintiff to execute a note to him in that amount. He testified that it was for income tax purposes.

[1, 2] Since 1941 plaintiff and her mother have been diligently and bravely seeking a restoration of plaintiff's ability to walk. They have moved from place to place in an attempt to better her condition or to provide quarters more suitable to her condition. On one occasion they went to Sister Kenny's hospital in Minneapolis for four months' treatment. To finance the trip, the mother sold her furniture, jewelry and piano. Defendant was not asked to assist. The mother is getting older, and has had eight years of 24 hour duty taking care of plaintiff. Plaintiff should have a 24 hour nurse which would cost $150 per month. Plaintiff's doctor testified that plaintiff needs a great deal of physio-therapy, massage and re-education of her muscles. She requires a special diet as she is overweight. Plaintiff testified that she takes lessons in ceramics as she hopes to teach the subject one day. She also stated that physical activities such as use of a sewing machine by her feet, a piano by her hands, swimming and exercises with bars and rings would be helpful. The polio foundation has given her a wheel chair and other help including supplying her physio-therapy and massage. Plaintiff has a great desire to overcome her paralysis, marry and have children. She has ability as a sculptress and in time might become self-supporting if she could use her hands properly and had the equipment and material. The evidence supports the conclusion that her mother is devoting her entire time and resources to plaintiff's care and that plaintiff is exerting every effort towards her own rehabilitation. Defendant urges that both mother and daughter fail to realize his financial situation and theirs and are unwilling to reduce their standard of living and to live as other polio victims

with limited income do. The evidence shows some support for this statement. Thus, the daughter has planned an ideal house for a polio victim to be built on a portion of the father's property and which would be highly expensive to build. She pointed out how much help she could get from a hydromatic car which she could learn to drive, a sewing machine, a piano, a gymnasium and a small swimming pool. However, even an impecunious polio victim may point out what things would be helpful to her in her earnest desire to be normal again. "While to the well child, food, clothing, and education, according to the parent's circumstances, are sufficient, if the child be either a temporary or permanent invalid, additional care may be required." Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 506, 115 P. 320, 326. Whether those things are attainable is a different question, dependent upon the earning ability and resources of her father. Any polio victim can, and plaintiff did, show a need far in excess of the amount allowed. But the coat must be cut to fit the cloth. This brings us to the vital question in the case—

Defendant's Financial Situation.

Defendant is now paying plaintiff and her mother $400 per month. He also pays $576 per year ($48 per month) premium on life insurance of which the mother is the beneficiary. (Apparently there is a $9,195 loan against this policy.) He has been an accountant, but since 1930 has been a promoter, investigating business propositions for clients, bringing investors and people having money to invest together. He has no office or fixed income. The period between making deals is long. He testified his gross income in 1942 was $6,123.61, in 1943, $12,683.97, in 1944, $11,731.02, in 1945, $12,654.43, in 1946, $7,423.37, in 1947, $1,955.13, in 1948, $5,252.22, in 1949, $10,152.47. These figures are taken from his income tax reports. He claims his net income after paying support to plaintiff and her mother in 1947 was minus $4554.20, in 1948, minus $215.65, and in 1949, plus $1051.36. He computes the amounts paid to plaintiff and her mother in 1949 as totaling 60 per cent of his gross income, and in July, 1950 (at the time of trial) as 57 per cent. It appears that in determining *gross* income he first deducts income taxes. He claims he has unsecured liabilities of $9,683.67, consisting of a bank overdraft of $129.80, personal loans $4,000, and a tax liability of $5,453.87. This tax liability is contingent and questionable. His only assets are furniture worth $1000 in storage at $17.50 per month and unimproved real property in Marin County which he purchased in 1926 for $97,000, portions of which he has sold from time to time to liquidate his liabilities. Defendant claims he has tried but has been unable to sell this property. There is a loan against the property for $13,490.83. One Nipper, a realtor called by plaintiff, estimated the value of the property as $43,500, although he said "I would not say it has reasonable market value now." His value was based upon selling it parcel by parcel, assuming that each individual would take care of his own sewer extension. Defendant offered no testimony as to the value of this property. The court found its market value to be in excess of $20,000 over the lien. (On motion for new trial, defendant filed the affidavit of one Jones to the effect that "the net realizable return for the sale of said property would not exceed $4,000.00" over the lien.) Defendant claims that at the time of the divorce the community debts were $62,330, including expenses of plaintiff's illness, of which he has paid off $52,281; that he is supporting plaintiff to the extent of his ability. He resides at the Pacific Union Club in San Francisco and belongs to the Olympic Club. He contends these memberships are necessary because it is there he gets his business contacts. His living expenses are not high, costing him about $200 per month. He claims he has tried to get a job but doubts if a large firm of accountants would employ a man of his age. He "cannot handle the little stuff" and feels that his best opportunity lies in fairly good size promotions. At the time of trial he was not expecting any substantial fees and did not know where he would get the next $300 to pay plaintiff's mother. He has no fixed income. Some months he receives nothing.

He has been fortunate in being able to borrow to keep him going until fees come in.

Did the Court Abuse Its Discretion?

[3-8] The court found that defendant "is an able-bodied man of considerable experience in the business world, is competent, intelligent and personable; that Defendant is capable of earning an income sufficient to enable himself to pay" the amount ordered for plaintiff's support. Here is a father 63 years of age, whose average yearly gross income over the previous eight calendar years was $8500, whose gross income for the first six months of 1950 was $3850, whose physical assets are furniture valued at $1000 and equity in real property worth at least $20,000 (we are required to accept this figure under the rule that we must consider the evidence most strongly in favor of the trial court's ruling), who has liabilities of $4129.80 and a possible liability of an additional $5,453.87, and who still has earning capacity. Can this court say it was an abuse of discretion to require that father to pay $250 per month for plaintiff's support in view of the fact that he is also required to pay $300 to the mother? Although it is a hard case and one in which the trial court about reached the limit of defendant's ability to pay, we cannot say that there was an abuse of discretion. Defendant contends that a court cannot require him to dip into his physical assets to support his indigent sick child. He cites no cases in support of this contention, nor is it the law. See Bailey v. Superior Court, 215 Cal. 548, 11 P.2d 865, where the court intimated that a father might even be required to sell trucks he was using in his farming operations in order to support his children. When a father should be compelled to dip into his physical assets and for how much is primarily for the trial court to determine. It seems harsh that a man 63 years of age should be required to use up his life's earnings, if necessary to support his child, and thereby leave himself no cushion to fall back upon, for the years not too distant when he will have very little, if any, earning ability. Before that cushion should be reduced substantially, however, it would seem that the needs of the child must be pared down to a minimum. The purpose of section 206 seems to be to protect the public from the burden of supporting a person who has a parent able to support her. See Duffy v. Yordi, 149 Cal. 140, 84 P. 838, 4 L.R.A.,N.S., 1159. Care must be taken, however, in applying this statute to see that the end result is not two persons for the people to support rather than one. The difficulty in this case is that we cannot say that the trial court felt there was any need for dipping substantially into defendant's assets. The evidence shows that defendant is engaged, as we said in Cameron v. Cameron, 85 Cal. App.2d 22, 29, 192 P.2d 89, 93, in a business "whose success depends upon how much energy and effort he puts into" it. Defendant's business is of the type in which at any time he might receive fees far in excess of the $8500 year's gross average. The trial court in its discretion made an award in view of defendant's earning ability. Whether subsequent events bring returns commensurate with that ability is another question and one to be determined in a proper proceeding, if defendant fails to make the payments ordered. If such failure is justified by a lack of income and not by a deliberate refusal to use his talents, the court would then so find. In determining support allowances a court is entitled to make them in view of a person's earning ability, even though it may later turn out that because of circumstances the person may not be able to realize the full value of that ability. As said in Anderson v. Anderson, 124 Cal. 48, 55, 56 P. 630, 633, 57 P. 81, where the court in a divorce action had made an allowance for support of an invalid adult child, "There is no settled rule which can be invoked in such a case to control the discretion of a trial court * * *." It should be pointed out, too, that there is nothing final about this award. It may be changed at any time that circumstances require or justify a change. "If petitioner's circumstances have since changed so that the order places upon him an intolerable burden, he is not remediless. The trial court entering the decree still retains juris-

diction to modify its orders if circumstances warrant the change, and the proper procedure for a party who is unable to comply with an order for * * * the support of his minor children is to seek a modification of the order * * *." Bailey v. Superior Court, supra, 215 Cal. 548, 555, 11 P.2d 865, 868. The same rule applies to support of an adult child. See Paxton v. Paxton, 150 Cal. 667, 89 P. 1083.

The facts in Gilbert v. Gilbert, 98 Cal. App.2d 444, 220 P.2d 573, cited by defendant, are not comparable to those in our case, although the rule of law discussed is. "Clearly the court refused to consider competent evidence and ignored the correct rule of law. His order should have been predicated upon the *ability of defendant to pay* as well as upon the necessity of the minor children." 98 Cal.App.2d at page 446, 220 P.2d at page 574. Nor is In re Lande, 96 Cal.App.2d 926, 216 P.2d 909, in point. It was a contempt proceeding in which "petitioner was adjudged in contempt for failing to comply with an order which, according to the court below, 'he simply can't comply with.'" 96 Cal.App. 2d at page 931, 216 P.2d at page 913.

[9] Defendant contends that because he was paying $100 per month for plaintiff's support, had in the past paid medical bills, and about two years before the trial gave plaintiff's mother $1400 to pay past due bills, this action will not lie. He cites no cases to support the contention. There is no basis for it. Its absurdity is shown by an exaggerated example. Under it, a millionaire could not be required to adequately support his invalid child if he were already paying a nominal sum for its support. Section 206 provides that it is the duty of the parent to support the child *to the extent of his ability.* The question in all cases under that section is not the amount the parent has been paying, but the extent of his ability to support the child.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

115 Cal.App.2d 131

MARGOLIS v. MARGOLIS.

MARGOLIS v. MARGOLIS et al.

Civ. 19050.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1952.

Hearing Denied Feb. 26, 1953.

In suit for divorce the Superior Court of Los Angeles County, Walter R. Evans, J., entered a decree of divorce in favor of husband and awarded husband $328/440$ of total properties accumulated since marriage, and wife appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained findings.

Judgment affirmed.

1. Divorce ⇐130

Evidence sustained finding that husband was entitled to divorce on ground of extreme cruelty of wife.

2. Divorce ⇐184(6)

On appeal from decree granting husband divorce on ground of extreme cruelty of wife, it was not function of District Court of Appeal to weigh evidence anew.

3. Divorce ⇐184(10)

Where finding of trial court that wife was guilty of extreme cruelty entitling husband to divorce was sustained by substantial evidence, finding was conclusive on appeal.

4. Divorce ⇐116

In divorce suit, court properly admitted evidence as to alleged acts of cruelty by wife 30 years before, since period of time during which acts of cruelty continued had a distinct bearing on ultimate disposition of community property. Civ.Code, § 146.

5. Divorce ⇐249(3)

Where trial court in divorce suit made finding, based on substantial evidence, that wife had been guilty of extreme cruelty, it was for trial court to determine whether any portion of community estate should go to wife when husband was awarded divorce. Civ.Code, § 146.

6. Divorce ⇐286

When, under substantial evidence of extreme cruelties, the trial court in divorce

suit awards more than one-half of the community property to one spouse, the reviewing tribunal is without jurisdiction to do more than determine whether trial court abused its discretion. Civ.Code, § 146.

7. Husband and Wife ⇐264

In suit wherein husband was granted a divorce on ground of wife's extreme cruelty, evidence sustained trial court's finding that only $112,000 worth of property out of $440,000 worth of disputed property was community property, and that remainder was husband's separate property. Civ. Code, § 1642.

8. Husband and Wife ⇐278(3)

Where attorney of wife at time of separation of husband and wife prepared a "memorandum of agreement" and a "separation agreement," which were executed by parties, and "separation agreement" provided for custody and support of daughter, that certain realty was separate estate of wife, and that husband and wife each relinquished all claims to any property then owned or thereafter acquired by either of them, and the "memorandum of agreement" acknowledged receipt of $6,000 by husband and recited that wife had certain separate property as to which husband would never make any claim, court in divorce suit properly found that the agreements constituted a property settlement.

9. Husband and Wife ⇐279(1)

Where "memorandum of agreement" and "separation agreement" executed by husband and wife when they separated related to the same matter and were executed together as one transaction, they were properly read together as one agreement in divorce suit. Civ.Code, § 1642.

10. Husband and Wife ⇐279(3)

Evidence sustained trial court's finding in divorce suit that property settlement agreement, which husband and wife had entered into the first time that they separated, was not abrogated by subsequent reconciliation when they resumed marital relations.

11. Husband and Wife ⇐279(3)

The resumption of marital relations by husband and wife after they first separated and entered into property settlement agreement, was of material weight in divorce suit in arriving at determination of question of whether parties intended that property settlement agreement should be abrogated by subsequent reconciliation, but resumption of marital relations was not of itself conclusive.

William B. Beirne, Newby, Holder & Newby, and Dee Holder, Los Angeles, for appellant.

Vaughan, Brandlin & Wehrle, J. J. Brandlin and Pat B. Trapp, Los Angeles, for respondents.

MOORE, Presiding Justice.

From an interlocutory decree of divorce and an award to respondent husband of $^{328}/_{440}$ of the total properties of the twain accumulated since marriage, the wife appeals.

Mr. and Mrs. Margolis were married in 1902. At that time respondent was engaged in the jewelry business in Kansas City. Early in 1920 he was adjudicated a bankrupt and the couple moved to Albuquerque, New Mexico. Respondent there purchased a home which the family occupied until December, when at the wife's instance the parties separated. Her attorney, Judge John Simms, represented her in the negotiations and in preparing a property settlement and separation agreement. This agreement consisted of two documents: the "separation agreement," and the "memorandum of agreement." Both were executed on the same date. Pursuant to those writings respondent received $6,000, an automobile and certain insignificant items of personalty. After such matters had been disposed of, Mr. Margolis transferred his domicile to Los Angeles.

In June, 1921, Vivian, daughter of the parties, joined Mr. Margolis in his Los Angeles home on St. Andrews Place. In August appellant paid them a visit and remained a few weeks. She then returned to Albuquerque where she sold the home and also an apartment building she had purchased after the separation. Returning to

the St. Andrews residence, she resided for six months, but no reconciliation occurred. The couple occupied separate apartments. Mrs. Margolis and Vivian departed, made a home in Los Angeles, then South Pasadena, later in a Burbank dwelling Mrs. Margolis had constructed. However, in 1924, pursuant to the entreaties of the daughter, the couple resumed their conjugal relationship and family life until the final separation in 1950. In July of that year, Mr. Margolis established his residence in an apartment house where he remained until he went to live in the home of Vivian and her husband.

After respondent had instituted the instant litigation by filing a complaint to have his rights determined under the writings executed by the parties after their separation in 1920, the action ultimately went to trial on appellant's complaint for divorce and respondent's cross complaint. Vivian Fern was by appellant made a defendant with the allegation that she had received gifts of community property from her father. The judgment determined that of the combined assets of the parties valued at $440,000, the community estate owns $112\frac{7}{440}$, respondent the balance. On this appeal, Mrs. Margolis attacks the findings that she treated her husband with extreme cruelty and that the greater portion of the total estate is respondent's separate property.

Divorce

[1] In support of the determination that respondent was entitled to a divorce on the ground of extreme cruelty, the court found that during the entire period of the marriage, appellant had "used insulting, abusive, derogatory and profane language and expressions" toward Mr. Margolis; that she had repeatedly humiliated him in the presence of friends and relatives; that during recent years while respondent was in ill health she continually upset him and hindered his recovery; that she went so far as to threaten his life. Such findings, based upon substantial evidence, support the court's conclusion that respondent is entitled to a divorce on the ground of extreme cruelty.

The testimony of Mr. Margolis, of Vivian Fern, and of former and present employees of the family was to the effect that for over thirty years, Mrs. Margolis treated her husband with a total lack of conjugal kindness, bordering on contempt and hatred. She continually berated him; applied vile epithets and opprobrious terms of hatred and contempt for his maternal ancestry. Mr. Phelps, a male nurse who attended respondent in recent years, testified that on one occasion Mr. Margolis fell while attempting to get out of a chair; that when he arrived to give aid he found Mrs. Margolis standing over the old gentleman addressing him in language seasoned with abhorrence and disgust while his patient was too weak to stand by his own effort; that appellant objected to Mr. Margolis' visiting his Jewish relatives, and to the visits of Vivian to see her father. He testified that on one occasion appellant "disowned the daughter in his presence and said she was no daughter of hers since she was married to a little fat pig, referring to Mr. Fern." There was ample proof that appellant's behavior caused Mr. Margolis much suffering and upset him greatly, that he was rendered extremely nervous, lost his appetite; that many times after Mrs. Margolis' tirades he "would go off and cry."

[2–4] In view of such evidence, this court is powerless to interfere with the findings and judgment. It is not the function of an appellate court to weigh the evidence anew. The issue of cruelty and its effect on the aggrieved spouse are questions of fact for the trial court and its determinations are conclusive when, as here, substantial evidentiary support therefor is revealed by the record. LeFiell v. LeFiell, 108 Cal.App.2d 321, 323, 239 P.2d 61. There was no error in the court's overruling appellant's objection to the introduction of evidence of her alleged acts of cruelty that occurred thirty years before. The period of time during which the acts of cruelty continued had a distinct bearing on the court's ultimate disposition of the community property. Arnold v. Arnold, 76 Cal.App.2d 877, 881, 174 P.2d 674.

Division of Property

After finding that the total value of the property in dispute was $440,000 and that the value of the community interest therein was $112,000, the court determined that the balance comprised the husband's separate property. Mrs. Margolis was awarded two pieces of income property and cash totaling $40,500 and in addition, the right to reside in the family home for the remainder of her life. In order to subvert such determination, appellant now presents numerous arguments in support of her contention that the court erred in its findings. She contends that the only proper ultimate fact to be derived from the evidence is that the totality of the property is community in character. She insists that respondent's proof fails to overcome the familiar statutory presumption that property acquired during marriage, though standing in the husband's name alone, is a community asset. Civ.Code, sec. 164.

[5–7] In order to ascertain the rights of the spouses in the property in dispute a consideration of the writings made in 1920 was essential. The court found that the agreements executed in Albuquerque constituted a property settlement agreement pursuant to which Mr. Margolis received $6,000. Such sum was by him during the period of the separation invested wisely. By 1924 it had increased to $126,000. That was the year in which the reconciliation was effected. The court also found "that the said property settlement agreement has never been rescinded by the parties as to the provisions executed at or prior to the time the parties resumed living together in the year 1924." Accordingly, in allocating the $440,000 to the respective interests of separate estate and community property, the court allowed Mr. Margolis a 6 per cent return on his separate property right of $126,000 and concluded that the balance was the fruit of his managerial wisdom. Thus, the court properly derived the portion belonging to the community. Such computations were proper and represent a fair and equitable allocation of the income. Todd v. McColgan, 89 Cal.App. 2d 509, 513–514, 201 P.2d 414; Pereira v. Pereira, 156 Cal. 1, 7, 103 P. 488, 23 L.R.A., N.S., 880. Moreover, the court might with judicial grace and abundant authority, Civ. Code, sec. 146, have awarded respondent the entirety thereof on the finding that appellant was guilty of extreme cruelty. In view of the proof of appellant's acts adopted by the court, it was for the "keeper of the king's conscience" to determine whether any portion of the community estate should go to appellant. When under such evidence of extreme cruelties the trial court awards more than one half the community property to one spouse, the reviewing tribunal is without jurisdiction to do more than determine whether the court below abused its discretion. Clearly, there was no such abuse here. The findings of extreme cruelty, abundantly justified by the evidence, warrant the award. According to the computations made by charging the living expenses to the community and allowing respondent 6 per cent per annum on his capital of $126,000 for 26 years, the community estate could not have greatly exceeded the sum derived by the trial court as of 1950. Hill v. Hill, 82 Cal.App.2d 682, 696, 187 P.2d 28.

[8, 9] There is no support for the contention that the court erred in concluding that the 1920 agreements constituted a property settlement and were so intended by the parties. The two writings were prepared by Mrs. Margolis' attorney, executed on the same date and the body of the "memorandum of agreement" referred to the "separation agreement." The latter provided for the custody and support of the daughter, that certain Albuquerque real property was the separate estate of the wife, and contained mutual covenants whereby each relinquished all claims to any property then owned or thereafter acquired by either of them. The other document acknowledged receipt of $6,000 by the husband and recited that Mrs. Margolis had certain "mortgages, diamonds and assets" which were her separate property and to which the husband "undertakes that he will not, in the future, make claim or demand." Thus since the documents related to the same matter and were executed together, obviously as one transaction, they were properly read together as one agree-

ment. Civil Code, sec. 1642; McNeill v. Pappas, 74 Cal.App. 591, 596, 241 P. 897. Appellant's contention is that they were unalike and had nothing in common, and that because respondent did not plead their kinship the court was without power to determine that they constituted one agreement. The chancellor is not so circumscribed. The parties, their controversy and their evidence were all before the court whose duty it was to settle all differences and terminate their mutual unpleasantness.

[10] Under attack also is the finding that the executed provisions of the agreement with respect to division of property were not abrogated by the reconciliation. The record reveals that after the parties entered into the agreement each transacted business in his own name and separately managed and dealt with the property received under that agreement. Mrs. Margolis remained in New Mexico, retained the dwelling and furniture and acquired an apartment house as her separate property. Later, after coming to California, she purchased a lot here and constructed a home, and bought an apartment building. She eventually sold these properties, invested the proceeds in a business which became bankrupt and ultimately lost practically all. She testified that Mr. Margolis handled the sales of her properties and collected the proceeds. However, his denial adopted by the court raised a conflict on this point. He could not remember receiving such sums. Moreover, such sales were made while the parties were residing in separate homes about six months prior to reconciliation.

[11] At all times after the 1920 separation Mr. Margolis' business transactions were consummated in his own name. After the parties came together again in 1924 his manner of operating was continued. He never consulted his wife or discussed with her his numerous real estate deals. After 1924 respondent's sole income was from his realty investments owned at that time. He was never employed by anyone, and had no occupation other than making investments and managing his properties. Accordingly, the court's finding is supported by the evidence. Whether the parties intended to terminate or abrogate entirely their prior agreement was a question of fact. The resumption of marital relations is of course of material weight in arriving at such intent, but it is not of itself conclusive. DeVault v. DeVault, 90 Cal. App.2d 15, 16, 202 P.2d 375. Since upon the evidence introduced the court concluded that respondent was possessed of some $126,000 in separate property at the time of reconciliation, and since he was never gainfully employed and had no income other than the rents, issues and profits resulting from such property, the court did not arbitrarily or unfairly determine that his assets held in 1950, less that part attributable to his managerial skills, were then his separate estate. Huber v. Huber, 27 Cal.2d 784, 791–792, 167 P.2d 708.

It is to be observed that in the main appellant's attack on the judgment consists of argument that the findings lack evidentiary support and she relies upon numerous inconsistencies and ambiguities in the testimony of Mr. Margolis. It is true that such testimony leaves much to be desired from the standpoint of clarity and precision. However, the trial court kept in view the fact that the witness was 81 years of age and had been in ill health for several years. His testimony demonstrates that he had difficulty in comprehending and answering the questions propounded to him. Nevertheless, such testimony amply supports respondent's position and is not, as labeled by appellant, so "confusing or contradictory" as to be disregarded by this court.

Judgment affirmed.

McCOMB, J., concurs.

114 Cal.App.2d 680

PEOPLE v. FRANKFORT et al.

Cr. 4677.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1952.

Defendants were convicted by court sitting without a jury of 68 counts of grand theft and one count of conspiracy to commit grand theft. The Superior Court of Los Angeles County, Clement D. Nye, J., sitting without a jury, entered judgment of conviction and denied motion for new trial, and defendants appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain convictions except as to two counts.

Judgment and order reversed as to counts 11 and 12 and affirmed as to remaining 67 counts.

1. Conspiracy ⇐43(6)

In prosecution for conspiracy to commit a grand theft, allegations that defendants falsely and fraudulently represented that, with purchase of each charter membership, there would be given a parcel of land to be exchanged for a lot in a selected rental area upon which a cottage would be constructed and furnished, that defendants' corporation would construct sanitarium and bath facilities and had developed source of mineral water, and that the maintenance fee collected from members was for upkeep of cottages stated a public offense. Pen.Code, §§ 182(4), 184.

2. Conspiracy ⇐43(6)

In prosecution for conspiracy to commit grand theft even if the allegations of the conspiracy count were of a promissory character, a public offense was stated in view of fact that it was also alleged that defendants had conspired to obtain money by false pretenses and promises with fraudulent intent not to perform. Pen.Code, §§ 182(4), 184.

3. Conspiracy ⇐23, 27

A "criminal conspiracy" is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the agreement, but it is not necessary that the overt acts be criminal if they are done by one of the conspirators as a step toward furtherance of the conspiracy. Pen.Code, §§ 182(4), 184.

See publication Words and Phrases, for other judicial constructions and definitions of "Criminal Conspiracy".

4. Conspiracy ⇐47

The existence of a conspiracy may be established by circumstantial evidence.

5. Conspiracy ⇐41

Members of a conspiracy are bound by all acts of other members done in furtherance of the agreed plot.

6. Criminal Law ⇐422(6)

Once a conspiracy is established, all evidence of the substantive crimes becomes admissible against all participants even though other conspirators were not present.

7. Criminal Law ⇐1159(2)

Before a reversal of a conviction may be had on ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

8. Criminal Law ⇐260(11)

The District Court of Appeal must assume, in support of the judgment of conviction, the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts justify the inference of guilt.

9. Criminal Law ⇐1159(2)

If the circumstances reasonably justify determination of trier of fact, reviewing court's opinion that the circumstances might also reasonably be reconciled with defendant's innocence will not warrant a reversal of the judgment of conviction.

10. Conspiracy ⇐47

Evidence was sufficient to sustain conviction for conspiracy to commit grand theft. Pen.Code, §§ 182(4), 184, 1111.

11. Criminal Law ⇐260(11)

Trial court has duty to pass upon credibility of witnesses, resolve conflicts and inconsistencies in the testimony, and determine the weight to which it is entitled.

12. Criminal Law ⇐511(2)

Corroborating evidence is sufficient if it connects defendant with commission of crime in such way as reasonably to satisfy trier of facts that accomplice is telling the truth.

13. Criminal Law ⇐511(1)

Corroboration must create more than a suspicion of guilt, and evidence thereof is sufficient even though it be slight, and, when standing by itself, entitled to but little consideration.

14. Criminal Law ⇐511(3)

Corroboration may be by direct or circumstantial evidence.

15. Criminal Law ⇐741(5)

The weight to be given corroborative evidence is for trier of the facts to determine.

16. Criminal Law ⇐511(3)

The relationship of the parties and all their acts and conduct may be considered in determining whether there are sufficient corroborating circumstances.

17. Conspiracy ⇐45

In prosecution for conspiracy to commit grand theft, in passing upon question as to whether a conspiracy had been formed, the trial court could consider facts and circumstances of what transpired at conferences between one defendant and some of the complaining witnesses even though at time of the conference the witnesses had already parted with their money.

18. False Pretenses ⇐4

Where grand theft charges are based upon theory of obtaining money by false pretenses, elements of that offense are intent to defraud, an actual fraud committed, use of false pretenses to perpetrate the fraud, and reliance upon the fraudulent representations in parting with money or other property.

19. False Pretenses ⇐51

In prosecution for grand theft, intent to defraud is a question of fact to be determined from all the facts and circumstances of the case.

20. False Pretenses ⇐49(2)

In prosecution for grand theft, evidence was sufficient to sustain trial court's implied finding of intent to default.

21. False Pretenses ⇐7(5)

Unconditional promises made without intention of performance may constitute actionable fraud.

22. Criminal Law ⇐260(11)

Whether a promise was dishonestly made is a question of fact for trial court's determination upon all the evidence.

23. False Pretenses ⇐49(2)

In prosecution for grand theft, evidence was sufficient to establish that defendants' promises were fraudulently made.

24. False Pretenses ⇐49(5)

In prosecution for grand theft, where most of the victims gave specific testimony that they relied upon defendants' representations in parting with their money, fact that such inquiry was not made of several of the victims was not fatal to defendants' conviction on counts involving such victims.

25. False Pretenses ⇐49(5)

Express testimony of a victim of false pretense that he was induced to part with his money by fraudulent statements of the accused is not essential, and it is sufficient if the inference of his reliance could be drawn from all the evidence.

26. False Pretenses ⇐9

In prosecution for grand theft, where one complaining witness testified that he did not part with his initial payment of money in reliance upon defendants' representations, and no new representations were made at time of his subsequent payment, a necessary element of the offense charged was absent, and, therefore, conviction on counts reflecting the transactions with such witness would be reversed.

27. Criminal Law ⇐427(5)

A prima facie showing of existence of conspiracy, not establishment of conspiracy beyond a reasonable doubt, is necessary before acts of each coconspirator in pursuance thereof is attributable to all other

conspirators, even those not personally present when such acts were committed.

28. Criminal Law ⇐422(6)

In prosecution for grand theft, where all of defendants' salesmen who were part of the fraudulent scheme were coconspirators, hearsay testimony of salesmen and victims concerning statements made out of presence of defendants was admissible.

29. Criminal Law ⇐553

Fact that inconsistencies and conflicts exist in witness' testimony does not bring it within rule of inherent improbability, but, to come within the rule, the testimony must be such that it is physically impossible for it to be true, or its falsity must be apparent without resort to inference or deduction.

30. Criminal Law ⇐747

Conflicts and inconsistencies in testimony are to be resolved by the trier of fact.

31. Criminal Law ⇐553

In prosecution for grand theft, fact that documents involved in defendants' scheme were read to complaining witness by defendants' salesmen would not make it inherently improbable that other, different, and additional representations were made by the salesmen.

32. False Pretenses ⇐22

In prosecution for grand theft, fact that defendants' contracts with complaining witnesses contained statements that the contracts constituted the entire agreement between the parties, that defendants' corporation was not bound by any representation outside the contract, and that the complaining witness had read and understood what he was signing did not prevent prosecution for grand theft since the people were not parties to the contract and, therefore, could show the true nature of the transaction.

33. Stipulations ⇐14(8)

In prosecution for grand theft, defendants had right to waive confrontation of some witnesses by stipulating that testimony of these witnesses, which was given in the preliminary hearing, might be read at trial subject to right of any desired additional cross-examination.

34. Stipulations ⇐14(8)

In prosecution for grand theft, where defendants stipulated that testimony of certain witnesses, which was given at the preliminary hearing, might be read at trial subject to right of any desired additional cross-examination, fact that defendants became displeased with result of stipulation did not give them right to insist that the District Court of Appeal reexamine the credibility, weight, and intrinsic value of such testimony.

35. Criminal Law ⇐260(11)

The District Court of Appeal is not authorized to reweigh the evidence and draw inferences contrary to those drawn by the trial court.

36. Criminal Law ⇐1144(13)

Upon appeal, the evidence must be viewed in light most favorable to the successful party in the trial court.

37. False Pretenses ⇐49(1)

In prosecution for grand theft, the circumstances connected with the transaction, the entire conduct of defendant, and defendant's declarations to other persons are proper matters for consideration of the jury and may be looked to to furnish the corroborative evidence contemplated by the law, and, likewise, testimony of all prosecuting witnesses may be taken into consideration for this purpose. Pen.Code, § 1110.

38. False Pretenses ⇐49(1)

In prosecution for grand theft, evidence of use by defendants of a uniform plan and pattern and very similar false statements and of defendants' conduct was sufficient to establish corroboration as contemplated by law.

39. Indictment and Information ⇐130

Question whether a series of wrongful acts constitutes a single or multiple offense must be determined by the peculiar facts and circumstances of each individual case.

40. Criminal Law ⇐29

In cases of theft involving the obtaining of money or property by false pretenses, where property of different value or character is taken at various times, though upon

the same false representations, a separate crime is consummated upon each distinct appropriation.

41. Criminal Law ⇐29

In prosecution for grand theft, where defendants obtained possession of several sums of money at different times but on the continuing strength of the representations originally made, the trial court was justified in treating each receipt and appropriation as a distinct offense.

42. False Pretenses ⇐20½

In prosecution for grand theft, where victims made down payments of less than $200 but also signed either a promissory note in excess of $200 or a contract obligating himself to pay such amount, but the subsequent payments were each less than $200, offenses charged were completed when promissory notes and written obligations were obtained by use of false representations, and, therefore, convictions for grand theft on such counts would stand. Pen. Code, § 7, subds. 10, 12; Civ.Code, § 953.

43. False Pretenses ⇐11

Where victims of crime of grand theft signed promissory notes and contracts obligating themselves to pay sums in excess of $200, they parted with "property" within meaning of the Penal Code. Civ.Code, §§ 654, 655, 1427, 1428; Pen.Code, § 7, subds. 10, 12; §§ 484, 492.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

44. False Pretenses ⇐49(1)

Evidence was sufficient to sustain conviction for grand theft.

45. False Pretenses ⇐7(1)

Where one has knowingly and designedly, by fraudulent representations, defrauded another, such representation shall be treated as continuing so as to cover any money, property, or services received as a result thereof. Pen.Code, § 484.

46. False Pretenses ⇐7(1)

Where defendants' false representations were made at time victim signed promissory note or contract providing for future payments, defendants could not escape conviction for grand theft on counts involving collection of the notes on ground that the crime, if any, had been committed prior to the collection, since the false representations would be treated as continuing to cover the payments subsequently made.

47. False Pretenses ⇐38

In prosecution for grand theft, where six counts covering transactions with two married couples named only the husbands, but the wives either made the payments or most of them and testified as to their reliance on the representations, the variance was immaterial in view of facts that both the husbands and wives were present when representations were made, and that the transactions covered by these counts were the only ones with these two families. Pen. Code, § 956.

48. False Pretenses ⇐38

In prosecution for grand theft, where persons listed in 10 counts did not actually pay money to defendants' corporation or its salesmen, but payments were made in each case by some member of the victim's family who was virtually acting as messenger for the particular victim, and false representations were made to each of these victims, who each relied thereon, the variance was immaterial. Pen.Code, § 956.

49. False Pretenses ⇐23

In prosecution for grand theft, as to five counts in which the victims gave money to defendants' salesmen who were not named as coconspirators and of whom only one out of the four testified at the trial, permitting such victims to testify as to the representations made was proper in view of fact that the four salesmen were acting as instrumentalities of the defendants in making solicitations and misrepresentations in furtherance of defendants' scheme.

50. Criminal Law ⇐62

A principal, in order to be held criminally liable, must be shown to have knowingly and intentionally aided, advised, or encouraged the criminal act committed by the agent.

51. Criminal Law ⇐254

In prosecution for grand theft and for conspiracy to commit grand theft, complaint

of one defendant that trial judge's verdicts went against him because the judge did not believe in high pressure selling and complaint of other defendant that the trial court was guilty of misconduct and prejudice and that the verdict was influenced by matters outside the record were without merit.

52. Criminal Law ⇐938(2)

In prosecution for grand theft and for conspiracy to commit grand theft, where defendant did not claim that his counsel had acted in bad faith in advising him that he should not testify that the attorney had advised him, from inception of the project, that his conduct was legal, fact that defendant subsequently discovered that such evidence was proper and should have been presented would not entitle defendant to a new trial on grounds of newly discovered evidence.

53. Criminal Law ⇐942(2)

In prosecution for grand theft and for conspiracy to commit grand theft, fact that one of defendants' salesmen testified that he got his sales talk from one defendant and thereafter denied this at hearing before a state board did not require granting of a new trial.

54. Criminal Law ⇐911, 1156(1)

In ruling on a motion for new trial, the trial court has a large discretion, and its ruling will not be disturbed on appeal unless there is a clear abuse thereof.

Sidney Traxler, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Logan Lindley, Deputies Dist. Atty., Los Angeles, for respondent.

FOX, Justice.

Defendants Frankfort and Nudelman were convicted, by the court sitting without a jury, of 68 counts of Grand Theft and one count of Conspiracy to commit Grand Theft, and were sentenced to the penitentiary. They appeal from the judgment and the order denying their motion for a new trial.[1]

This prosecution arose out of defendants' participation in a club and subdivision project in which various individuals were induced to invest their money through fraudulent representations allegedly made by them. The sales scheme developed on a step by step basis. The modus operandi was as follows: First, potential buyers were offered an associate membership in a country club, then a charter membership, and finally a conversion membership, each of which was sold at progressively higher prices. These were followed by building-lot sales, and collection of maintenance fees. The sales inducements varied from time to time. Initially, the lure was a gift lot, then an equity bond, and finally a lot-purchase discount proposition. Out of these operations defendants collected some $450,000.

In the summer of 1945 defendant Frankfort purchased the property and facilities here involved, which were located at Lake Elsinore, California. Defendant Nudelman became associated with him. A considerable portion of the property had been previously owned by the Clevelin Realty Corporation, which had for a number of years carried on a subdivision program and had sought to develop both a country club and a beach club, and had accordingly sold a great many memberships throughout Southern California. The Clevelin Realty Corporation went defunct and the holder of the trust deed became the owner of the property through foreclosure. In acquiring the property Frankfort arranged to get a list of all former holders of membership privileges in the Clevelin Realty organization. In December, 1945, defendants Frankfort and Nudelman (together with a third party who some months later disposed of his interest to them) organized the Spa Corporation, which took over these prop-

1. The intricate transactions and operations here under review cover 5,000 pages of Reporter's Transcript. There are 600 exhibits, and the briefs total 750 pages.

erties. The parties had already created the Spa Country Club, which was a fictitious name. It become the property of the Spa Corporation. These defendants then embarked on a campaign to sell memberships and lots. To that end a sales organization was recruited. Sales meetings were held by Frankfort, who also gave individual instructions. He prepared the forms, literature and brochures that were used in making the sales.

The first membership drive was for associate members at a rather nominal annual fee. The former members of the Clevelin Realty Corporation as well as the public generally were circularized and solicited. Between 5,000 and 6,000 such memberships were sold. The purpose of this membership was not alone to obtain the fees involved but the opportunity to get people acquainted with the club at a cheap price and then sell them a charter membership or a conversion membership and ultimately a building lot.

The charter memberships were offered to the former members of the Clevelin Realty group and to the associate members. The price varied from time to time but ranged from $225 to $435. This class of membership provided for a gift to each member by the Spa Corporation of a piece of unimproved real property situated some 2½ or 3 miles from the club house. All of these charter memberships had a promissory note attached which varied in amount from $270 to $360, which was payable on either an annual or semi-annual basis over a ten-year period. This was said to be for maintenance. Each member was required to sign the note as a part of the membership purchase. The gift deed could be used in the acquisition of a building site in the improved section. In 1947, upon the demand of the Real Estate Division, the use of the gift deed was discontinued. Defendants offered in its place, in connection with the sale of charter memberships, an equity bond which had a value of $750 when applied toward the purchase of a building site. The use of this equity bond was, however, soon discontinued at the request of the Real Estate Division.

Early in 1948 defendants discontinued the sale of charter memberships and in their place offered a conversion membership to all associate and Clevelin members. The price of this membership was $615 plus a $360 maintenance fee, payable in semi-annual installments over a ten-year period. With this conversion membership defendants offered a discount agreement by which a member could buy property from the corporation at a reduced price. Defendants continued to sell this class of membership until September, 1948, when their operations were closed down.

As a part of this project defendants formed the Spa Hot Springs Corporation. The avowed purpose of this corporation was to develop a hot springs, mineral bath and health resort at the Spa Country Club to be run in connection with the activities of the country club.

[1, 2] Defendants contend that Count I (Conspiracy) fails to state a public offense. They point out that a false representation is a necessary element of the crime of obtaining money by false pretenses. They then proceed to analyze the allegations of the conspiracy count and reach the conclusion that no false representations are in fact alleged; that the allegations are mere matters of opinion, or are promissory in character, or relate to collateral rather than material matters. Their analysis, however, is not sound. Only a few references to these allegations need be made to demonstrate their error. It is alleged, for example, that defendants falsely and fraudulently represented that with the purchase of each charter membership there would be given a parcel of land to be exchanged for a lot in a selected rental area upon which a cottage would be constructed and furnished; also, that the Spa Corporation and the Spa Hot Springs Corporation would construct a large sanitarium and bath facilities near Lake Elsinore and had developed a source of mineral water to be piped to such sanitarium and bath facilities; and that the maintenance fee was for the upkeep of the cottages and that the government agencies and lending institutions required payment of such fees in advance of construction. It is clear that the foregoing

charges relate to material and not merely collateral matters, and that they are not in the realm of opinion. If it be said that some of these and other allegations in the conspiracy count are of a promissory character the answer is that it is alleged that the defendants conspired to obtain money by false pretenses and by false promises with fraudulent intent not to perform such promises. The charge here is in the language of Penal Code section 182(4) and since the amendment of section 952, Penal Code, in 1927 such a pleading is sufficient to state a public offense. People v. Chait, 69 Cal.App.2d 503, 513, 159 P.2d 445; People v. Gordon, 71 Cal.App.2d 606, 610, 163 P.2d 110.

[3–6] Defendants contend that the evidence is insufficient to sustain their conviction on the conspiracy count. The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the agreement. Pen.Code, secs. 182, 184; People v. Brownstein, 109 Cal. App.2d 891, 892, 241 P.2d 1056; People v. Pierce, 110 Cal.App.2d 598, 610, 243 P.2d 585. The existence of the conspiracy may be established by circumstantial evidence. People v. Steccone, 36 Cal.2d 234, 237–238, 223 P.2d 17. The agreement may be inferred from the acts and conduct of the defendants in mutually carrying out a common purpose in violation of the statute. People v. Benenato, 77 Cal.App.2d 350, 358, 175 P.2d 296; People v. Brownstein, supra. It is not necessary that the overt acts be criminal. People v. Gordon, supra, 71 Cal.App.2d at page 628, 163 P.2d 110. If such acts are done as a step toward the furtherance of the conspiracy they are sufficient. People v. Gilbert, 26 Cal.App.2d 1, 23, 78 P.2d 770. Also the overt act may be performed by any one of the conspirators and yet be sufficient, for the members of the conspiracy are bound by all acts of all members done in furtherance of the agreed plot. People v. Creeks, 170 Cal. 368, 374, 149 P. 821; People v. Pierce, supra. Finally, once the conspiracy is established all evidence of the substantive crimes becomes admissible against all participants, even though the other conspirators were not present. People v. Temple, 15 Cal.App.2d 336, 339, 59 P.2d 417; People v. Gordon, supra.

[7–10] It should also be borne in mind in passing on the sufficiency of the evidence to sustain a conviction that, before a reversal may be had, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts "justify the inference of guilt." People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259, 263. If the circumstances reasonably justify the determination of the trier of fact, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal. People v. Newland, supra; People v. Gould, 111 Cal.App. 2d 1, 243 P.2d 809. Applying these principles it is clear that the trial court was amply warranted in drawing the inference that an agreement and plan existed between the defendants to cheat and defraud by false representations and fraudulent promises.

In buying this property Frankfort arranged to acquire a list of former members in the defunct Clevelin Realty organization. Defendants then started operating under the fictitious name of the Spa Country Club. These operations, however, appear to have been carried on through the Spa Corporation upon its organization. Defendants conceived the plan and developed the technique by which memberships in this country club would be sold and how such sales would be used as a means of selling lots in their subdivision. Their first approach was to the Clevelin Realty group. It was at first by mail, but with slight success. This was followed by salesmen whom the defendants had employed, trained and equipped. Defendants developed a sales talk for their agents, to the effect that by reason of their former

membership in the Clevelin setup they owned certain rights for which the Spa Corporation must give them something or get their release. Defendants also developed the story for their salesmen that the old Clevelin Corporation had sold memberships without having a roster of 100 members who owned property, and that, to fill up that roster, the right had been given to such persons to receive a piece of property in the income area of the club; that by reason of death and resignations there were vacancies that carried these rights which they were now offering the Clevelin membership. This was false because the Clevelin Realty Corporation never had any roster of charter members, lots were sold to anyone who wanted to buy, and membership was issued to all who bought lots. It did not give the member the right to purchase any particular property.

Defendants conceived the membership plans to be offered to former Clevelin members and to their own associate members. They instructed their salesmen that with every such membership the member would receive a gift lot in the residential area which could be exchanged for a lot in the rental area provided the member would have a house built for rental purposes which the Spa Corporation would finance. These statements were false. The member could not exchange the gift lot for one in the rental area and the Spa Corporation could not finance the construction of the cottages.

As to the collection of maintenance fees, defendants instructed their representatives to tell the members that the corporation desired to undertake a building program but because of the maintenance fee they could not deliver a clear title for the reason that this fee was considered a lien and therefore prevented their getting finances; that if the member was to be one of the first 25 to own a cottage, such member must pay the maintenance fee; that if the member did not pay such fee he would have to sign a release. The collectors were told by defendants that the money collected from the maintenance fees was going into a fund for the perpetuation of the club and care of the cottages. This line of "sales talk" appears to have been simply another technique for the purpose of extracting more money from the members. No separate maintenance fund appears to have been established; nor was there any reasonable basis for saying that the maintenance fee notes created a lien.

As a further step in their scheme defendants organized the Spa Hot Springs Corporation. They represented to their salesmen that a large sanitarium and bath facilities would be constructed near the lake, and that they had developed a source of thermal mineral water to be piped to such facilities. The statement relative to the development of a source of mineral water was not true as shown by their own engineer's report.

It was stated by defendants that the corporation had spent over $1,000,000 in piping the hot water from the spring to the bath house; also, that the properties were being financed by a syndicate in New York having plenty of money. These representations were not true.

Approximately $450,000 was realized from the sale of memberships and lots. Of this amount about $70,000 went into the property and improvements during their three years of operations, and something like $160,000 was divided between Frankfort and Nudelman.

While the foregoing summary shows defendants' pattern of operation it does not include numerous variations in their sales campaigns and many details in their sales talks.

In view of the close, cooperative, and apparently harmonious manner in which Frankfort and Nudelman worked together in this venture for some three years, the development by them of one sales scheme after another, and the unison of their efforts in instructing and equipping their salesmen, the trial court could reasonably draw the inference that they were operating with a common understanding and pursuant to an agreement between them. The evidence clearly supports the implied finding that defendants, in accordance with their mutual understanding, made false and fraudulent representations with respect to

material matters, as, for example, the exchange of the gift lot for a building site in the rental area, financing, mineral water supply, and maintenance fees.

The court was justified in drawing the inference that such representations were made with the intent to deceive and defraud in view of the fact that only about 15 percent of the money derived from the sale of memberships and lots went into the development of the project and that for every dollar that was actually so used approximately $2.25 found its way into the pockets of defendants. These facts also justify the inference that the statements of defendants that they planned to build a large sanitarium and health resort, which would undoubtedly have cost a substantial amount, were fraudulent. A multitude of overt acts were committed in furtherance of this corrupt agreement, among them being some 46 contacts by defendant Nudelman and the other salesmen with the victims of the defendants' scheme.

[11] In arguing that the evidence is not sufficient to support their conviction on the conspiracy count defendants attack the testimony of certain of the salesmen charging it is full of conflicts, inconsistencies and lies, and also attack the credibility of the victims who corroborated the testimony of the salesmen. It was of course, for the trial court to pass upon the credibility of the witnesses, resolve the conflicts and inconsistencies in the testimony, and determine the weight to which it is entitled. Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

Defendants argue that the conviction on the conspiracy count cannot be sustained because it is based on the testimony of the salesmen who were accomplices and that there is no sufficient corroboration as required by section 1111, Penal Code. In reaching this conclusion defendants overlook a number of significant facts and circumstances.

[12–16] The corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the trier of the facts that the accomplice is telling the truth. People v. Griffin, 98 Cal.App.2d 1, 26, 219 P.2d 519; People v. Henderson, 34 Cal.2d 340, 342–343, 209 P.2d 785. "Such corroboration must create more than a suspicion of guilt, but is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration.'" People v. Trujillo, 32 Cal.2d 105, 110–111, 194 P.2d 681. The corroboration may be by direct or circumstantial evidence. People v. Griffin, supra; People v. Henderson, supra. The weight of the corroborative evidence is for the trier of the facts to determine. People v. Trujillo, supra, 32 Cal.2d at page 112, 194 P.2d 681. The relationship of the parties and all their acts and conduct may be considered in determining whether there are sufficient corroborating circumstances. People v. Henderson, supra, 34 Cal.2d at page 343, 209 P.2d 785; People v. Willmurth, 77 Cal.App. 2d 605, 611, 176 P.2d 102; People v. Ross, 46 Cal.App.2d 385, 395, 116 P.2d 81.

The court had, among other things, the following testimony, facts and circumstances for consideration on the question of corroboration. In selling a lot to Miss Anderson, who had already bought a club membership for $615, defendant Nudelman told her they intended to build a health center and were to pipe the mineral water from the other side of the hill to the sanitarium. Two cottages, for each of which she would receive a monthly rental of $200, were to be built on her property. She gave Nudelman her check for $2,325 to cover this transaction. It was endorsed by defendant Frankfort, who also signed her deed. Nudelman stated construction of the sanitarium and cottages would start as soon as the permit came through, and it would not take long for the construction to be completed as they had a gang of men ready to start building. Neither the cottages nor the sanitarium were built. It is a reasonable inference, in view of the manner in which defendants handled the funds collected, that they never intended to build either. Defendants did not have mineral waters to pipe anywhere.

In soliciting one Anspach, who had purchased a club membership for $435, to pay the maintenance fee Nudelman told him the people who were financing the paper on the

cottages considered the $360 maintenance fee note a lien on the property, and that it was necessary to pay it before they could consider going ahead with the financing, and if he did not pay up it would be necessary to go to the next on the list and give them the opportunity to pay theirs, and consequently he would not receive the cottage. Nudelman also explained that the bank official who had originally made the arrangements for financing 50 cottages had been fired and that only 25 cottages would be constructed. Upon that occasion Nudelman delivered to Anspach the gift deed to which he was entitled as a result of his membership purchase. Nudelman, however, asked him not to record it since it was to be turned in to the company in exchange for one covering the property he would select in the rental area near the club house. While Anspach did not pay the maintenance fee the story Nudelman told him was in line with the sales talks defendants gave their salesmen.

After purchasing a charter membership and securing a gift deed Mr. Francois was told by Nudelman that upon the payment of the $350 maintenance fee he would be taken to Lake Elsinore to pick out a lot upon which a cottage would be built. The corporation would rent the cottage, make the collections, retain a certain amount for cost of construction and pay the balance over to him. He would not have to pay anything further before the cottage was built. No cottage was ever erected for him. In the initial approach to Mr. Francois, who was manager of a substantial concern, it was explained that they needed a few select business and professional people, and he had been chosen as one of such persons, to whom they would give a membership at a very small fee plus land and a cottage for income.

In selling Mrs. Hall a lot for $2,325 Nudelman, among other things, represented that the Spa Corporation was going to have a hot springs at Lake Elsinore and had $1,500,000 to put into it; that they had the water rights; that they almost had the material on the ground to build the cottages; and that construction would start right away. The Spa Corporation would rent the cottages (two on a lot) and collect the rent for her. Her deed was signed by defendant Frankfort. It was not until later that she learned she would be required to advance two-thirds of the cost of construction.

In collecting the maintenance fee of $350 from Mr. Hammer, Nudelman represented to him that the bank refused to finance any construction unless the lot was cleared by paying the maintenance note. He also stated that Spa Corporation owned the hot springs and that a representative of the corporation would call on him to discuss the mineral springs. Shortly thereafter such a representative did call and in an attempt to make another sale on which $500 was paid he represented, among other things, that the Spa Corporation had mineral hot springs over the hill which they were going to pipe to the resort in a glass tubing.

Briefly stated, Nudelman represented to Mr. and Mrs. Hanan that a group of financiers from New York had taken over the property and were operating the Spa Country Club; To Mr. Kaufmann that this group had plenty of money and there was no worry about further finances; To Mr. Harris that they had discovered on the company property a mineral spring well which was capable of producing 100 gallons of water per minute; that the hot springs corporation was planning to build a large hospital; that it was a $2,000,000 enterprise, and the plans called for several different pools of this mineral water at various temperatures for treatment of arthritis; To Mrs. Peckinpaugh that the Spa Corporation would build and furnish a cottage that went along with her membership and take out $35 per month to apply on construction cost and pay the balance to her; that the $350 maintenance fee was for the upkeep of the cottage and for maid service; that if she paid this fee in advance the corporation would proceed to build the cottage; that they had the contractor engaged.

Nudelman contacted a number of the other victims making various representations to them similar to those herein enumerated. All of these were along the pattern of the sales talks prepared by Frankfort and Nudelman, and which the salesman used, according to the testimony

of the victims, as the representations made by them.

While defendant Frankfort appears to have devoted his efforts primarily to the management of the enterprise, including the employment and training of salesmen and the preparation of a great variety of contracts and other documents for the use of the salesmen and his associate defendant Nudelman, he nevertheless had some significant contacts with members and lot purchasers. One of these was Terry. Frankfort told him there were hot springs back in the mountains and that "the corporation had spent at that time over a million dollars in piping these hot springs down to where they were going to build * * * a bathhouse." Frankfort exhibited a pencil sketch which showed the main bath building and then arched around that a group of larger cottages which Frankfort said would be more elaborate than those built at the club. He explained to Terry that the latter could give up his cottage deal at the club and go into the hot springs deal. Terry, however, did not go into the new project, and later, at the request of Nudelman, who told him he was holding up the whole "shebang" by his failure to sign a paper releasing his rights (whatever they were), did sign such a release.

In selling membership to Morris it was represented that he was one of six persons who had been selected to fill vacancies in the original charter group of 100 who were required to be landowners, and that a lot went with the transfer of such membership; that a licensed realtor would be around within ten days to take him and his wife to Lake Elsinore to select his building site. Upon the failure of any realtor to appear Morris went to the Spa Corporation offices and contacted Frankfort. He explained to Frankfort what he had been told and asked why the realtor had not called to take them to select their location. Frankfort replied that "they were exceptionally busy, very busy, in fact." Morris then wanted to know what he was going to do about the cottage since it was "supposed to be ready by July first." Frankfort told him "they were ready to go ahead." Morris inquired about authority from the Federal Housing Administration. Frankfort said, "We have that." He explained this was 95 percent true; that the local office had authorized it and sent it to Washington but this "was only a matter of form," that the construction company was ready and had their machinery available, and that Morris would hear from them in a few days. Later Morris received the "Deed of Gift" and a letter of transmittal, both signed by Frankfort. Nudelman then called on Morris in an effort to collect in advance the maintenance fee and Morris thereupon wrote Frankfort that the deed which he had received was not acceptable, stated the representations upon which he had paid $435 for the membership and signed the maintenance fee note, and demanded performance in accordance therewith. He also referred to his personal visit to see Frankfort and the latter's assurances. Morris did not get either a cottage built or a building site.

Mrs. Hibbs testified that she told Frankfort of the misrepresentations made to her by Nudelman and another salesman and demanded a return of her money. She did not receive it.

[17] Defendant Frankfort argues that what transpired at his conferences with Terry, Morris and Mrs. Hibbs can in no wise serve to connect him with the alleged conspiracy because these people had already parted with their money when they talked to him. The crime had already been committed. The court is not so restricted as to the facts and circumstances which it can consider in passing on the question as to whether a conspiracy has been formed. People v. Ross, 46 Cal.App.2d 385, 395, 116 P.2d 81; People v. Kobey, 105 Cal.App.2d 548, 556, 234 P.2d 251; People v. Griffin, 98 Cal.App.2d 1, 25, 219 P.2d 519. All the facts that throw any light on the question are to be considered by the court. The inferences may be very illuminating. Here the court could reasonably infer from these incidents that the sales representations were in accordance with Frankfort's understanding of what they were to be and met his approval.

From the facts, circumstances, and evidence herein recited and referred to, and

certainly from the record in its entirety, it is clear that there was ample corroborative evidence of the conspiracy, and that the judgment of the trial court on that count must be sustained.

[18] The grand theft charges are based on the theory of obtaining money by false pretenses. The elements of that offense are: (1) An intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with the money or other property. People v. Harrington, 92 Cal.App. 245, 254, 267 P. 942; People v. Alston, 139 Cal.App. 575, 576, 34 P.2d 759; People v. Daniels, 64 Cal.App. 514, 517, 222 P. 387.

[19, 20] Defendants contend that not all these elements are established. In this, however, they are in error except as to certain counts that will later be discussed. The intent to defraud is a question of fact, to be determined from all the facts and circumstances of the case. People v. Post, 76 Cal.App.2d 511, 514, 173 P.2d 48. It is clear that there is ample evidence in the record to support the court's implied finding of such intent. It is equally clear that the purchaser in each transaction did not get what he bargained for and was actually defrauded. Since, however, defendants contend that the evidence is insufficient to sustain their conviction it is necessary to examine the nature and character of the representations that were made. A great variety of representations were made to the various victims, not all, of course, being made to any one person. Because of the large number of counts it is not practicable to summarize the evidence on each. The following, however, are among the representations that were made, viz., that the Spa Corporation had invested $1,500,000 in the property and had another $1,500,000 to spend on its development; that they had discovered mineral water and hot springs on the property, had spent over $1,000,000 in piping hot water from the springs to where they were going to build a bathhouse, and had put down test wells and could get enough mineral water for at least 2,000 people; that the company had a large sum to put into the clubhouse and grounds, the boat landing and dockhouse; that a big maintenance fund had been established; and that various amounts in the neighborhood of $2,000,000 were to be spent in building a health resort.

Many representations, differing however in detail, were made regarding the building and financing of cottages by the company for those who purchased memberships, and also for those who bought lots. Perhaps the most frequent story was that the free lot, which was given in connection with a membership purchase, could be exchanged for another lot in the rental area near the clubhouse on which the company would build a cottage which would be paid for from the rentals over a certain period of years, after which it would belong to the owner free and clear. The owner, however, would be entitled to have certain use of the property during this period. In some cases the representation was that the owner would immediately receive the rentals,—not that they would first be applied to the cost of the building for any fixed period or at all. To others it was represented that financing was arranged with the Bank of Hemet; that financing had already been provided for the construction of 50 cottages; that the company had $70,000 with which to build 20 cottages; and that the Federal Housing Authority had granted permission for such construction.

[21–23] The maintenance fee phase of this scheme, insofar as collections were concerned, dealt principally with the statements that the government would not permit the company to build, and the bank would not finance any building, until the maintenance fee was paid, and that this fee had to be paid before construction would start. Without delineating the testimony beyond that to which reference has already been made, it can be said with assurance that there is ample evidence in the record to demonstrate the falsity of the above representations with respect to past or then present asserted facts. Complaint is made, however, that certain of the representations were of a promissory character. This is true but such promises,

if unconditional and made without intention of performance, may constitute actionable fraud. People v. Mason, 86 Cal.App. 2d 445, 449, 195 P.2d 60; People v. Chamberlain, 96 Cal.App.2d 178, 182, 214 P.2d 600. Whether a promise was dishonestly made is a question of fact for the trial court's determination upon all the evidence. People v. Ames, 61 Cal.App.2d 522, 532, 143 P.2d 92; People v. Gordon, supra, 71 Cal.App.2d at page 624, 163 P.2d 110 at page 124. The failure to build the sanitarium and the promised cottages, and the use the defendants made of the money that was collected justified the inference that the promises were fraudulently made.

[24–26] On the question of reliance, most of the victims gave specific testimony that they relied on the representations made to them in signing the contracts and maintenance notes, and in parting with their money. There were, however, several victims of whom such inquiry was not made. Defendants insist that this omission is fatal to their conviction on such counts. This is not true. "* * * the express testimony of a victim of false pretense that he was induced to part with his money by the fraudulent statements of the accused is not essential. It is sufficient if the inference of his reliance could have been drawn from all the evidence." People v. Gordon, supra; People v. Schmidt, 79 Cal.App. 413, 418, 249 P. 832, 250 P. 1104. It is clear that the trial court was justified in drawing such inferences. However, the conviction on counts 11 and 12, which reflect the transactions with Mr. Dally, must be reversed because he testified that he did not part with his initial payment of $365 in reliance upon the representations made to him. No new representations were made at the time of his subsequent payment of $500. A necessary element of the offense charged in those counts was thus absent.

[27, 28] It is contended that the testimony of the salesmen and club members was hearsay as to statements made out of the presence of the defendants, and as such was inadmissible on the individual counts to which it related. This contention, however, overlooks the principle that the existence of the conspiracy having been shown, the acts of each coconspirator in pursuance thereof is attributable to all the others even though they were not personally present when such acts were committed. People v. Ash, 88 Cal.App.2d 819, 828, 199 P.2d 711; People v. Benenato, 77 Cal.App.2d 350, 358, 175 P.2d 296. The conspiracy need not be established beyond a reasonable doubt before such evidence is admissible; a prima facie showing of such fact is all that is required. People v. Steccone, supra, 36 Cal.2d at page 238, 223 P.2d 17. Here all the salesmen who were a part of this fraudulent scheme were coconspirators. Therefore this evidence was admissible. People v. Sica, 112 Cal. App.2d 574, 247 P.2d 72.

[29–31] Defendants challenge the testimony of the victims as being inherently improbable. In support of this contention they point to inconsistencies and conflicts in the testimony of particular witnesses and the asserted fact that the contracts and other documents were either read by them or read to them by the salesmen. The fact that there are inconsistencies and conflicts in the testimony of a witness does not bring it within the rule of inherent improbability. (8 Cal.Jur., sec. 582, p. 591.) Conflicts and inconsistencies in the testimony of an individual witness are to be resolved by the trier of facts. Peterson v. Peterson, 74 Cal. App.2d 312, 319, 168 P.2d 474; Hansen v. Bear Film Co., 28 Cal.2d 154, 184, 168 P.2d 946. To come within the rule of inherent improbability the testimony must be such that it is physically impossible for it to be true, or its falsity must be apparent without resort to inference or deduction. People v. Lindsey, 90 Cal.App.2d 558, 563, 203 P.2d 572; People v. Klinkenberg, 90 Cal.App.2d 608, 627, 204 P.2d 47, 613. The fact that the documents were read would not make it inherently improbable that other, different and additional representations were made by the salesmen.

[32] Defendants insist these contracts insulate them from this prosecution because they contain the statement that they constitute the entire agreement between the parties, that the Spa Corporation is not bound by any representations outside the

contract, that no salesman is authorized to make any additional or contrary representations, and that the club member has read and understands what he is signing. The simple answer to this argument is that "The people prosecuting for a crime committed in relation to a contract are not parties to the contract and are not bound by it. They are at liberty in such a prosecution to show the true nature of the transaction." People v. Chait, 69 Cal.App.2d 503, 519, 159 P.2d 445, 454; People v. McEntyre, 32 Cal. App.2d Supp. 752, 760, 84 P.2d 560; People v. Jones, 61 Cal.App.2d 608, 620, 143 P.2d 726; People v. Pierce, supra, 110 Cal.App. 2d page 605, 243 P.2d 585. The practical wisdom of the rule is illustrated in this case. Upon at least three occasions prospective purchasers complained to defendant Nudelman that the written agreement did not seem to conform to what they had been told, whereupon he assured each party, in effect, that everything would be taken care of and he need not worry.

[33–36] It was stipulated that the testimony of a number of witnesses given at the preliminary hearing might be read at this trial subject to the right of any desired additional cross-examination. Defendants had the right to thus waive confrontation by these witnesses. People v. Wallin, 34 Cal.2d 777, 215 P.2d 1. Defendants now, however, insist that this court should reexamine the credibility, weight, and intrinsic value of such testimony. When they made this arrangement they knew what the testimony of these witnesses was, had cross-examined them, and had observed their demeanor on the witness stand. They apparently then thought it was not important for the trial judge to see and hear them in order to evaluate their testimony. Being displeased with the result does not give them the right to shift to this court a responsibility which unequivocally belongs to the trial court. People v. Smith, 39 Cal.App.2d 154, 157, 102 P.2d 550; People v. Newland, supra; Chuchian v. Metropolitan Life Ins. Co., 103 Cal.App.2d 760, 762, 230 P.2d 381. This proposal illustrates the basic difficulty with defendants' argument throughout this case. They would have us reweigh the evidence and draw inferences contrary to those drawn by the trial court. We are not authorized to do this under well recognized legal principles. People v. Gould, 111 Cal.App.2d 1, 8, 243 P.2d 809. It is the pursuit of this unauthorized approach to a consideration of the evidence that leads defendants to their erroneous conclusion that the judgment against them is the result of what they call guilt by association. When, however, the evidence is viewed, as it must be on appeal, in the light most favorable to the successful party in the trial court, In re Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, it supports the conclusion that their conviction was based on their own planning of and participation in fraudulent business transactions.

[37, 38] Defendants cite section 1110 Penal Code and argue that the testimony of the respective victims covering the false representations made was not corroborated. The rule is that in this class of cases the circumstances connected with the transaction, the entire conduct of the defendant, and his declarations to other persons are proper matters for the consideration of the jury, and may be looked to to furnish the corroborative evidence contemplated by the law. People v. Wymer, 53 Cal.App. 204, 206, 199 P. 815; People v. Whiteside, 58 Cal.App. 33, 41, 208 P. 132; People v. Helmlinger, 69 Cal.App. 139, 142, 230 P. 675. As pointed out in People v. Chait, supra, 69 Cal.App.2d at page 516, 159 P.2d 445, the testimony of all the purchasers may be taken into consideration for this purpose. This testimony, which shows the use of a uniform plan and pattern and very similar statements of the false pretenses, together with the conduct of the defendants, was sufficient.

[39–41] Defendant Nudelman asserts that 31 of the counts, based on two separate payments of over $200 each made by 14 of the victims and three such payments made by one other victim, should have been telescoped into 15 counts, since the particular payments made by each of the parties were in pursuance of a single transaction and thus could not constitute more

than one offense. "The question of whether a series of wrongful acts constitutes a single or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case." People v. Stanford, 16 Cal.2d 247, 251, 105 P.2d 969, 970. In cases of theft involving the obtaining of money or property by false pretenses, where property of different value or character is taken at various times though upon the same false representations, the rule is established that a separate crime is consummated upon each distinct appropriation of money or property obtained under the influence of the fraudulent misrepresentations. People v. Howes, 99 Cal.App.2d 808, 818, 222 P.2d 969; People v. Miles, 37 Cal.App.2d 373, 378–379, 99 P.2d 551; People v. Ellison, 26 Cal.App.2d 496, 79 P.2d 732. The evidence clearly shows that the defendants obtained possession of the several sums of money referred to in each of the counts under consideration at different times but on the continuing strength of the representations originally made; in such circumstances, the court was justified in treating each receipt and appropriation of money as a distinct offense. People v. Howes, supra; People v. Stanford, supra.

[42] Defendants argue that if the doctrine followed in the above cases is applicable to the circumstances of this case, then this court must reverse the convictions based on seven of the counts, in each of which they complain that several payments of less than $200 by a particular victim were aggregated in order to constitute one count of grand theft. They argue that this procedure can only be based on the theory that the successive payments were part of one over-all transaction based on a single felonious impulse, which is inconsistent with the view taken in the cases last cited. However, an examination of the counts referred to indicates that there is no merit in this argument. In each of these transactions, the victim made a down payment, and then signed either a promissory note for an amount in excess of $200 or a contract under which the victim obligated himself to pay such amount. While it is true that subsequent payments, each less than $200, were made to discharge the debts evidenced by the promissory notes and contractual obligations, nevertheless the offenses which form the basis for these counts were already completed when the promissory notes and written obligations to pay were obtained by the use of false representations. People v. Hand, 127 Cal. App. 484, 487, 16 P.2d 156. The promissory note itself is property within the meaning of section 484 of the Penal Code. People v. Cassou, 27 Cal.App. 23, 25, 148 P. 810.

[43, 44] Section 7 of the Penal Code provides that "the word 'property' includes both real and personal property" (subd. 10), and "the words 'personal property' include money * * * things in action, and evidences of debt". (Subd. 12.) "A thing in action is a right to recover money * * * by a judicial proceeding." (Civ. Code, sec. 953.) The Civil Code defines property as a "thing of which there may be ownership" (sec. 654) and states there may be ownership "of all obligations". (Sec. 655.) An obligation is a legal duty by which a person may be bound to do a certain thing, and it may arise from a contract. (Civ.Code, secs. 1427, 1428.) "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon * * * or which in any contingency might be collected thereon * * *, is the value of the thing stolen." (Pen.Code, sec. 492.) It is thus apparent that when it was shown that the victims signed promissory notes and contracts obligating themselves to pay sums in excess of $200, they parted with property. (Pen.Code, sec. 7, subds. 10, 12; sec. 484.) "The evidence therefore as a matter of law supports the conviction of *grand* theft." People v. Leach, 106 Cal. App. 442, 456, 290 P. 131, 137.

[45, 46] Defendant Nudelman insists that the judgment based on the 15 counts involving collection of the maintenance fee notes cannot be sustained because a person cannot be defrauded of money which he owes under a valid obligation, and that if a crime was committed it was committed when the club member signed the promissory note as part of the transaction by

which he purchased his membership contract. There appears to be merit in this position because it was at the time of the sale of the membership that the representations were made that the maintenance fee was to be used for the care and maintenance of the cottages and grounds. This representation was false because no cottages were built and no maintenance fund was ever established. But defendants cannot escape on this ground for when one has knowingly and designedly, by fraudulent representations, defrauded another, such representation shall be treated as continuing so as to cover any money, property or services received as a result thereof. (Pen.Code, sec. 484; People v. Caldwell, 55 Cal.App.2d 238, 251, 130 P.2d 495; People v. Rabe, 202 Cal. 409, 413, 261 P. 303. The fact that the salesmen later told some of these members when the collections were actually made that the note constituted a lien on their property or that a discount was offered for prepayment of these notes does not alter the situation. These later representations were made as an aid to the accomplishment of the main purpose. Under this principle of the continuing character of the false representations the conviction on a count involving collection of such fee would have to be sustained even though no new inducing representations were made. Nor may defendants escape conviction on such collections on these counts where the victims made some investigation or consulted an attorney before payment was made. The discovery of such fraud is not always simple. This is particularly true when a portion of it deals with fraudulent provisions to build a health resort, as here. The trial court may well have concluded that the particular victim had not discovered the fraud when he made the payment or consulted his attorney.

[47] Defendant Nudelman argues that the six counts covering the transactions with Mr. and Mrs. Wood, and the count involving the Hanan deal must be reversed because the husbands only are named in the information while the respective wives either made the payments or made most of them and testified as to their reliance on the representations. The husbands did not testify. Therefore it is claimed there is no showing of reliance on the part of the person alleged to have been defrauded. The evidence shows that both the husbands and wives were present when the representations were made. The transactions covered by these counts were apparently the only ones with these two families. The defendants were therefore undoubtedly sufficiently informed to present any defense they had. They could not have been misled or placed at any disadvantage by reason of the husbands, instead of the wives, being named in the information. The variance was therefore immaterial. Pen.Code, sec. 956; People v. Silverman, 33 Cal.App.2d 1, 4, 92 P.2d 507.

[48] Defendant Nudelman lists ten counts which he argues must be reversed because the person named in the information paid no money to the Spa Corporation or any of its salesmen. In these counts the evidence shows that the money was actually delivered by some member of the family. In one instance the money was paid by the victim's father while the former was out of the city; in other cases the money was handed over either by the husband or wife. Because of the circumstances and particularly because of the relationship, the trial court was entitled to infer that the person who delivered the money was acting as the agent of the victim and made the delivery pursuant to arrangements with the latter. The record reveals false representations were made to these witnesses and that they relied upon them. The Spa Corporation issued its usual routine of documents in such transactions, so the money reached it. The members of the family who delivered the money were virtually acting as messengers. The pleading sufficiently identified the respective charges so defendants could not have been prejudiced in making their defense. The variance was therefore unimportant. Pen.Code, sec. 956; People v. Woodson, 11 Cal.App.2d 604, 606, 54 P.2d 33.

[49] Defendant Nudelman points to five counts in which the club members purchased their memberships from salesmen who were not named as co-conspirators in

the information. Three of the salesmen did not testify at the trial; one of them did. Victims were permitted to testify over the objections of defendants as to the representations made by them. It is urged that this was error. We think not.

[50] "A principal, in order to be held criminally liable, must be shown to have knowingly and intentionally aided, advised, or encouraged the criminal act committed by the agent." People v. Doble, 203 Cal. 510, 515, 265 P. 184, 187. Bearing in mind that the defendants employed and trained all salesmen; that these men were selling club memberships; that they made substantially the same representations as were made by other salesmen who were named as co-conspirators; that one of them assisted, at the request of defendant Frankfort, in the training of at least one salesman; that another went on sales solicitations with a salesman who was named as a co-conspirator; that the defendant corporation, through Frankfort, issued a gift deed to a member as the result of the solicitations of the third salesman, who did not testify at the trial; that the fourth of these salesmen—the one who did testify—was hired by Frankfort and trained by Nudelman and made the same character of misrepresentations that other co-conspirators made, justified the trial court in drawing the inference that the four salesmen were acting as the instrumentalities of the defendants in making these solicitations and misrepresentations in furtherance of the preconceived plan and scheme of the defendants. People v. Keller, 79 Cal.App. 612, 617, 250 P. 585. The activities of these salesmen were an important part of the general conspiracy, People v. Chait, supra, 69 Cal.App.2d at page 520, 159 P.2d 445, and the statements they made were, under the circumstances, attributable to the defendants, and the challenged evidence was properly admitted.

[51] The complaint of defendant Frankfort that the verdict of the trial judge went against him because the latter does not believe in high pressure selling and that he believed defendants were engaged in such practice, the charge by defendant Nudelman that the trial court was guilty of misconduct and prejudice, and the intimation that the verdict was influenced by matters outside of the record, are wholly without merit. Just before deciding the case the judge stated that he had "listened carefully to all of the evidence with a desire of seeking out the truth," and had "read and reread much of it;" that the briefs had been of "great assistance" to the court and much time had been spent in reading them as well as in independent research. The judge then said, "Taking all the facts into consideration, it is impossible to arrive at any other conclusion than that the defendants conceived, developed and put into operation this plan to obtain the money of the so-called 'members' by false and fraudulent representations." This summation belies these charges. Many of the items about which complaint is made relate to procedural matters and rulings such as normally arise during the course of an extended criminal trial. Our examination of the record discloses that the judge conducted this trial in a thoroughly objective manner and with due regard for the rights of all parties.

[52] In support of his motion for a new trial Frankfort filed an affidavit stating that his trial attorney had advised him from the inception of this project in every move he had made, approved all legal documents, the method and plan of sale, and had advised him that his entire course of conduct was legal; that during the course of the trial he had requested his attorney to permit him to testify to such facts but was advised by his counsel that such evidence had no bearing on the issues. Frankfort further states he has since been told by other counsel that such evidence was proper and should have been presented. He now contends that this latter advice places such facts in the class of newly discovered evidence and entitled him to a new trial. In this he is in error. It is obvious that the facts were known to both defendant and his counsel. It is therefore not the facts but their materiality which is claimed to have been newly discovered. Where it is not even claimed counsel acted in bad faith, such discovery

does not entitle a defendant to a new trial. People v. English, 68 Cal.App.2d 670, 673, 157 P.2d 429; People v. Kelly, 32 Cal.App. 2d 624, 627, 90 P.2d 605; People v. Urquidas, 96 Cal. 239, 242, 31 P. 52.

[53] Frankfort emphasises that one of the salesmen who testified that he got his sales talk from Frankfort later denied this at a hearing before a state board. Affidavits also attack the truthfulness of the testimony given by other witnesses. Such showing, however, did not require the granting of the motion for a new trial. People v. Tallmadge, 114 Cal. 427, 430, 46 P. 282; People v. Lee, 9 Cal.App.2d 99, 106, 48 P.2d 1003; People v. Poor, 52 Cal. App.2d 241, 243, 126 P.2d 146.

[54] Finally, it is fundamental that in ruling on such a motion the trial court has a large discretion and that its ruling will not be disturbed on appeal unless there is a clear abuse thereof. People v. Coronado, 57 Cal.App.2d 805, 815, 135 P.2d 647; People v. Mandell, 48 Cal.App.2d 806, 818, 120 P.2d 921. We find no abuse of discretion.

Our examination of this record impels us to observe that neither the results in this case nor the administration of justice generally justifies filing so many counts in this class of cases.[2] Here the sentence runs concurrently on all the counts. This result could have been achieved upon a successful prosecution on a relatively few counts. Because so many counts were involved the expense of this case has been quite excessive both to the People and the defendants, the administration of justice has been unreasonably delayed,[3] and the criminal courts unnecessarily congested, thus interfering with the normal disposition of other matters. The public is entitled to expect and the procedural sections of the criminal code provide for the expeditious handling of criminal proceedings. The proper administration of justice requires that this be done, and that it be accomplished without unnecessary expense. These results can be achieved by a practical consideration of the number of counts that are to be included in the information.

The judgment and the order denying the motion for a new trial are reversed as to Counts 11 and 12; they are affirmed as to the remaining 67 counts.

MOORE, P. J., and McCOMB, J., concur.

2. The present district attorney of Los Angeles County was not in office when this case was tried.

3. The trial of this case started on June 19, 1950. The record on appeal was filed on June 4, 1951. Principally because of the large number of counts, it was necessary to grant counsel for defendants three months' additional time in which to prepare their opening brief, the People six months, and defendants five months for their reply. The final brief was filed in this court on Oct. 17, 1952. The case was on the calendar and submitted on Oct. 22, 1952.



115 Cal.App.2d 55

In re SCHRAMM'S ESTATE.

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. LIZDENNIS.

Civ. 19253.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1952.

Rehearing Denied Jan. 12, 1953.

Hearing Denied Feb. 19, 1953.

Controversy involving construction of trust provisions of a will. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered judgment for executor, and contestant appealed. The District Court of Appeal, Moore, P. J., held that where will created trust and named beneficiary thereof as cotrustee, provision directing that such individual, as cotrustee, should be engaged as building manager for building constituting trust corpus, manifested intent that such individual should become building manager only after distribution of the corpus to the cotrustees, and not during probate.

Order affirmed.

1. Wills ⇐435, 440

In construing a will, the court must ascertain the intention of the testator as expressed by his own declarations, and if that intention cannot be enforced to its full extent, it must have effect as far as possible.

2. Trusts ⇐172

Where will which created trusts provided that named individual, who was also named as cotrustee, was to receive income from certain trust which was to terminate five years after distribution, and that one of the cotrustees, namely, such individual, was to be engaged as building manager for properties constituting trust corpus of which he was beneficiary, intent manifested was that such individual was not to be employed as business manager during probate, but only after distribution of the entire estate to the trustees, and only during the period of the trust.

3. Trusts ⇐126, 280

Income earned by a testamentary trust during probate inures to the benefit of the trust, and is payable to the beneficiary during the court's administration, in absence of specific directions of the testator to the contrary.

Lester Lev, Los Angeles, for appellant.

Sheppard, Mullin, Richter & Balthis, Frank S. Balthis, Los Angeles, for respondent.

MOORE, Presiding Justice.

By her last will and its codicils executed in 1951, Lillian E. Schramm created four trusts (A, B, C and D) with her favorite bank as a trustee. After her decease in February, 1952, the bank and Clarence Lizdennis, sole beneficiary under Trust D, were, according to the will, appointed cotrustees of that trust, and the bank as sole executor. Clarence was to receive the total net income of Trust D which was to terminate five years after distribution. At that time the assets are to be distributed to Clarence free of the trust. If he should not survive the period of the trust, it will continue as a trust for charitable uses.

The controversy here involved arises out of the Seventh clause of the will.[1] Be-

1. "Seventh: I give, devise and bequeath to The Farmers and Merchants National Bank of Los Angeles, a national banking association, and to Clarence Lizdennis, as Co-Trustees, in trust, to hold, manage and distribute as hereinafter provided, the property hereinafter listed and described under the section establishing Trust D.

"A. Establishment Of, And Properties To Be Included Under, Trust D.

"1. The properties which are hereby devised and bequeathed to the Co-Trustees and to be held under Trust D are as follows:

"The Carroll W. Blake Building located at 430 South Broadway in the City of Los Angeles, together with all personal property located therein.

"2. If said real property or said personal property are sold prior to my death the net proceeds received therefrom are to become a part of the corpus of said Trust D.

"3. Said properties above described are devised subject to encumbrances, if any, and to all unpaid real estate taxes and assessments constituting liens thereon.

"4. I direct that one of the Co-Trustees, said Clarence Lizdennis, is to be engaged as building manager for said properties, and providing he devotes his full business time to said activity he is to receive the sum of $2,000.00 per month for performing the duties of said building manager.

"B. Distribution Of Income And Principal As To Trust D.

"1. The Trustee shall first set aside from the gross income such amounts as in their judgment are reasonably necessary to pay principal and interest on any existing encumbrances, real estate taxes and assessments, and also reasonable amounts for depreciation and maintenance expenses, and also including the building manager's compensation above mentioned.

"2. I request that my individual Co-Trustee, Clarence Lizdennis, consider the payment to William Winterberg of the sum of $100.00 per month during the continuance of this trust from the net income of said trust. This is made as a request only and is not a direction, and the individual Co-Trustee shall have entire discretion to act in such matter.

"3. The net income during the continuance of this trust shall be paid to or for the benefit of said Clarence Lizdennis."

cause item 4 under A directs that Clarence is to be engaged as "building manager for said properties" at a salary of $2,000 a month provided he "devotes his full business time to said activity" he conceives that he should have been promptly designated as the manager of the Blake building by the bank which was qualified as executor of the will so that he could receive, during probate, the specified salary for devoting his full time to the task of managing the Blake building. Respondent contends that the testator did not intend that Clarence should become the building manager during probate but that he should enter upon such duties after distribution of the entire estate to the trustees. For the reasons about to be stated, it appears that the trial court's interpretation of the will was without error.

[1] It is agreed that in construing a will the court must ascertain the intention of the testator as expressed by his own declaration. The authorities concur. In re Estate of Layton, 217 Cal. 451, 458, 19 P.2d 793, 91 A.L.R. 480; In re Estate of Wilson, 184 Cal. 63, 67, 193 P. 581. It is also a rule of construction that if the intention cannot be enforced to its full extent, it must have effect as far as possible. Prob.Code, § 101; In re Estate of Bjors, 103 Cal.App.2d 361, 370, 229 P.2d 468. Each case depends upon its own peculiar facts. But little aid can come from precedents except in so far as they announce or confirm established principles. Ibid. The will and entire scheme of disposition should be viewed as a whole. In re Estate of Franck, 190 Cal. 28, 31, 210 P. 417.

[2] The language of testatrix' writings impells the conclusion that she directed the trustees to employ one of the cotrustees as building manager for the trust property and that such employment was to be during the administration of the testamentary trust. The above-quoted Article Seventh devises her property to the bank and appellant as cotrustees to administer and distribute as directed. The corpus of trust D is the Blake Building and its movable contents, subject to encumbrances. The trustees are to provide for such existing encumbrances, taxes, maintenance expense and the manager's salary, and to pay the net income to appellant. No matters are discussed in Article Seventh other than those pertaining to trust D. The employment of appellant as building manager is mentioned in no other portion of the will. That fact is in itself largely determinative of respondent's claim that appellant's employment is to be operative during the trust. It is significant also that the employment provision falls within the section A that designates the properties of trust D. It is equally as important that within the same section the trustees are directed to employ one of the cotrustees. Naturally, he could not have been a cotrustee until after distribution of the corpus of the trust created by the will. Appellant argues that the term "co-trustee" is merely a description of the person. That is not correct. Clarence Lizdennis needs no description to emphasize his identity. His name is most unusual. The purpose of the testatrix in making use of the term "cotrustee" was to leave no doubt of the trustees' authority to employ one of them to occupy a specific station. Its use and the power granted are on a par with the provisions that "the corporate trustee shall receive for its services while acting as cotrustee, the same compensation as if it were acting as sole trustee" leaving no pay for appellant as cotrustee who shall receive the specified compensation for "his full business time to said activity as building manager." In view of the order outlined and the language employed by testatrix, it is unmistakable that she intended for appellant to be employed only by the trustees and only during the period of the trust.

There are some internal evidences to support the foregoing conclusion. By her codicil of December 21, 1951, she specified the Blake Building and its movable contents as the "properties hereby devised to the Co-Trustees" and added: "Except the income from said property received during the probate administration of my estate which is specifically included within the residue of my estate bequeathed under Article Eighth." That provision definitely demonstrates that she did not intend for

Clarence, as the beneficiary under trust D, to share in the income during the administration of the executor, despite the provision for him to have the residue of income in possession of the bank at the close of probate.

[3] It is, of course, the rule that income earned by the trust property during probate inures to the benefit of the trust, Prob.Code, § 163; Estate of Platt, 21 Cal. 2d 343, 347, and is payable to the beneficiary during the court's administration. However, that rule gives way when the testator has made specific directions in her codicil to avoid the general rule. An expressed intention controls the distribution of income from trust property. Moreover, by her codicil testatrix amended her residue clause (section Eighth) to provide that all income from the Blake Building during probate administration be used to pay expenses of probate, all taxes and "any taxes imposed upon any assets not included in my probate estate but which are includible in the adjusted gross estate for Federal Estate tax purposes." Also, she required by her codicil that the income from the Blake Building is to be used by the executor for the payment of administration expenses and taxes, "and I do not intend that the beneficiaries under this residuary clause are to receive such income commencing from the date of my death." Such provisions show a clear intention that appellant shall have no interest in the income during probate but that such income shall be used to pay state and federal taxes and all expense of administration. Payment to appellant of the fixed compensation out of the Blake Building income during probate is contrary to the expressed purpose of testatrix in her codicil. The evidence shows that should appellant take $2,000 a month during probate, there would not be left sufficient funds for payment of probate expense and taxes and the sums due on the encumbrances.

Finally, the testatrix declared outright that it was her intention that the income of the properties passing under the residuary clause is to be used to pay administration expense and taxes. She knew and the proof shows that the disbursement of those funds to appellant would leave the executor without funds for administration expenses and such a calamity would vitally affect all creditors and beneficiaries of the estate. If she had intended appellant to manage the Blake Building during probate, she would surely have told as much to Mr. McGinley, employee of the bank who conferred with her upon the details of her will. When she discussed the subject with Mr. Scott, an officer of the bank, she did not once indicate a desire for appellant to have any voice in management or any share in the income of the trust properties prior to distribution. Such testimony was introduced by appellant.

The order is affirmed.

McCOMB and FOX, JJ., concur.



DIETRICH v. DIETRICH.*

Civ. 19116.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1952.

Rehearing Denied Jan. 12, 1953.

Hearing Granted Feb. 16, 1953.

Action by wife for separate maintenance wherein husband cross-complained for annulment on ground that foreign decree dissolving prior marriage of wife was void, with result that such marriage existed at time of purported marriage of parties. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered order allowing wife alimony pendente lite and attorneys' fees and costs, and defendant appealed. The District Court of Appeal, White, P. J., held that when husband had been fully informed at time of marriage as to facts surrounding the obtaining by wife of foreign decree dissolving her prior marriage husband was thereafter estopped to attack such foreign decree, and was a stranger to decree and not entitled to maintain collateral attack.

Order affirmed.

* Subsequent opinion 261 P.2d 269.

1. Marriage ⇐62

Where grounds on which husband seeks an annulment of marriage are denied by wife under oath, wife is entitled to allowance during pendency of suit on application therefor, without regard to merits of action, and fact that husband who is defendant in action for divorce or separate maintenance, seeks to secure annulment by cross-complaint does not abrogate the rule.

2. Divorce ⇐330

A foreign divorce decree, valid on its face, may not be collaterally attacked for fraud by a stranger to decree who had no rights which were prejudiced at the time the decree was made, and such rule has application to one who subsequently marries one of the divorced parties.

3. Divorce ⇐330

Husband against whom wife brought divorce action was stranger to foreign decree by which wife had obtained dissolution of prior marriage, and could not collaterally attack such decree by way of cross-complaint for annulment.

4. Divorce ⇐330

Where husband against whom wife brought divorce action had been fully informed at time of marriage as to facts surrounding the obtaining by wife of previous foreign divorce decree dissolving wife's prior marriage, husband was estopped to attack such foreign decree by way of cross-complaint for annulment.

5. Husband and Wife ⇐205(6)

The manifest purpose of pendente lite allowances to a wife are to enable her to live in her accustomed manner pending the disposition of the matrimonial action, and to provide her with whatever is needed by her to litigate properly her side of the controversy, and basis is not alone the husband's ability to pay.

6. Husband and Wife ⇐295

In wife's action for separate maintenance wherein husband cross-complained for annulment or divorce, evidence sustained determination of need by wife of $2,750 per month to maintain herself in accordance with her accustomed standard of living, and that husband was financially able to meet the obligation imposed upon him to make such payments.

7. Husband and Wife ⇐205(6)

Where the wife possesses independent means sufficient for purpose of enabling her to live in her accustomed manner pending disposition of matrimonial action, and sufficient means to litigate properly her side of the controversy, an allowance of alimony pendente lite should not be granted, but wife is not required to impair the capital of her separate estate. Civ.Code, § 137.

8. Husband and Wife ⇐205(6)

Where record supported determination that wife needed $2,750 per month for purpose of maintaining herself in accordance with her accustomed standard during pendency of matrimonial action, and that husband was financially able to meet the obligations imposed upon him to make such payments, allowance of such amount as alimony pendente lite without reduction for independent income of wife was improper, and same would be reduced to an amount representing the difference between amount reasonably required and income produced from wife's separate estate.

9. Appeal and Error ⇐1078(5)

Where brief by husband on appeal in matrimonial action presented no argument in support of his claim that award for costs of suit was exorbitant, court would assume an abandonment by husband of that contention.

10. Appeal and Error ⇐984(5)
Husband and Wife ⇐205(6)

An allowance of attorneys fees on account to attorneys for wife in a matrimonial action rests in sound discretion of the trial court, and allowance made will not be set aside except upon clear showing of abuse of discretion.

11. Husband and Wife ⇐205(6)

Where matrimonial action between husband and wife was of complex nature and involved large amount of property and conflicting claims, award of $10,000 to wife as attorneys' fees to enable her to prosecute her action and defend cross-complaint was not an abuse of discretion. Civ.Code, § 137.

Loyd Wright, Charles A. Loring and Wright, Wright, Green & Wright, Los Angeles, for appellant.

Jennings & Belcher and Frank B. Belcher, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff-cross-defendant and respondent (hereinafter referred to as plaintiff) instituted this action to obtain a decree of separate maintenance from defendant-cross-complainant and appellant (hereinafter referred to as defendant). As ground for obtaining the relief sought, plaintiff in the first count of her complaint alleged numerous acts of adultery on the part of defendant. In the second count extreme cruelty is pleaded. In her complaint plaintiff also alleged the existence of community property in excess of $2,500,000; that defendant is earning as salaries $220,000 per year, and has community income in addition to his salary in amount considerably in excess of $100,000 per year.

Defendant filed an answer admitting a "purported marriage ceremony" with plaintiff on May 23, 1936. He alleged that such "purported marriage" is illegal and void because of an alleged prior marriage of plaintiff which had not been dissolved by divorce, annulment, death or otherwise. Defendant denied the charges of adultery and extreme cruelty contained in plaintiff's complaint. He disputes plaintiff's allegations as to the value of the community property of the parties, alleging that the value thereof, if a valid marriage exists, does not exceed the sum of $122,626. Admitting that he holds the positions set forth in plaintiff's complaint, defendant alleges that his net income from all sources, after payment of federal, but exclusive of state income taxes, will not exceed the sum of $77,908 for the calendar year 1951, and that increased income tax rates accruing, his income for the year of 1952 will not exceed $71,818. Defendant further contends that a substantial portion of his property holdings are his separate property.

In addition to his answer, defendant filed a cross-complaint for annulment, or, in the alternative, for divorce. In his cross-complaint defendant alleges that a decree of divorce obtained by plaintiff from a prior husband by a judgment rendered in a court of the State of Nevada on May 23, 1936, was and is void for want of jurisdiction of the Nevada court. At the time of the hearing on the order to show cause hereinafter referred to, no answer to the cross-complaint had been filed. It is admitted that there are three children as the issue of said marriage, presently aged approximately 15, 10 and 6 years.

Pursuant to an order to show cause a hearing was had before the trial court on December 12 and 13, 1951. By supporting affidavits plaintiff asked an allowance for monthly alimony and support of the three children of $5,028.85, attorneys fees in the sum of $25,000 and court costs of $5,000.

Following a hearing on the order to show cause the court ordered, among other things, the payment of attorneys fees on account in the sum of $10,000; alimony to plaintiff in the sum of $2,750 monthly; $750 per month for the maintenance, support and education of the three children, and $500 payable forthwith for costs. Defendant was further ordered to pay all property taxes amounting to a sum testified by plaintiff as being "something in excess of $4,000.00 on the tax year". It was further ordered that defendant pay premiums upon all health, life and accident insurance policies in which plaintiff or any of the three minor children of the parties appear as beneficiary, and also to pay when due all premiums for fire and public liability insurance upon the premises occupied by plaintiff and the minor children, and which amounted to $2,210.51 annually.

From that portion of the order allowing alimony to the plaintiff, attorneys fees and court costs, defendant prosecutes this appeal. In other words, the appeal is taken from all of the court's order directing payments to be made by defendant to plaintiff for her counsel, save and except as to the $750 per month allowed for the maintenance, support and education of the three minor children.

As a first ground for reversal of the order defendant urges that the trial court erred in sustaining plaintiff's objection to the former's offer of proof. In that re-

gard the record reflects that during the progress of the hearing on the order to show cause defendant undertook to cross-examine plaintiff concerning the alleged marriage between the parties. It was plaintiff's contention that she and defendant were legally married at Redondo Beach, California, on May 23, 1936.

There was no question that the parties had participated in a marriage ceremony at that time and place, but defendant sought to show that at that time plaintiff was then legally married to one Harold C. Moore; that she and said Harold C. Moore were married at Portland, Oregon, on or about October 25, 1930; that the marriage between plaintiff and Harold C. Moore was never legally dissolved and still existed on May 23, 1936, at the time of the marriage ceremony participated in by the parties hereto. Plaintiff contended that her marriage to Harold C. Moore was dissolved and terminated on May 22, 1936, the day before the marriage ceremony at Redondo Beach, by a decree of divorce by a Nevada court at Las Vegas, Nevada. Defendant contended that said decree of divorce was merely a so-called "quickie Nevada" divorce, and was void for want of jurisdiction in that at the time of the alleged Nevada divorce plaintiff and Harold C. Moore were each residents of California, and neither of them were residents of Nevada.

In this regard the record reflects that on cross-examination of plaintiff she was interrogated as follows:

> "Q. (By Mr. Loring, of counsel for defendant) Mrs. Dietrich, isn't it a fact that you went to the State of Nevada on or about April 4, 1936, for the sole purpose of procuring a divorce or a purported divorce from your then husband, Harold Moore?"

To the foregoing question, plaintiff answered:

> "* * * No, I did not go to Las Vegas (Nevada) for the sole purpose of obtaining a divorce * * *."

Defendant then obtained an admission from plaintiff that in the Nevada divorce she was represented by Attorneys McNamee and McNamee. Thereupon plaintiff was confronted with a letter written in her handwriting and addressed to defendant, and which letter read in part as follows:

> "* * * I had to see Mr. McNamee during the noon hour because he is so rushed with divorces, and I thought I should see him before I called you, so that I could report progress. I thought you would be glad to know I had not forgotten the purpose of my trip."

After plaintiff admitted writing the letter she was asked, "Now, doesn't that refresh your recollection that the purpose of your trip to Las Vegas (Nevada) was to get a divorce from Harold Moore?"

An objection by plaintiff's counsel to this question was sustained.

Thereupon, by stipulation, defendant made an offer of proof. In support of and as part of the offer of proof he offered many pieces of documentary evidence consisting in large part of plaintiff's written declarations. This evidence was designed to show that plaintiff was never a resident of Nevada; that she never intended to make Nevada her home and that therefore, the divorce decree in Moore v. Moore was void for want of jurisdiction. For the purpose of deciding the legal questions herein raised it will be sufficient to epitomize defendant's offer of proof by saying that he offered to prove by the aforesaid documentary evidence that at the time plaintiff obtained her Nevada decree of divorce from her husband, both parties to said action were residents of the State of California and not of the State of Nevada. That plaintiff intended, after she obtained her divorce in Nevada and married defendant, to live with him in the State of Texas. That plaintiff referred to her stay in Nevada as "my sojourn in Nevada". That during her stay in Nevada awaiting her divorce from her former husband, plaintiff wore defendant's engagement ring and fairly "flaunted it" in the presence of other people. That plaintiff did not stay continuously in Nevada during the six-week period April 4, 1936, to May 22, 1936, as required by the laws of that state, but came to Los

Angeles on four occasions, and on one of such occasions remained in Los Angeles for more than twenty-four hours. That during said six-week residence in Nevada plaintiff made active plans to marry defendant. That as early as April 21, 1936, plaintiff's wedding date for her marriage to defendant was fixed as May 23, 1936. That on May 19, 1936, three days before she secured her Nevada decree of divorce from her former husband, plaintiff came to Los Angeles and with defendant applied for a license to marry him. That after testifying in the Nevada court at the hearing of her divorce proceeding on May 22, 1936, that she came into the State of Nevada "with the intention of making it your (plaintiff's) home and permanent place of residence", which testimony was given at about 9:45 a. m., plaintiff sent a telegram to defendant reading in part as follows: "* * * Am all finished and leaving on noon train due L. A. nine forty-five tonight but running late". That plaintiff did on that same day board the train at Las Vegas, Nevada, and arrive in Los Angeles that night. That she never returned to the state of Nevada thereafter. That plaintiff caused an appearance to be entered in the Nevada action on behalf of Harold Moore by means of a power of attorney which Harold Moore gave plaintiff; that Harold Moore was never personally present in the State of Nevada at any time during the dates April 4, 1936 to May 22, 1936; that plaintiff paid the expense of legal fees and court costs for Harold Moore, and that the divorce proceeding did not cost the latter anything. That defendant had no knowledge or information prior to the month of November, 1951, regarding the invalidity of plaintiff's Nevada divorce from her husband Harold Moore and that he first learned that there was some question regarding the validity of such Nevada divorce in 1951.

The foregoing offer of proof was made, as stated by defendant's counsel, "for the purpose of showing that there is no legal marriage between the (plaintiff) and (defendant) in this action by reason of the fact that on May 23, 1936, at the time of the ceremony with the defendant (the plaintiff) was then and there the legal wife of a man to whom she was married in 1930".

The trial court sustained objections to this offer of proof on the following grounds:

> "The offer, on its face, shows an activity on the part of the defendant in obtaining the Nevada divorce which the Court considers constitutes an estoppel.
>
> "Second, the Court holds that the defendant, in any event, is not a person who may attack the divorce, not being a party thereto, or interested therein.
>
> "Third, that under the law, both parties having appeared in the action, and had an opportunity to present all matters, including jurisdictional matters, entitled the Nevada decree to full faith and credit in this and every other state."

An objection to all documentary evidence offered in support of the offer of proof was sustained, except that the judgment roll of the Nevada proceeding was received in evidence, but the transcript of the testimony given by respondent in said proceeding was excluded.

In support of his contention that the trial court erred in sustaining an objection to the aforesaid offer of proof, defendant urges that the validity of the challenged marriage between the parties in the instant proceeding was an issue on the hearing of the order to show cause.

Relying heavily and alone upon the case of Hite v. Hite, 124 Cal. 389, at page 391, 57 P. 227, at page 228, 45 L.R.A. 793, which involved an appeal from an order awarding alimony and counsel fees *pendente lite*, defendant insists that, as therein stated, "To justify alimony, marriage must be admitted or proven. Upon this subject there is no difference in the authorities. * * * The judge should be satisfied from the entire proof made of the fact of marriage. Unless upon that question the husband has had his day in court, and a hearing, if alimony is allowed, his property is taken without due process of law. * * * He must be heard, and be allowed to submit

evidence, which must be considered in determining as to the fact of marriage."

However, in the case just cited, the court was concerned with a claimed common-law marriage wherein the marriage contract, according to plaintiff's deposition, consisted simply in this, that the defendant said to her, "You are my wife". That no witnesses were present, and *that she had refused to live with defendant husband unless he married her.* In a concurring opinion prepared by Chief Justice Beatty in the Hite case, supra, we find the following language: "If he sues to annul a marriage upon the ground that it was void *ab initio* by reason of fraud, precontract, insanity, etc., the granting of alimony *pendente lite* would be proper, because a formal marriage is alleged, and will remain a lawful and established marriage in the absence of affirmative proof by him of the existence of some fact or facts which will invalidate it. In such a case I concede the propriety and justice of allowing the wife (for until the fraud or other invalidating circumstances are established she is the wife) money to make her defense."

[1] In the instant case we are confronted with a situation wherein a ceremonial marriage is not only admitted but affirmatively alleged in verified pleadings by both parties. Under such circumstances, we are persuaded that plaintiff was entitled to an award *pendente lite* of alimony, attorneys fees and costs. We are satisfied that the weight of authority supports us in the conclusion that where a husband seeks an annulment of a marriage on grounds, the existence of which is denied by the wife under oath, the wife is entitled to an allowance during the pendency of the suit. That this is sufficient to sustain the application and the court will not go into the merits of the action at this state. And the fact that the husband, where he is the defendant in an action for divorce or separate maintenance, seeks to secure an annulment by cross-complaint, instead of by an original suit, does not change the rule. 17 Am.Jur. 444, sec. 556; 35 Am.Jur. 226, 227, sec. 70.

In the case of Bancroft v. Bancroft, 9 Cal.App.2d 464, 467, 50 P.2d 465, the case of Hite v. Hite, supra, is discussed and the reasons for its inapplicability in cases of a ceremonial marriage is set forth. In the Bancroft case it was held that where, as here, the defendant did not deny his marriage to plaintiff, but merely denied the legal effect of the marriage for the reason that plaintiff was under a supposed disability that prevented her from entering into a lawful marriage with defendant, and where, on an application *pendente lite* for trial costs and attorneys fees, the fact of a ceremonial marriage was established, and it was admitted that the parties had lived together as husband and wife for at least a year after the ceremony (in the case at bar more than 14 years) the trial court was fully justified in concluding that, for the purpose of said application, plaintiff had made a reasonably plain case of the existence of her marriage, and was entitled to be furnished with means of temporary support and of counsel and of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the trial of the case.

[2, 3] We are satisfied that the ruling of the court sustaining an objection to defendant's offer of proof challenging the validity of the Nevada decree dissolving plaintiff's former marriage must be sustained for the reason that appellant was estopped to collaterally attack such decree. A stranger to a foreign divorce decree can impeach it collaterally only when it injuriously affects him. And it has been held that one who subsequently marries one of the divorced parties has no such interest as will enable him to attack the decree. Mumma v. Mumma, 86 Cal.App.2d 133, 135, 194 P.2d 24, and cases therein cited. Defendant is a stranger to that decree; he had no rights which were affected by it. The case now before us does not fall within any of the jurisdictional grounds upon which a foreign divorce decree is subject to collateral attack as recited in the case of Cardinale v. Cardinale, 8 Cal.2d 762, 766, 68 P.2d 351. We find no cases holding that a foreign decree, valid on its face, may be collaterally attacked for fraud by a stranger to the decree who had no rights which were prejudiced at the time the decree was made.

The proffered facts contained in appellant's offer of proof have hereinbefore been narrated and need not be here repeated. Suffice it to say that the offer of proof shows that defendant knew and was kept meticulously informed of every step taken by plaintiff in securing her Nevada decree of divorce from Harold Moore. It is equally clear that marriage was contemplated between defendant and plaintiff from a time prior to the latter's departure for Nevada. A part of the defendant's offer of proof was that as early as September of 1935 a marriage between the parties was discussed, with a planned honeymoon trip to Honolulu. Defendant wrote to plaintiff almost daily during her stay in Nevada. He gave her an engagement ring prior to the time she obtained her Nevada decree, and made weekend trips to Nevada during her stay there. Defendant's offer of proof shows that he was thoroughly cognizant of plaintiff's state of mind, her intent and the purpose she sought to achieve. With full and complete knowledge of all facts with reference to the Nevada decree, defendant lived with plaintiff as husband and wife for a period of more than 14 years, and they have a family of three children.

[4] Though it be conceded that defendant did not actually aid plaintiff in procuring the Nevada decree by paying her attorneys fees and expenses so that she would be free to marry, it is manifest that he married her in reliance upon such decree, was interested in the outcome of the Nevada divorce proceeding, and anxious that plaintiff be in a position so that she could marry him. The result in which he was so vitally interested he now seeks to nullify. This he cannot do because of the principle of quasi estoppel, or acquiescence. While an estoppel does not make valid the thing complained of it does silence the complainant. Rediker v. Rediker, 35 Cal.2d 796, 805, 808, 221 P.2d 1, 20 A.L.R.2d 1152; Harlan v. Harlan, 70 Cal.App.2d 657, 661, 161 P.2d 490; Watson v. Watson, 39 Cal.2d 305, 246 P.2d 19.

Defendant accepted the situation and married plaintiff upon the faith of the status conferred upon her by the Nevada decree. Particularly pertinent to the case now engaging our attention is the language in the case of Cromarty v. Cromarty, 38 Ont.L. Rep. 481, 33 D.L.R. 151, wherein it is said: "* * * it would be a monstrous thing to hold that this marriage conferred upon him any status to attack the earlier divorce and so annul his marriage".

The case of Brill v. Brill, 38 Cal.App.2d 741, 745, 102 P.2d 534, strongly relied upon by defendant, does not aid him. The cited case neither discusses nor decides the question specifically decided in the later case of Mumma v. Mumma, supra, that a second husband is a stranger to a foreign divorce action of his wife and consequently, in no position to collaterally attack the decree therein. Whatever may be said in other foreign state decisions in conflict with the holding in Mumma v. Mumma, supra, must yield to the holding in the latter case, which declares the law of California. The finding of the trial court that the proffered evidence constituted an estoppel was, therefore, correct and proper.

[5] We come now to a consideration of the defendant's final contention that the award of the trial court of attorneys fees and alimony *pendente lite* constitutes abuse of discretion. In this regard it is first contended that the amounts awarded were excessive in view of defendant's ability to pay. The manifest purpose of *pendente lite* allowances to a wife are to enable her to live in her accustomed manner pending the disposition of the action, and to provide her with whatever is needed by her to litigate properly her side of the controversy.

As we read defendant's contentions, he does not claim that the amount awarded for plaintiff's support and maintenance was excessive except for the claimed inability of defendant to pay. With reference thereto there was testimony by a certified public accountant that he had examined the financial records of defendant, including the income tax returns of both plaintiff and defendant for the year 1950; that the 1950 income tax returns of plaintiff and defendant reflected a gross cash income for that year of $406,700.67, $87,984 of which was received on oil royalties, twenty-seven and

one-half percent of which is tax free; that the expense of maintaining the family for the year of 1950—or, in other words, household expenses—amounted to $85,567.76. That income tax returns, both state and federal, reflected a payment of $209,561.35 for the year 1950; that the net amount left after the payment of income taxes was $197,139.32, leaving after the payment of family maintenance the sum of $111,571.56; that under the federal income tax law covering the year of 1951, there would be an increase of about $20,000 in federal taxes. That in addition, $8,459.41 was received by defendant's two daughters by a former marriage through a gift made by him to them.

[6] In making the award of $2,750 per month for the support and maintenance of plaintiff the court made a specific finding, "* * * which amount the court finds to be in accordance with her present standard of living". There was ample testimony to establish the fact that in determining plaintiff's need of such an amount to maintain herself in accordance with her accustomed standard of living the court did not abuse its discretion. Neither did the court abuse its discretion in determining that defendant was financially able to meet the obligation imposed upon him to make such payments.

[7] However, a most serious question is presented by defendant's contention that the court erred in failing to require plaintiff to utilize the income from her separate property for her maintenance and support. Section 137 of the Civil Code does not empower the court to award temporary support and suit money except upon a finding of necessity. And if the wife possesses independent means sufficient for the purpose of enabling her to live in her accustomed manner pending the disposition of the action, and to litigate properly her side of the controversy, the allowance therefor should not be granted. However, she is not required to impair the capital of her separate estate. Loeb v. Loeb, 84 Cal.App.2d 141, 145, 190 P.2d 246.

[8] In her affidavit to support the order to show cause plaintiff admitted she had a net financial worth of $67,212.13, and that her income from her separate property was $1,100 monthly. However, according to plaintiff's own records, she had an income of $11,768.03 during the period January 1, 1951 to August 31 of the same year. This shows an average income during the stated period of $1,471 per month.

In the instant case the court concluded that the sum of $2,750 per month was the "* * * amount the court finds to be in accordance with her (plaintiff's) present standard of living." Manifestly, the "need" of a wife as that term has been construed by the courts, is, in a case such as the one now before us, the difference between what the court finds she reasonably requires for her support and maintenance, and her ability to pay for such support and maintenance from the income produced by her separate estate. The record reveals that the attitude of the trial court was not in accord with the foregoing rule. Therefore, it must be held that in refusing to consider plaintiff's needs in the light of the rule above enunciated, the court abused the discretion vested in it. The order must be modified by reducing the amount to be paid plaintiff for her own support and maintenance from $2,750 monthly to $1,650 per month, which added to her admitted income of $1,100 per month totals the sum which the court found was reasonably necessary to maintain her in accordance with her accustomed standard of living. Loeb v. Loeb, supra, 84 Cal.App.2d at page 145, 190 P.2d at pages 248, 249; Spreckels v. Spreckels, 111 Cal.App.2d 529, 534, 244 P.2d 917.

What we have herein stated is not to be considered as an expression upon our part as to what would be a proper judgment upon the ultimate issue of permanent support.

We now come to a consideration of defendant's final contention that the court abused its discretion in making an allowance to plaintiff of the sum of $10,000 on account of attorneys' fees and $500 for costs of suit.

[9] In his brief defendant presents no argument in support of the claim that the award for costs of suit was exorbitant, and we shall therefore assume an abandonment by him of that contention.

[10, 11] Concerning the award of attorney fees, defendant urges that the sum of $10,000 on account was excessive. It is agreed that under the law, the allowance of such fees and their amount rest in the sound discretion of the trial court, and that an allowance thereof will be set aside only upon a clear showing of abuse of discretion.

In the case of Pope v. Pope, 107 Cal.App. 2d 537, 539, 237 P.2d 312, 314, it is said that "In determining the amount of a reasonable fee the trial court is permitted to consider various factors: The nature of the litigation, its complexity, the nature and extent of the contest, the amount involved, the financial circumstances of the parties, the skill required, the professional standing and reputation of the husband's attorneys and of the attorneys selected by the wife, are some of the relevant matters to be considered." (Citing cases.)

Since Civil Code section 137 limits the allowance of attorneys fees to those necessary to enable the wife to secure adequate representation to prosecute or defend the suit and to meet the legal expenses and fees that she can reasonably be expected to incur in such prosecution or defense, the award must of necessity be based upon the value of the services that can be anticipated from a consideration of the extent to which the action may be contested, the size of the marital estate, and the difficulties attending a determination of the value of the property and its classification as separate and community. And, as heretofore pointed out, the court may consider the skill required, the professional standing and reputation of the husband's attorneys and of the attorneys selected by the wife. Because section 137 gives the court no authority to base an award on past services, the allowance of fees thereunder is necessarily prospective in nature. Warner v. Warner, 34 Cal.2d 838, 840, 841, 215 P.2d 20; Pope v. Pope, supra, 107 Cal.App.2d at page 539, 237 P.2d at page 314.

It cannot be successfully urged that this litigation is devoid of difficulty or complexity. On behalf of plaintiff wife there is involved her suit for separate maintenance, predicated upon charges of adultery and cruelty. There is also the question of whether certain property is community or separate, and the setting aside of transfers of alleged community property by defendant to his children by a former marriage, namely Elizabeth Jewell and Katherine O'Harra, consisting of a five per cent interest to each of them in the Oak Canyon Oil Field, as well as the securing of an accounting of sums of money allegedly received by said transfers. Also tendered as issues by defendant in his cross-complaint is an action for annulment, and, in the alternative, for divorce.

Large and complicated property interests are involved. Plaintiff claims there is community property in excess of $2,500,000. Both sides have employed expert accountants. There is every indication that the trial of this action will be long and bitterly contested. In view of the foregoing facts, we cannot say that the trial court abused its discretion in making the award of attorneys fees.

Furthermore, as was said in Warner v. Warner, supra, 34 Cal.2d at page 841, 215 P.2d at page 22, quoting from Nightingale v. Superior Court, 184 Cal. 583, 194 P. 1002, "We entertain no doubt of the power of the court in divorce actions to modify its orders for the payment to the wife of money necessary to enable her to support herself during the pendency of the action, or to enable her to prosecute or defend the action, as the circumstances with regard to necessity change".

Therefore, the trial court could reduce the award to an amount necessary to compensate the attorneys for services actually rendered should contingencies arise that would preclude rendition of the anticipated services.

In view of the fact that plaintiff's revenues received as income from her separate property will be consumed by her own living expenses, we cannot say that the trial court abused its discretion in making the award of counsel fees and costs and ordering that they be paid by defendant.

For the foregoing reasons, the order appealed from is modified by reducing the

amount to be paid for the maintenance and support of plaintiff as set forth in paragraph "D" thereof, from the sum of $2,750 per month to $1,650 per month. In all other respects the order is affirmed. The parties will bear their respective costs on appeal.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 498

In re MEYER'S ESTATE.

Civ. 8178.

District Court of Appeal, Third District, California.

March 4, 1953.
Hearing Denied April 30, 1953.

Proceeding in the matter of the estate of a decedent. The Superior Court, Sonoma County, Hilliard Comstock, J., entered a judgment dismissing contests which were filed after probate of decedent's will and the contestants appealed. The District Court of Appeal, Van Dyke, P. J., held that where contestants knew of pendency of probate contest before trial of contest began, but did not know of their interest in proceedings until after trial began, such contestants did not have actual knowledge in time to have joined therein within statute providing that when a will has been admitted to probate an interested person, other than a person who had actual notice of previous contest in time to have joined therein, may contest will, and such knowledge did not preclude contest of will after will had been admitted to probate.

Judgments reversed and causes remanded.

1. Wills ⇐229

In enacting amendatory statute providing that when a will has been admitted to probate an interested person, other than a party to contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may contest will, purpose of legislature was aimed exclusively at those who had full opportunity to contest before probate but preferred to be dilatory, and legislature did not intend that persons who knew of pendency of pre-probate contest should be excluded from class of those who might file post-probate contests if those persons had neither actual nor implied knowledge that they were interested persons. Probate Code, § 380.

2. Wills ⇐229

A person does not have actual notice of a pre-probate contest in time to have joined therein, within statute providing that when a will has been admitted to probate an interested person other than a person who had actual notice of previous contest in time to have joined therein, may contest will, where such person did not possess, expressly or impliedly, a knowledge of his right to contest as an interested person, even though such person had actual notice of pre-probate contest. Probate Code, § 380.

3. Wills ⇐229

Where contestants knew of pendency of probate contest before trial of contest began, but did not know of their interest in proceedings until after trial began, such contestants did not have actual knowledge in time to have joined therein within statute providing that when a will has been admitted to probate an interested person, other than a person who had actual notice of previous contest in time to have joined therein, may contest will, and such knowledge did not preclude contest of will after will had been admitted to probate. Probate Code, § 380.

Lounibos & Lounibos, Petaluma, and Geary, Spridgen & Moskowitz, Santa Rosa, for appellants.

Sullivan, Roche, Johnson & Farraher, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

The appeals herein were taken direct to this Court. Involving probate matters, they should have been taken direct to the Supreme Court. The error was not noticed by anyone concerned and the appeals were reg-

ularly briefed and argued without having been transferred to the Supreme Court. This Court rendered its decision and the error was then discovered. Our decision was therefore set aside and the appeals transferred to the Supreme Court. The Supreme Court returned the appeals to this Court for decision and they were again calendared for argument and submitted for decision. During the reargument the attention of this Court was called to a slight error in the statement of facts contained in our previous opinion which we have now corrected. We are satisfied with the decision heretofore rendered. With the correction in the statement of facts we adopt that opinion as the opinion of the Court. That opinion follows as so amended:

Alice Marie Meyer died in Sonoma County, and on September 18, 1947 a will was proposed for probate by the executor therein named. Albert C. Meyer, a son of deceased, contested. Judgment went against him and the document was thereupon admitted as the will of decedent. Thereafter Viola Marie Guay, a daughter of Albert C. Meyer, and also Viola Meyer, his wife, filed contests after probate. In the answers thereto filed by proponents of the will there was set up the special defense that each of said two contestants had actual notice of the pre-probate contest in time to have joined therein and that by Section 380 of the Probate Code they were not qualified to contest after probate. This special defense was first tried. It was determined against contestants, following which judgments were entered dismissing each contest. Viola Meyer Guay and Viola Meyer appeal.

It appears that both appellants knew of the pendency of the pre-probate contest shortly before November 3, 1947 when the trial of that contest was begun. On that date and while appellants were in the court room attending the trial a previous will of decedent was introduced in evidence. On the following day Viola Marie Guay testified for Albert C. Meyer and on November 5th her mother also was a witness. There were a number of postponements and the trial was not completed until April 15, 1948, when the court ordered the cause submitted for decision. September 30, 1948 the court ordered judgment for the proponents of the will and on October 18th following admitted the will to probate. Within six months thereafter appellants filed their contests, alleging their interests to be that of legatees under the earlier will of decedent which had been introduced in evidence. Each appellant in the petition for revocation of probate alleged that she had no actual notice of the pre-probate will contest in time to have joined therein. The court found these allegations to be untrue and affirmatively found that each appellant had had such notice. More specifically the court found as to each appellant that early in the trial of said contest she had knowledge of the fact that there existed a will made by the decedent prior to her making her last will and that she was a beneficiary thereunder.

The question presented by these appeals is whether or not the findings as to notice of contest in time to join are supported by the evidence. This calls for construction and application of Probate Code section 380, which provides: "When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, * * * contest the same * * *." We think the questioned findings are not supported.

The researches of attorneys for appellants and respondents and of this Court have not revealed any decision of the appellate courts of this State determining the specific issues raised by these appeals.

[1] Prior to 1929 the Code of Civil Procedure relating to contests of wills provided as to post-probate contests that when a will had been admitted to probate any person interested might contest the same; in 1929 the legislature enacted the qualifying provisions recited above excluding from the interested persons who might contest after probate those who had been parties to pre-probate contests or had had actual knowledge thereof in time to have joined therein. Under the older provisions it often happened that persons entitled to contest wills would, instead of joining in a pre-probate contest, withhold their contest until such

contest had been determined, benefiting equally with the contestants if the will were defeated, and reserving to themselves a second chance to have the will invalidated by post-probate contest. We think it to have been the purpose of the legislature in the 1929 amendment to discourage this practice. But when this has been said it is still left apparent that the legislature did not intend to do away with post-probate contests. We think the amendatory legislation was aimed exclusively at those who had full opportunity to contest before probate but preferred to be dilatory, waiting to see what might happen and then filing their contests after probate if disappointed in the outcome of the first contest. When the amendment is considered in the light of its purpose we think that the legislature did not intend that persons who knew of the pendency of the pre-probate contest should be excluded from the class of those who might file post-probate contests if those persons had neither actual nor implied knowledge of their right to contest in that they had neither actual nor implied knowledge that they were interested persons. Appellants here were not heirs of the decedent and had no knowledge of the interest arising by reason of the provisions in their favor in the earlier will. When Albert C. Meyer, the son, filed his pre-probate contest, no citation was issued to appellants as interested persons. It appears from the record that the proponent executor had the earlier will in his custody and took no steps to inform appellants of its existence nor to have them joined as interested persons. The result was that appellants wholly lacked any real opportunity to join in the pre-probate contest until the trial thereof had been commenced and they had been brought in as witnesses.

[2] Coming now to the specific terms of the amendment which deny the right of post-probate contest to a person who had actual notice of a pre-probate contest in time to have joined therein, we hold that, although having actual notice of a pre-probate contest, a person cannot be said to have had such notice *in time to have joined in the contest* when he did not possess, expressly or impliedly, a knowledge of his right to contest as an interested person. Up to the time appellants gained knowledge of their interests actual notice of the pendency of the contest meant nothing to them. Whether they had actual notice in time to have joined in the contest must be resolved in view of the purpose of the amendment by considering only that part of the time of actual notice running after they had knowledge that they were interested persons. If they did not get such knowledge in time to join in the contest then we think they did not have actual notice of the contest in time to have joined therein. And that was the situation in which appellants found themselves. That portion of the time during which they had actual notice of the contest without knowledge of their interests must be disregarded. As interested persons, knowing themselves to be such, appellants had *effective* notice of the pending contest only from the second or third day of the trial of that contest.

[3] The period ensuing between this notice and the adverse determination of the pre-probate contest was about 11 months. Appellants argue that this period offered them no opportunity to join in the pending contest within the meaning of the code section. Respondents assert that appellants had during that time ample opportunity to join. We think that the legislature cannot be said to have intended circumscribing to any degree the effectiveness of a contest by appellants if they were entitled to contest at all; and that this would be the result if it were to be held that appellants could be compelled to become parties to a contest after trial thereof had begun. Experienced lawyers and trial judges will readily appreciate the difficulties and the prejudice which a would-be contestant might well suffer if his right to contest were so limited. For example, if the pending contest were being tried to a jury, persons situated as were appellants, if then compelled to join, would have lost the right to join in the selection of that jury, and would have lost the benefit of an opening statement. In any case they would have lost the right of prompt cross-examination of adverse witnesses who might have testified, would have lost the opportunity of pre-trial deposition taking, and possibly would have irretrieva-

bly lost the right to have the testimony of vital witnesses. Other prejudice which they might suffer can readily be called to mind, but the foregoing is sufficient to show that in reality persons so situated might have lost any real right to a trial of the issues presented by their contest. A right to trial means a right to be present at and to participate in every phase of the trial. Included in the right to trial is the right to have counsel of one's own choosing and to have such counsel at all times when necessary to effective representation. We think the plain meaning of the statute in this respect must be declared to exclude from consideration, while determining whether or not persons situated as were appellants had learned of the contest in time to have joined therein, any period of time ensuing after the beginning of the trial. Indeed, we think that time to join in a contest ought to provide a reasonable time before trial to prepare adequately therefor. "There can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights." People v. Sarazzawski, 27 Cal.2d 7, 17, 161 P.2d 934, 939.

The judgments appealed from are reversed and the causes are remanded for further proceedings in accordance herewith.

SCHOTTKY, and PEEK, JJ., concur.

KRIEGER et al. v. BULPITT et al.

L. A. 22065.

Supreme Court of California, in Bank.

Jan. 6, 1953.

Rehearing Denied Feb. 2, 1953.

Proceedings to determine the title of third party claimant to proceeds of property seized by plaintiff on execution pursuant to judgment for attorneys fees rendered in divorce action. The Superior Court, Los Angeles County, Thurlow T. Taft, J. pro tem., entered judgment adverse to third party claimant, and he appealed. The Supreme Court, Spence, J., held that a contingent fee contract whereby attorneys undertook to protect their clients' interests upon any division of the community property in divorce action previously instituted by wife, and to defend action, was not in violation of public policy, and judgment entered on such contract was not void upon the judgment roll, and consequently was not subject to collateral attack.

Judgment affirmed.

Prior opinion: 243 P.2d 31.

1. Attorney and Client ⇐147

A contingent fee contract between an attorney and his client looking to the institution of a divorce action is void as against public policy.

2. Attorney and Client ⇐147

A contingent fee contract whereby attorneys undertook the defense of a divorce action which had been instituted by their client's wife, and by which they undertook to protect their client's interest upon any division of the community property, was not promotive of divorce and against public policy, but agreement was valid and enforceable.

3. Attorney and Client ⇐147

The validity of a contingent fee contract in a divorce action is to be determined in the light of the factual background of the particular case and the considerations of public policy appropriate thereto, and not every such contract is to be condemned as violative of public policy.

4. Judgment ⇐487

Judgment entered on contingent fee contract in divorce action whereby attorneys undertook to protect husband's property interest in divorce action which had previously been commenced by wife was not void upon the face of the judgment roll, and consequently was not subject to collateral attack in proceeding to determine title of third-party claimant to property seized on execution for satisfaction of judgment. Code Civ.Proc. § 689.

Alexander Ruiz, in pro. per., for third-party claimant and appellant.

Arnold D. Krieger, in pro. per., and Morgan W. Gordon, Beverly Hills, for respondents.

SPENCE, Justice.

This is an appeal by the third party claimant from a judgment determining that defendant was the owner of a certain airplane and that the third party claimant held the proceeds of a sale thereof in trust for defendant. A purported appeal is also taken from a minute order denying a motion to quash execution, a motion to dismiss, and overruling a demurrer to plaintiffs' petition to determine title.

Appellant's sole contention is that the judgment upon which execution was issued is void on its face because it is based on a contract contrary to public policy, and that therefore any proceedings to enforce such judgment are likewise void. But an inspection of the record refutes appellant's claim and sustains the validity of the judgment.

Prior to March 8, 1949, Dr. Helen Bulpitt, the former wife of defendant, filed an action for divorce against defendant. The latter retained plaintiffs, who are attorneys at law, to represent him in the pending divorce action and to secure a favorable property settlement. Accordingly, on the date mentioned he entered into a written agreement with plaintiffs for their employment under a contingent arrangement, allowing them for "services rendered and to be rendered" ten per cent of the appraised value of all property secured for defendant, but in no case should their fee be less than $5,000 nor more than $7,500. Pursuant to such employment, plaintiffs negotiated with the attorneys for defendant's wife and secured a property settlement agreement.

Defendant orally approved the agreement but later refused to execute it and permitted his wife to secure an interlocutory decree of divorce without contest.

Defendant refused to pay plaintiffs any attorney fees or costs. Thereupon plaintiffs brought suit against defendant, basing their first cause of action upon the express terms of the agreement and their second and third causes of action upon common counts for the reasonable value of their services. Defendant answered and counterclaimed, alleging plaintiffs' neglect of their duties as attorneys. This answer and counterclaim were stricken on motion of plaintiffs, and plaintiffs' motion for a summary judgment was granted. The trial court found all allegations of the complaint true, that plaintiffs were entitled to compensation in accordance with their agreement with defendant, but that they had not established their right to the maximum fee therein fixed and should only be allowed the minimum fee of $5,000. Accordingly, on January 6, 1950, judgment was given in plaintiffs' favor for $5,050, the additional $50 representing the amount of costs which they had advanced on defendant's behalf in the divorce action.

On April 16, 1951, plaintiffs levied execution on a certain Beechcraft airplane. Immediately thereafter Alexander Ruiz as third party claimant filed his claim, alleging absolute ownership of the airplane by virtue of a bill of sale executed by defendant on March 30, 1951, in consideration of legal services rendered and to be rendered by said claimant. Plaintiffs thereupon filed a petition under section 689 of the Code of Civil Procedure to determine the title of the third party claimant. In the meantime the airplane was sold and pursuant to court order, the proceeds were placed in a special fund. At the subsequent hearing, the trial court decreed that defendant, and not the third party claimant, was the owner of the airplane, and that the proceeds of its sale were held in trust for defendant subject to a lien by the third party claimant for attorney's fees. Accordingly, judgment was given to plaintiffs for the excess of the trust funds over the lien, amounting to $3,701.66. The third party claimant appeals on the judgment roll. Code Civ.Proc. § 689.

Appellant argues that it was the duty of the court, in the determination of title, to refuse to lend its aid to the enforcement of plaintiffs' judgment for these reasons: that such judgment on its face shows that it is based on a contingent fee contract negotiated in a divorce action, which contract is void as against public policy, Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548; Parsons v. Segno, 187 Cal. 260, 201 P. 580; Ayres v. Lipschutz, 68 Cal.App. 134, 228 P. 720; Theisen v. Keough, 115 Cal.App. 353, 1 P.2d 1015; Wiley v. Silsbee, 1 Cal.App.2d 520, 36 P.2d 854; that no action on the part of the parties either by conduct, stipulation or judicial decree will give such judgment validity, and it remains subject to collateral attack, Hunter v. Superior Court, 36 Cal.App.2d 100, 113–114, 97 P.2d 492. But appellant cannot prevail in his argument when consideration is given to the precise nature of the contract here involved.

[1, 2] Unquestionably, a contingent fee contract between an attorney and his client looking to the institution of a divorce action is void as against public policy. The above cited cases so hold upon the ground that such collateral bargaining is promotive of divorce and so contrary to the interests of society. See Bishop on Marriage, Divorce and Separation, vol. 2, § 696; also Green v. Green, 66 Cal.App.2d 50, 57, 151 P.2d 679; 30 A.L.R.Anno. 188. In each of those cases the contingent fee contract was between the attorney and the party seeking to procure a divorce, which situation involved the personal interest of the attorney in preventing a reconciliation between the parties, a thing which the law favors and public policy encourages. Newman v. Freitas, supra, 129 Cal. 283, 291–292, 61 P. 907. But here the contingent fee contract did not have for its object the dissolution of a marriage. Rather by the terms of their contingent arrangement, plaintiffs undertook the defense of a divorce action already instituted by their client's wife and the rendition of services for the protection of his

interests upon any division of the community property.

[3] There should not be a dogmatic condemnation of every contingent fee contract in a divorce action regardless of distinguishable circumstances. Rather the validity of such contract should be determined in the light of the factual background of the particular case and considerations of public policy appropriate thereto. This general principle was followed in Hill v. Hill, 23 Cal.2d 82, 142 P.2d 417, in upholding a property settlement agreement conditioned upon divorce, where these factors appeared: prior to execution of the agreement the parties had been separated for two years and the wife previously had a cause for divorce. In rejecting the husband's claim that the agreement was not enforceable by the wife because it was contra bonos mores, the court observed that there is no public policy in the continuance of a moribund marriage, where all possibility of reconciliation is apparently extinct and the parties "had no intention or expectation of resuming marital relations." 23 Cal.2d 93, 142 P.2d 422. In such case where a marriage's legitimate ends have been frustrated and the parties cannot derive from it the benefits for which it was instituted, the best policy is to permit dissolution of the marriage. See Streeter v. Streeter, 67 Cal.App.2d 138, 141, 153 P.2d 441; Miranda v. Miranda, 81 Cal.App. 2d 61, 69, 183 P.2d 61.

Like considerations apply here to sustain the conclusion of the trial court in the main action that plaintiffs' contingent fee agreement is valid and enforceable. The divorce action had already been commenced by the wife, establishing that the "domestic status of the parties was unsettled and their relations unsatisfactory", Hill v. Hill, supra, 23 Cal.2d 82, 93, 142 P.2d 417, 422, and thereafter the husband engaged plaintiffs to defend the suit and protect his interests in adjusting property rights on a contingent fee basis because, as appears from the agreement, he had no funds with which to reimburse them for "services rendered and to be rendered" in the pending litigation. A contingent fee contract made under such circumstances between an attorney and a client does not involve vitiating considerations contrary to public policy or constitute an agreement "promotive of divorce". Such agreement is wholly distinguishable from the contingent fee contract which is condemned as tending "directly to bring about alienation of husband and wife by offering a stranger a premium to advise dissolution of the marriage ties." Hill v. Hill, supra, 23 Cal.2d at page 92, 142 P.2d at page 421. Since the reason for condemning a contingent fee contract in a divorce action does not here exist, there is no ground for application of the rule invalidating such contract. See Newman v. Freitas, supra, 129 Cal. 283, 292, 61 P. 907.

[4] We conclude that the judgment which was entered upon the contract in the main action is not void upon the face of the judgment roll and that it is therefore not subject to collateral attack in this proceeding instituted under section 689 of the Code of Civil Procedure.

The purported appeal from the minute order is dismissed. The judgment appealed from is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



115 Cal.App.2d 72

PAYNE et ux. v. CROSSLEY et ux.

CROSSLEY et ux. v. PAYNE et ux.

Civ. 4483, 4484.

District Court of Appeal, Fourth District, California.

Dec. 23, 1952.

Hearing Denied Feb. 19, 1953.

Consolidated actions by tenants against landlords to set aside written lease cancellation agreement on grounds of fraud and by landlords against tenants for unlawful detainer, ejectment, and breach of the lease. The Superior Court of Riverside County, Lawrence A. Hutton, Judge Assigned, entered separate judgments in favor of landlords, and tenants appealed. The District

Court of Appeal, Griffin, J., held that the findings and judgments were sustained by the evidence.

Judgments affirmed.

1. Landlord and Tenant ⇐34(1)

In consolidated actions by tenants against landlords to set aside written lease cancellation agreement on grounds of fraud and by landlords against tenants for unlawful detainer, ejectment, and breach of the lease, evidence was sufficient to sustain trial court's finding that the cancellation agreement was executed voluntarily by tenants and was not obtained through landlords' fraud.

2. Landlord and Tenant ⇐34(1)

Written agreement to cancel lease, which contained mutual covenants and promises and canceled many obligations owed by tenants to landlords, was supported by a legally sufficient consideration. Civ. Code, § 1614.

3. Landlord and Tenant ⇐49(2), 285(4), 291(13)

In consolidated actions by tenants against landlords to set aside written lease cancellation agreement on ground of fraud and by landlords against tenants for unlawful detainer, ejectment, and breach of the lease, evidence sustained trial court's finding that tenants were in default under the lease.

4. Contracts ⇐88

In a written agreement, consideration for its execution is presumed. Civ.Code, § 1614.

5. Appeal and Error ⇐1011(1)

Where evidence, although conflicting, amply supported findings and judgments of trier of fact, such findings would not be disturbed upon appeal.

Alexander W. Staples, Indio, for appellants.

Eugene E. Therieau, Palm Springs, and John L. Roberts, Riverside, for respondents.

GRIFFIN, Justice.

Appellants William R. Payne and wife brought an action against respondents Lawrence Crossley and wife to set aside a cancellation agreement upon the ground that it was obtained by fraud. Subsequently, respondents Crossley brought an action against appellants Payne for unlawful detainer, ejectment and damages for alleged breach of the lease agreement. The two actions were consolidated for trial and upon appeal from separate judgments entered in favor of respondents.

The evidence shows that the Crossleys, in 1947, were lessors of Indian land near Palm Springs. They desired to develop a trailer park. Subsequently, they contacted appellants, who were without funds. They entered into a lease agreement in October, 1947, by the terms of which respondents were to furnish the land and money for development, and to supply certain income from the trailer park for this purpose. Appellants were to help develop the land. The net earnings from the rentals were to be divided equally between them.

Appellants entered upon the property and commenced physical improvements, such as putting in streets, poles for electricity, gas lines, and marking out lot lines. A gross income of a considerable amount was earned but was insufficient to prevent financial difficulties for the appellants. In the spring of 1950, appellants' creditors were numerous and the Department of Internal Revenue was threatening proceedings for failure to pay taxes due. On July 21, 1950, appellant Payne was served with notice to quit the premises for violation of the covenants of the lease. Voluntary bankruptcy proceedings for appellants were discussed with Crossley and his attorney. A conference resulted in which the parties, on July 22, 1950, signed some form of agreement denominated "Cancellation of Lease" for the admitted default by lessee of the terms of the lease. It provided that the lease should be surrendered and that each party should be released from any liability thereunder. Thereafter, by some agreement, Mrs. Payne remained as acting manager until a new manager could be procured. Prior to September 1st, Mrs. Payne was notified that a new manager would take over on that date. At that time appellants asserted they still had an interest

in the premises and refused to vacate or deliver the keys to the new manager. Thereafter, notice was served upon them to vacate. These actions, as above indicated, were then instituted.

The trial court found specifically that the lessees failed to comply with the terms and conditions of the lease in many particulars such as failure to pay rent and to furnish correct accounts and statements of income and expenses; that they possessed and used intoxicating liquor on the premises owned by the Indians; that they failed to correct unsanitary conditions and make certain improvements; that the lease was mutually canceled; and that after September 1st, Mrs. Payne remained on the property only as an employee of respondents and that said employment was terminated; that the cancellation of the lease agreement was, for a consideration, executed by appellants freely and voluntarily and without fraud or misrepresentation on the part of respondents; and that accordingly respondents were entitled to possession of the premises.

Appellants concede that their testimony that they were not aware of the nature of the cancellation agreement they signed and believed they were signing merely to clear the leasehold estate from appellants' bankruptcy proceedings is in conflict with the testimony of respondent Mr. Crossley, but claim his testimony should not have been given any credence because, in other respects, his testimony was proven to be false.

[1] Although there is evidence that there was some difference in bookeeping accounts and in amounts claimed to be advanced by Crossley, and some knowledge on Mr. Crossley's part of the records and accounts maintained by appellants, the evidence does show that the attorney dictated the terms of the agreement to his secretary in the presence of appellants and respondent Mr. Crossley, after the terms thereof were discussed with them. All were presented with signed copies after they had read them. There is ample evidence to support the finding of the trial court in respect to the allegations of fraud.

[2–4] The next point is that the court erred in finding that appellants received a consideration for the execution of the cancellation agreement. Also, it is contended that the agreement was void because it was executed by appellants in reliance upon the trust and confidence existing between the appellants and respondents. The argument is that appellants were not, in fact, in default under the lease, and therefore there was no consideration for the execution of the cancellation agreement; that the entire scheme of respondents was to avoid financial embarrassment by reason of their going into bankruptcy with appellants.

Although there is conflicting testimony as to some of the claimed grounds for breach of the lease by appellants, there is sufficient evidence to indicate that most of them are substantially supported and that appellants were, in fact, in default. The cancellation agreement contained mutual covenants and promises and canceled many obligations owing by appellants to respondents. In addition, it may be said that since the agreement is in writing, consideration for its execution is presumed. Sec. 1614, Civil Code.

There is no conclusive showing of such a confidential relationship as would compel a finding contrary to that reached by the trial court that the appellants voluntarily agreed to the terms of the cancellation agreement and that there was no fraud practiced by respondents upon appellants.

[5] The findings and judgments are amply supported by the evidence and, although there may be conflicts in it, the trier of fact has resolved them in favor of respondents. Accordingly, under the time-honored rule, such findings will not be disturbed on appeal. Lynch v. Lynch, 22 Cal. App. 653, 135 P. 1101; Maggini v. McBain, 65 Cal.App. 133, 223 P. 428.

Judgments affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

115 Cal.App.2d 29

DEL RICCIO et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY.

Civ. 19362.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1952.

Proceeding in mandamus to require Superior Court to annul certain orders. The District Court of Appeal, Shinn, P. J., held that the Superior Court had no authority under statute, after judgment debtor's money was in hands of officer under valid writ of execution, to stay further execution and direct the officer to hold such money, even though it did so on condition that debtor give security.

Writ of mandamus issued.

1. Execution ⇐322

Judgment ⇐890, 895

Money collected under valid execution, while in hands of officer, is the property of the judgment creditor, and as between the parties, the money should be deemed to have been delivered to creditor immediately upon its receipt by the officer, and, at the same time, the debtor immediately becomes entitled to partial or full satisfaction of the judgment. Code Civ.Proc. § 691.

2. Execution ⇐328

The rights of the judgment creditor and debtor, following the taking of the debtor's money under a valid execution, cannot be interfered with except through procedure authorized by statute.

3. Execution ⇐158(1)

Where officer was in possession of judgment debtor's money under valid writ of execution, trial court had no authority under statute to enter orders purporting to stay the execution, directing the officer to retain the money in his possession, and staying further execution until ten days after determination of debtor's pending motion for new trial. Code Civ.Proc. §§ 681a, 691.

4. Judgment ⇐204

In the exercise of equitable jurisdiction, the trial court has broad discretionary power to take whatever action is necessary in the interests of justice in order that its decrees will not fail to accomplish that purpose.

5. Execution ⇐158(2)

The power of the court to stay execution is limited by statute, and in absence therein of provision for stay of execution upon the giving of security, the court might not extend its purely statutory authority on condition that such security be given. Code Civ.Proc., § 681a.

Chas. L. Nichols, Ivan Miller and Anthony T. Carsola, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Patrick D. McGee, Los Angeles, for real party in interest.

SHINN, Presiding Justice.

Petition for Writ of Mandate to require the Superior Court to annul certain orders.

Petitioners, Lorenzo Del Riccio and Kent Allen, recovered a judgment against Photochart, a corporation, for $10,041.74, in action No. 595352. The judgment was duly entered and no stay of execution was then sought or ordered. A writ of execution was issued and levied upon a bank, in which the defendant had on deposit the sum of $6,426.66. The bank made its return and paid the sum to the sheriff. On September 24th, while the sheriff still had the money in his possession, upon application of the defendant, the court ordered the sheriff not to pay any moneys to plaintiffs in the action, and that: "Further execution in the above entitled matter is stayed upon the condition that the defendant forthwith and within 15 days, bring on, upon notice to plaintiffs, a motion to post a cash undertaking sufficient to protect plaintiffs in the event the motion for new trial heretofore made should be denied." On October 2nd plaintiffs made a motion, on notice, to vacate the former order, which motion was denied. On October 9th the defendant, on notice, moved for an order staying execu-

tion upon posting a cash undertaking in the action, (consisting in part of the money in the hands of the sheriff), and, defendant having deposited with the court an additional $1,500, the court made a further order that: "Further execution in the above entitled matter is hereby stayed until ten (10) days after determination of the motion for new trial heretofore filed by defendant." This proceeding is for the annulment of both orders.

No motion was made to recall the execution or quash the levy. No claim was or is made of any irregularity in the proceedings. The statutory authority to stay execution is derived from section 681a, Code of Civil Procedure.[1] Although the orders here purported to stay execution, they came after the writ had been fully executed by the sheriff with respect to the money in question. The authority conferred by the code is to restrain further proceedings that might be taken in execution of the writ. The purpose of the orders in question was not to halt execution of the writ but only to restrain the sheriff from paying over money in his possession. We do not construe the second order as a command to the sheriff not to pay over the money, although it has been accorded that effect.

The question then is whether in the absence of statutory authority such procedure was within the inherent powers of the court. By section 691 of the Code of Civil Procedure it is made the duty of the officer who collects money on execution to pay over to the plaintiff or his attorney so much thereof as will satisfy the judgment. Where a sale is required he has the same duty to pay the amount of the judgment from the proceeds of the sale.

[1-3] When the writ has been regularly issued and executed, money collected, while in the hands of the officer, is property of the judgment creditor and not the debtor. Nothing can be done with it other than to turn it over to the creditor. The possession of the officer solely for the use and benefit of the creditor is possession by the latter. As between the parties, the money should be deemed to have been delivered to the creditor immediately upon its receipt by the officer and his right to receive it is not affected by any delay that may occur. Correspondingly, when the debtor's money is taken on a valid execution it ceases to be his and he immediately becomes entitled to partial or full satisfaction of the judgment. The rights of the parties cannot be interfered with except through procedure authorized by statute. There can be no doubt as to the power of the court to control further proceedings while the execution is outstanding, but we think the court was without power to take control of the money of petitioners by ordering the sheriff not to pay it over as he was legally bound to do. The court would not have had authority to order the petitioners to pay the money into court after they had received it, and yet the orders in question accomplished a seizure by taking control of the fund.

[4] In the exercise of equitable jurisdiction the court undoubtedly has broad discretionary powers to take whatever action is necessary in the interests of justice in order that its decrees will not fail to accomplish their purpose. Here, no appeal was made to the equitable powers of the court. A stay of execution was proper—the code provides for it—but the court could not, by ordering a stay, undo what had already been done so as to deprive the creditor of ownership and use of money collected under the writ.

[5] The power of the court to stay execution is limited by statute. There is no provision for a stay of execution upon the

1. "The court, or the judge or justice thereof may stay the execution of any judgment or order; provided that no court shall have power, without the consent of the adverse party, to stay the execution of any judgment or order, the execution whereof would be stayed on appeal only by the execution of a stay bond, for a longer period than ten days in justices' courts, nor for a longer period than thirty days in other courts. If a motion for a new trial is pending, execution may be stayed until ten days after the determination thereof."

giving of security and the court may not extend its purely statutory authority on condition that security be given.

Let the writ issue commanding the superior court to vacate its orders of September 24th and October 9th, 1952, insofar as they purport to command the sheriff not to pay over to petitioners herein the money on hand, less sheriff's fees and costs.

WOOD, J., concurs.

VALLÉE, J., did not participate.



115 Cal.App.2d 105

SWAFFORD v. GOODMAN.

Civ. 15305.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1952.

Action by civil engineer against landowner for reasonable value of engineer's services in preparing plans and specifications for building to be built upon defendant's lot. The Superior Court, Alameda County, Albert J. Woolsey, J., entered judgment for plaintiff for $1,200 plus interest, and defendant appealed. The District Court of Appeal, Bray, J., held that conflicting evidence sustained judgment for plaintiff, against contention that plaintiff's testimony was so inherently improbable as to preclude application of conflict of evidence rule, but that since claim was unliquidated until time of judgment, it did not bear interest prior thereto.

Portion of judgment allowing interest reversed; judgment otherwise affirmed.

1. Appeal and Error ⇐1011(1)
Work and Labor ⇐28(1)

In action by civil engineer against landowner for reasonable value of engineer's services in preparing plans and specifications for a building to be constructed on landowner's lot, conflicting evidence sustained judgment for engineer, against contention that engineer's testimony was so inherently improbable as to preclude application of conflict of evidence rule.

2. Work and Labor ⇐4(2)

Where a person orders services to be rendered the law raises an implied agreement to pay their reasonable value.

3. Interest ⇐39(3)

A claim upon a quantum meruit for reasonable value of services or materials is unliquidated until time of judgment and therefore does not bear interest prior to judgment.

Arthur Harris, Berkeley, for appellant.

Cornish & Cornish, Francis T. Cornish and Howard W. Wayne, Berkeley, for respondent.

BRAY, Justice.

Defendant appeals from a judgment awarding plaintiff $1,200 plus interest as the reasonable value of services in preparing building plans and specifications. Defendant attempts to appeal from the order denying a new trial.

Questions Presented.

1. Sufficiency of the evidence, particularly whether plaintiff's testimony is inherently improbable, thereby taking the appeal out of the conflict of evidence rule. 2. Interest.

Facts.

The testimony of the parties is directly contradictory. Defendant owned a lot in Emeryville. He had contacted one Kenealy and had offered to build a building on the lot and rent it to the latter. Kenealy drew a rough sketch of the proposed building. Plaintiff is a civil engineer, and member of the Structural Engineer's Society of Northern California, although not entitled to call himself a structural engineer. Defendant and Kenealy went to plaintiff's house, gave plaintiff the sketch and discussed in some detail the proposed building, its trusses, saw tooth skylights and a penthouse office. Plaintiff testified that defendant asked him to design a building along

the lines discussed and prepare plans and specifications for a building which could be built as reasonably as possible; that a price of $20,000 was not mentioned. Plaintiff and defendant were then to meet and defendant would show plaintiff certain buildings of the type he desired. Within the week they met. Defendant showed plaintiff the lot on which the building was to be constructed and the buildings he had in mind. Defendant again told plaintiff to go ahead with the plans. Plaintiff started work on the plans the day after the first meeting, working a total of 74 days on them. During this time plaintiff claims he talked to defendant a half dozen times about the plans he was drawing. In March defendant informed him that because of health restrictions, Kenealy could not rent the proposed building, but instructed plaintiff to finish the plans anyhow. At defendant's request plaintiff the day after the first discussion with defendant contacted one Drinkward with whom defendant had previously discussed construction. Plaintiff testified he delivered one copy of the plans and specifications to defendant in April and that defendant at no time until shortly before suit ever objected to them.

Defendant testified that in the first conversation plaintiff was merely instructed to prepare a preliminary plan, and that at no time did he ever instruct plaintiff to prepare detailed plans and specifications. He claimed that plaintiff agreed to prepare a pencil sketch to give to Kenealy in a few days to base the cost of the building so that defendant and Kenealy could arrive at a rental basis. He also told plaintiff that he wanted to construct a building for approximately $20,000. Defendant claimed that at no time did he go with plaintiff to look at buildings, nor did plaintiff communicate with him; that when two or three weeks had passed and he had not heard from plaintiff, defendant called him and told him that because of plaintiff's delay Kenealy had abandoned his plan. On March 27 defendant says he phoned plaintiff and advised him to "abandon everything" as he had lost a tenant for defendant. Within a day or two he wrote out a letter to plaintiff and had it typed by Mrs. Hall, notary public and public stenographer, and defendant sent it to plaintiff. The gist of this letter was that all defendant had asked for were "those truss plans and that tentative plan or preliminary drawing you promised Mr. Drinkward" and that as Kenealy could not wait "just forget about the matter." Plaintiff denied ever receiving the letter. Mrs. Hall was not called as a witness, although the record indicates that defendant intended to call her. Plaintiff testified that he requested defendant several times to supply him with a survey map of the property but defendant refused to supply one. Defendant denied receiving a copy of the plans and specifications.

Drinkward testified that in plaintiff's talk with him plaintiff mentioned a cost of around $20,000 and that they talked about preliminary plans and plaintiff said he would get out a set and they would go over it. Plaintiff denied saying that he would give Drinkward a set of preliminary plans but testified that he did say he might submit a plan to him at defendant's request. Plaintiff had no recollection of mentioning the $20,000 figure. Kenealy testified that in the conversation with plaintiff, defendant and himself he gave plaintiff the rough sketch he had drawn. Nothing was said in front of him about the proposed cost of the building. He testified further that there was no relation between rental and construction cost. He did say "We were just going to come up with a rough sketch so we could get some idea of the rental. The conversation was mostly between them [plaintiff and defendant]." He advised defendant within about a month of this meeting that he could not go ahead because of Board of Health restrictions on the property.

The court resolved the conflict in favor of plaintiff and found that defendant had ordered the plans and specifications and agreed to pay the reasonable value of plaintiff's services in preparing them; that plaintiff delivered them to defendant, and that $1,200 was the reasonable value of the services rendered.

Alleged Improbability.

[1, 2] Defendant recognizes the conflict of evidence rule but contends that plaintiff's testimony is inherently improbable in five respects: 1. Plaintiff's testimony is contradicted by defendant and two witnesses. This fact, however, does not make plaintiff's testimony inherently improbable. The trial court heard and saw the witnesses and believed plaintiff. That this is the right of the trial court and that we are bound by its action is so well established as not to require the citation of authorities. 2. On cross-examination defendant examined plaintiff concerning the schedule of minimum fees of the Structural Engineers Association, on which plaintiff had based his testimony as to the reasonable value of his services. He was asked: "But your Association lists as the first service the preparation of preliminary drawings, is that correct? A. That is common procedure." It is contended that construing the agreement between the parties as not to require preliminary plans is unreasonable and contrary to usage and custom (based on plaintiff's testimony that it is common procedure). Plaintiff testified that preliminary plans were not always made; that here, as the lot was level and defendant and Kenealy were in a hurry, it was not necessary, expedient or in accordance with defendant's request to make preliminary drawings. He testified that discussion of details of the building with defendant and the pointing out by defendant of the particular type of building he wanted reproduced made preliminary plans unnecessary. The trial court saw nothing improbable in this testimony, nor do we. Nor can we find that the court's construction of the contract is unreasonable or contrary to custom. Nor can we say that the failure to get estimates of the cost of the building before drawing the plans and specifications is a circumstance that makes inherently improbable plaintiff's version of the agreement. 3. The court found that defendant agreed to pay the reasonable value of the services. It is true there was no express agreement to pay. Plaintiff testified to that effect, and that the first discussion of pay was when he delivered the plans and defendant asked him what he was going to charge for them. Defendant denied this. Where a person orders services to be rendered the law raises an implied agreement to pay their reasonable value. See 5 Cal.Jur.2d § 4, p. 528; Fancher v. Brunger, 94 Cal.App.2d 727, 211 P.2d 633. The court properly found such an agreement here. 4. Defendant testified that he had limited the cost of the building to approximately $20,000 and that as the estimated cost of the building planned by plaintiff was around $40,000, defendant cannot be required to pay for the plans, citing Martin v. McMahan, 95 Cal.App. 75, 271 P. 1114. Plaintiff denied that there was any such limitation. The court apparently believed plaintiff. Therefore, the rule set forth in that case does not apply. 5. The court found that plaintiff delivered the plans and specifications to defendant on April 25, 1946, and that plaintiff on that date demanded his fees. Defendant denied both. The evidence supports the finding of delivery but there is no evidence of demand for fees on that date. Plaintiff did not make such demand until January, 1947, when he sent defendant the first bill which, incidentally, defendant ignored. This error as to date of demand is not fatal to the allowance of the principal of the judgment, and hence may be disregarded.

Interest.

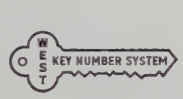
[3] It does affect the question of interest. However, there is a more serious question involved than the date of demand. A claim upon a quantum meruit for the reasonable value of services or materials is unliquidated until the time of judgment and therefore does not bear interest prior to judgment. Farrington v. A. Teichert & Son, 59 Cal.App.2d 468, 139 P.2d 80; Crocker v. Crocker First Nat. Bank, 60 Cal.App.2d 725, 141 P.2d 482.

Cases like Gardner v. Watson, 170 Cal. 570, 150 P. 994, Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 126 P.2d 644, and others cited by plaintiff, are not applicable here. They were cases involving actions on accounts stated, actions on liquidated claims or on claims where the

amounts were ascertainable. None were actions which required a court to determine the reasonable value of the items for which suit was brought.

The appeal from the order denying the new trial is dismissed. The portion of the judgment allowing interest prior to judgment is reversed. The judgment otherwise is affirmed. Each party will bear his own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.



115 Cal.App.2d 63

PEOPLE v. MISENER.

Cr. 4867.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Harry J. Borde, J., of two murders in the first degree and of an assault with a deadly weapon with intent to commit murder, and he appealed. The District Court of Appeal Moore, P. J., held that evidence was sufficient to sustain reasonable inference that the murders were maliciously conceived and premeditatedly executed.

Judgment affirmed.

1. Homicide ⇐253(3)

In prosecution for murders in the first degree, direct evidence of the essentials of deliberation and premeditation is not required, and they may be inferred from the proof of the facts and circumstances of the crime.

2. Homicide ⇐253(3)

In prosecution for murders in the first degree, evidence was sufficient for reasonable inference that the crimes were maliciously conceived and premeditatedly executed.

3. Criminal Law ⇐419(10)

In murder prosecution of defendant who claimed that he had no recollection of his acts for reason that victim doped him with sleeping pills after he had telephoned to ask if she could give him stomach medicine, answer to question put to prosecution witness on cross-examination, as to whether victim, when she received telephone call, had told witness that caller was defendant, was inadmissible as hearsay if offered to prove that defendant phoned, and was inadmissible as immaterial if offered only to establish who victim thought caller was.

4. Criminal Law ⇐1186(4)

In murder prosecution of defendant who claimed that he had no recollection of his acts for reason that victim had doped him with sleeping pills after he asked her for stomach medicine, if trial court erred in sustaining objection to question which sought to establish that after victim had given defendant medicine and defendant had left, victim said to prosecution witness, "I have gotten rid of that wet blanket. I lowered the boom on him.", such error was not prejudicial, in view of the mass of inculpatory testimony. Const. art. 6, § 4½.

5. Homicide ⇐315

Implicit in finding that defendant was guilty of first degree murders was determination that he was conscious at the time the crimes were committed.

6. Criminal Law ⇐485(2)

On separate presentation of issue of sanity of convicted murderer, whose defense had consisted of claim that, during time when acts were committed, he had been rendered unconscious by dose of sleeping pills, hypothetical question, put by defendant to psychiatrist, which referred to "automatic acts" in contradiction to weight of evidence and implicit finding that defendant had been conscious, was properly disallowed. Const. art. 6, § 4½.

F. Walter French, Donkin & Mulholland, Santa Monica, for appellant.

Edmund G. Brown, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

The information herein accuses appellant of the murder of Ann Symington (Count I), the murder of Margaret Cramer (Count II), and of an assault with a deadly weapon with intent to commit murder upon Paul Mowery Beck (Count III). The accused entered pleas of "not guilty as charged in the information" and not guilty by reason of insanity. After a lengthy trial before a jury, verdicts of guilty on all counts were returned with a recommendation of life imprisonment as to the murders. The issue of insanity was subsequently presented to the same jury and that body found appellant to have been sane at the time of the commission of the offenses charged. Appellant's motion for a new trial having been denied, he was sentenced to the state prison for life as to Counts I and II and for the term prescribed by law as to Count III. The appeal is from the judgments of conviction, and from the order denying a new trial on the grounds discussed below.

It Was Premeditated Murder

Inasmuch as the only attack upon the judgments is the claim that the proof does not justify verdicts for malicious and premeditated homicides as to Counts I and II, a generous narrative of the events preceding appellant's extravagant use of deadly weapons is deemed essential to a full vindication of the jury's implied findings. In March, 1951, appellant departed from his family in Portland, Maine for Pensacola, Florida where he visited with Margaret Cramer whom he had known in the New England metropolis during preceding years. Pursuant to arrangements agreed upon in the southern city, appellant soon located in Los Angeles county where he was joined by Mrs. Cramer about May 1. Together they occupied an apartment on High Street in Santa Monica until about December 1 when Margaret moved into the apartment of her friend Ann Symington on 24th Street. While Margaret exhibited a loss of interest in appellant, he continued his fervid pursuit. He met Paul Beck at the Symington apartment on a number of occasions prior to the middle of December. He inquired of Beck relative to his own standing with Margaret and whether Beck thought appellant might effect a reconciliation with her and whether she was interested in any other man.

About December 17 appellant met Louis Nuzzaci in the Symington apartment imbibing alcoholic beverages with Margaret in the living room. Two days later he met Nuzzaci in the market operated by the latter and told him of his recent intention to get his gun from his car to kill Nuzzaci. "Lou," he said, "you don't know how lucky you are." He told Nuzzaci of his love for Margaret and that he would "crucify anybody that goes near her * * * stay away from there * * * It might be you." He repeated his warning on the following day. Such evidence furnishes proof of the motive operating in appellant's mind two weeks previous to the 30th day of December, 1951.

Paul Beck testified that on the night of December 29th he arrived at the Symington apartment about 10:15; that after several hours of drinking with the ladies, he and Margaret retired to the bedroom. Mr. Thomas who had entered during the revelry took an early departure. The next event of which Beck had recollection was awakening in Margaret's bedroom to see appellant with a gun in hand rushing at him. Following the melee in which Beck was knocked unconscious and blood flowed from his wounds, appellant stood at the foot of the bed beating Margaret who was screaming, "Mert, it is murder. Mert, you are killing me. Mert, stop." Then he rushed at Beck repeating, "I am going to kill you." He carried a gun in one hand and a knife in the other. As he thrust the knife into Beck's chest, the latter threw the bedclothes upon his assailant, leaped from the bed, ran through the kitchen and out to the street. Appellant followed and again stabbed Beck. At that moment the police arrived and Misener escaped into the darkness. The officers returned Beck to the apartment of Ann Symington who lay on a couch in the living room, her head in a pool of blood, a spent bullet nearby. She died shortly thereafter. The corpse of Margaret was in the bedroom. A yellow metal tie-chain with the initial "M" lay close to her. The apartment was a shambles of blood and

death. Appellant's automobile with the engine still warm was found in the alley behind the premises.

After their discovery at appellant's apartment of silent evidences of his participation in the bloody orgy, the officers traced him to Torrance where he was apprehended at about 8 a. m. He had been denied admission to the home of his friend Mr. Miller. The Millers had been informed about 5 a. m. by the police of their search for Misener. Before leaving the Miller doorstep, appellant left $2,300 in cash on the stairway, instructed Mr. Miller to send it to his wife in Maine.

During the ride from Torrance to Santa Monica with police officers, appellant was asked, "How many times did you shoot Margaret, two or three times?" He answered, "I don't know whether it was two or three times." When asked if he "blew his top" when he found another fellow in bed with Margaret Cramer, he replied, "I guess I did." A .25 caliber gun and holster were subsequently found at the rear of appellant's 24th Street apartment. Expert testimony established that the bullet found near Miss Symington's head, the bullet removed from the body of Margaret, and a spent bullet found in her bedroom had been fired from such gun. Also, expert witnesses testified that appellant's finger print was on the knife found in the sink of the women's apartment. The autopsy surgeon's report established that Ann died of a gunshot wound in the head; Margaret's death resulted from hemorrhage from numerous stab wounds and a gunshot wound on the face.

[1] It was thus established that appellant was guilty of the dual murder and of the assault with a deadly weapon with homicidal intent. His every step leading to the crime was taken with deliberation and premeditation. Direct evidence of these essentials of murder in the first degree is not required. They may be inferred from the proof of the facts and circumstances of the crime. People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 1. The nature of the weapon used, the declarations of hostile malevolence toward any rival, his threats of death two weeks in advance of his vengeance and his contemporaneous declarations and savage assaults upon the women who had rejected him serve to provide a reasonable basis for a conviction of murder in the first degree.

[2] Shortly after Margaret had left appellant he learned that other men were visiting the women in Ann's apartment. His warnings to such visitors that he would crucify anyone that should go near Mrs. Cramer and his boast to Nuzzaci that the latter was lucky to have escaped, prove a brewing malice and a girding of his loins for combat. One hour after having seen other men with the women he returned to their apartment with a reign of terror and his threats of murder were dealt out with gunfire and steel. He poured a bullet into Ann's brain as she slept. Margaret's body was mutilated by 86 separate wounds and a bullet through her face. Having meditated upon his rejection by her who had attended him on many an amorous adventure, the jury were warranted in believing that he had resolved to remove her from the mundane scene and to erase those who might have contributed to her alienation and who could be witnesses against him. By reason of the recited facts it was a reasonable inference that the crimes were maliciously conceived and premeditatedly executed.

No Prejudice From Rulings

Appellant testified that on the evening of December 29, 1951, while on his way to a motion picture theatre he became ill and telephoned Margaret to request that she give him medicine to settle his stomach. At her suggestion he called at the apartment where she gave him two yellow capsules. He left immediately but had no recollection of his movements until his arrival in Torrance the next morning. During the cross examination of Beck, appellant's counsel sought to corroborate Misener's testimony as to the telephone call to Margaret. The following occurred:

"Q. Did she receive a telephone call that night, if you know? A. Yes, she received a telephone call.

"Q. Did you hear her say when she put her hand over the mouthpiece, 'This is Mert'?"

[3] Objection was made to this question as calling for hearsay and the objection was sustained. Appellant now contends that such ruling was erroneous, that this testimony would not be rendered inadmissible by the hearsay rule since it was sought only to show Margaret's belief that she was talking to Misener and it was not offered to prove the truth of the matter asserted. Appellant is in no position to complain of the ruling. The transcript reveals as does his own brief, that he offered the evidence to corroborate his own testimony that he telephoned Margaret. Yet he boldly asserts that the truth of whether or not he made the call was not the matter to be established. Obviously, if it were an attempt to prove he made the telephone call, the statement was hearsay and inadmissible. No applicable exception to the hearsay rule has been suggested.

If, on the other hand, the evidence was in fact offered merely to establish that the statement was made and to show Margaret's belief that appellant was telephoning, still it would not follow that the statement was erroneously excluded. The fact that Margaret believed Misener was calling was of no moment in the case. Such fact was not a material issue and evidence tending to prove or disprove it would be immaterial, and hence inadmissible.

[4] Through cross examination of Beck, appellant sought to establish that after Misener left the apartment before midnight, Margaret said to Beck, "I have gotten rid of that wet blanket. I lowered the boom on him." An objection on the ground that the question called for hearsay was sustained. Appellant contends that its exclusion was error; that the hearsay rule would not operate as a bar to its admission since the testimony was offered to show the declarant's state of mind—her intent to get rid of appellant by giving him sleeping tablets, thus corroborating appellant's testimony. Relied upon in support of this argument are decisions such as People v. Weatherford, 27 Cal.2d 401, 164 P.2d 753, and People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627, in which a decedent's declarations expressing an intention to do an act in the future were held admissible as proof that the act was probably performed as intended. Conceding, *arguendo,* that the ruling was erroneous, it is not shown to have been prejudicial. In view of the guilt of appellant as disclosed by the record, it cannot be said that the exclusion of the testimony caused any detriment to him. Such testimony was of little probative value. Margaret's statement that she "lowered the boom" on appellant lends little, if any, support to his defense that he had been drugged. Even if material, such statement was so general in its import as to permit any number of inferences to be drawn thereform including the very logical conclusion that Margaret peaceably pursuaded appellant to depart. This could well be true since she considered him a "wet blanket" whose absence would tend to preserve the festive atmosphere of the apartment.

The mass of inculpatory testimony, appellant's admissions, his flight and efforts to evade his pursuers—reflecting his consciousness of guilt, all point unerringly to the ultimate fact that he was the perpetrator of the horrible crimes. To reverse the judgments for asserted error in the court's ruling would be to scorn principles of respected lineage, violate the Constitution of this State, Art. VI, sec. 4½, and subvert established rules of appellate procedure.

[5, 6] The court's limitation on appellant's cross examination of Dr. Wyers, psychiatrist, during the trial of the issue of appellant's sanity is assigned as prejudicial. He testified on direct that from his examination of Misener it was his opinion that appellant was same during the period from midnight on December 29 to six or seven a. m. on December 30, 1951. On cross examination he testified that it could not be said that because a person had loss of memory he was insane during that period; that if a person suffered from a pathological intoxication, he would say such person was insane and that such a person "likely would

not be able to" differentiate between right and wrong. The following then occurred.

"Q. Now, Doctor, isn't it true that if a person's symptoms—that is, his history is that he was under the influence of a certain drug and that he had no conscious recollections for a period of approximately six hours and from extrinsic evidence it appeared that he had done certain automatic acts, are they not the symptoms of pathological intoxication?

"Mr. Aggeler: Just a moment. I will object to that question, that it is a hypothetical question based upon a very limited set of facts that do not represent the facts in this case.

"The Court: Pathological intoxication is merely, as I understand it, a form of unconsciousness, isn't it?

"The Witness: Well, yes."

Respondent's objection was sustained. Appellant now contends that he was thereby prejudiced as he was forestalled of an opportunity to demonstrate by the doctor the probability of appellant's insanity. The ruling was correct. Appellant had previously been found guilty of murder as charged and implicit in such finding was the determination that he was conscious at the time the crimes were committed. People v. Wells, 33 Cal.2d 330, 349, 202 P.2d 53. Hence, the assumption that appellant's acts were "automatic" contradicted the weight of the evidence and was contrary to the jury's previous determination. Moreover, the question did not specify the drug by which it was to be assumed the hypothetical person was influenced. Accordingly, since the question was vague, uncertain and not phrased in conformity with the weight of the evidence, it was properly disallowed. People v. Wilson, 25 Cal.2d 341, 348, 153 P.2d 720.

In any event, the ruling could not be said to have prejudiced appellant. Expert testimony at the first phase of the trial, the entire record of which was stipulated as being before the jury at the sanity proceeding, was received to show that appellant was unconscious at the time of the commission of the crimes charged. One expert also testified that Misener had a pathological intoxication at that time. Hence, when Dr. Wyers testified that one suffering from a true pathological intoxication was criminally insane, appellant's proof was complete and no prejudicial error could have resulted.

Judgment and order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.



115 Cal.App.2d 116

FINLEY v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. No. 15159.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1952.

Rehearing Denied Jan. 28, 1953.

Hearing Denied Feb. 26, 1953.

Action by municipal cable car passenger against city and county and against street railroad company for injuries sustained by passenger when municipal cable car stopped with a jerk at intersection of tracks of each system and passenger was thrown against stanchion. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment of nonsuit in favor of the street railroad company and judgment in favor of City and County upon jury's verdict. The District Court of Appeal, Wagler, J. pro tem., held that where evidence tended to show that street railroad company employees had been working on the tracks at the intersection prior to the accident, whether street railroad company was negligent for having obstructed the cable slot at the intersection was sufficient for the jury.

Reversed.

1. Trial ⇐165

Trial court is justified in granting a nonsuit only when diregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled,

indulging in every legitimate inference which may be drawn from such evidence, there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Carriers ⇐316(3)

The "res ipsa loquitur" doctrine was inapplicable in action against street railroad company for injuries sustained by municipal cable car passenger when municipal cable car stopped with a jerk at intersection of its tracks with those of street railroad company and passenger was thrown against stanchion.

3. Street Railroads ⇐117(2)

In action by municipal cable car passenger against city and county and against street railroad company for injuries sustained when municipal cable car stopped with a jerk at intersection of systems' tracks and passenger was thrown against stanchion in which action evidence tended to show that street railroad company employees had been working at the intersection prior to the accident, whether street railroad company was negligent in having caused an obstruction in the cable slot at place at which tracks intersected was for the jury.

4. Carriers ⇐280(3)

The care required of the operator of a street railroad to a passenger for hire is the highest that may reasonably be exercised consistent with the mode of transportation used and the practical operation of business as a carrier.

5. Appeal and Error ⇐1064(1)
Trial ⇐243

In action by municipal cable car passenger against city and county and against street railroad company for injuries sustained by passenger when municipal cable car stopped with a jerk at intersection of systems' tracks and passenger was thrown against stanchion, instruction on unavoidable accident conflicted with instruction on negligence and constituted prejudicial error. Civ.Code, § 2100.

6. Appeal and Error ⇐1170(9)
Trial ⇐243

The giving of conflicting instructions on a material point is error but it is only where substantial rights of a party have been affected that a reversal is justified. Const. art. 6, § 4½.

Jack Flinn, San Francisco, for appellant.

Dion R. Holm, City Atty., and Donald J. Kropp, Deputy City Atty., San Francisco, for respondent City & County of San Francisco.

Dana, Bledsoe & Smith, San Francisco, for respondent.

WAGLER, Justice pro tem.

This is an appeal by plaintiff from a judgment of non-suit in favor of the California Street Cable Railroad Co., a corporation, and a judgment in favor of the City and County of San Francisco, a municipal corporation, entered upon a jury's verdict in favor of the defendant City and County.

On January 4, 1949, while plaintiff was a fare paying passenger on the cable car of the defendant City and County, she suffered general and special damages by reason of injuries sustained by her when the cable car came to a sudden stop at the intersection of Hyde and Jackson Streets, at a point where the tracks of each system intersect at right angles and interlock.

On the morning of the accident, and the day before, workmen employed by the defendant California Street Cable Railroad Co. had been working on and about the portion of the tracks where they intersect. The plaintiff had no knowledge of the accident, and presented no direct evidence thereon. The defendant City and County presented evidence that a piece of angle iron was stuck in the cable slot of their tracks where the cable slots of the two defendants intersect. They presented evidence that this piece of iron caused the cable car grip to stick and bring the car to a sudden stop.

Plaintiff contends that there was sufficient evidence introduced in her opening

case to allow the issue of negligence of the California Street Cable Railroad Co. to go to the jury, and that the court misdirected the jury to her prejudice so far as the defendant City and County was concerned.

Only two witnesses were used by plaintiff to establish the facts of the accident; the gripman on the cable car of the defendant City and County and the plaintiff herself. Plaintiff testified only that the cable car stopped suddenly and she was thrown against a stanchion.

The gripman testified that the car in which plaintiff was a passenger stopped at the entrance to the intersection where the accident occurred before proceeding across. That as he looked forward before and as he proceeded, the intersection was clear. There was no obstruction on the rails, and so far as he could see, the slot was clear. The grip was in good condition and he had no difficulty with the operation of the car before the accident. While the car was proceeding across the intersection, it stopped suddenly. It stopped with its front end four or five feet over the nearest rail of the California Street Cable Railroad Co. tracks, but not over the rail farthest from the front of the car. On the morning of the accident, the gripman saw workmen working on the tracks of the California Street Cable Railroad Co. at their intersection with the tracks of the City and County. The gripman knew most of the trackmen employed by his company, and did not recognize any of the men as employees of his company. The men were working on the tracks of the California Street Cable Railroad Co. on the two trips prior to the trip on which the accident occurred. On the afternoon of the day of the accident, he made three trips past the intersection in question. The accident happened on the third trip. No workmen were at the scene at the time of the accident.

[1] The rule governing the propriety of the granting of a motion for non-suit has been stated by the Supreme Court in Blumberg v. M. & T. Incorporated, 34 Cal. 2d 226, 229, 209 P.2d 1, 3, as follows:

> "A trial court is justified in granting a motion for nonsuit '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' * * * 'Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.'"

[2, 3] While the plaintiff was not entitled to rely upon the doctrine of res ipsa loquitur in her case against the defendant California Street Cable Railroad Co., Gerhart v. Southern California Gas Co., 56 Cal.App.2d 425, 132 P.2d 874, we believe it may be legitimately inferred from the testimony of the gripman that since the rails were clear, that an obstruction of the cable slot at the point where they intersect caused the sudden stopping of the car, and that only employees of the defendant California Street Cable Railroad Co. could have caused said obstruction. The causing of such an obstruction would constitute negligence. The trial court was accordingly not justified in taking the case against the California Street Cable Railroad Co. from the jury.

[4, 5] That the court gave an erroneous instruction at the conclusion of the case against the City and County of San Francisco, there can be no doubt. The instruction of which plaintiff complains, reads as follows: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been

proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. Therefore, if you find that this accident was unavoidable, your verdict shall be for the defendant."

As a passenger for hire, the defendant City and County owed to plaintiff more than the duty of ordinary care as that term was defined elsewhere in the instructions. The defendant would be liable in damages for acts falling short of negligence as that term was defined in the instructions. The City and County owed to plaintiff the duty to "use the utmost care and diligence" for her safe passage. Civil Code, § 2100. The care required of it was the highest that reasonably could have been exercised, consistent with the mode of transportation used, and the practical operation of its business as a carrier. Kline v. Santa Barbara, Etc., Ry. Co., 150 Cal. 741, 90 P. 125; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584.

Ordinary care was defined in the instructions as "that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others."

Negligence was defined as "the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. *It is the failure to use ordinary care in the management of ones property or person.*" (Emphasis ours.) This definition is entirely accurate so far as it goes. Negligence, however, is not an absolute term, but a relative one—"relative to the circumstance of the time, of the place, and of the person or persons", Conner v. Southern Pacific Co., 38 Cal.2d 633, 636, 241 P.2d 535, 537, and when a common carrier is involved, we might add—relative to the status of/or legal relationship existing between the parties concerned.

Negligence, in so far as the conduct of a common carrier in its relationship to a passenger for hire is concerned, should be defined as any failure to exercise the utmost care and diligence for the safety of its passenger. Civil Code, § 2100.

The instruction to the jury that the defendant could not be held liable even if the "accident could have been avoided by the exercise of exceptional foresight, skill or caution", considered in connection with the limited definition of negligence which was given, was an erroneous statement of the law, and one which in effect removed plaintiff from the category of a fare paying passenger.

The defendant City and County cites the following cases as authority for the instruction given in the instant case: Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931; Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823; Lawrence v. Pickwick Stages, N.D., 68 Cal.App. 494, 229 P. 885; Smith v. Harger, 84 Cal.App.2d 361, 191 P.2d 25; Merry v. Knudson Creamery Co., 94 Cal.App.2d 715, 211 P.2d 905; and Middleton v. California St. Cable Ry. Co., 73 Cal.App.2d 641, 167 P.2d 239.

Only two of these cases, to wit: Lawrence v. Pickwick Stages and Middleton v. California St. Cable Ry. Co. are cases involving common carriers. The others have no possible application to the question here involved. In the case of Lawrence v. Pickwick Stages, supra, 68 Cal.App. at page 500, 229 P. at page 887, the court approved the following instruction, which has at times been construed as an instruction on unavoidable accident: "You are instructed that while you have been advised in these instructions that the defendant, Pickwick Stages, Northern Division, Inc., as a carrier of passengers, was required, under the law, to exercise the highest degree of care in the operation of its passenger vehicles, yet in that connection I charge you that passenger carriers are not to be considered in law as the insurers of the safety of the passengers who travel with them, but are only held to the highest degree of care in the management and operation of their equipment, and if they have fulfilled that duty and some outside instrumentality shall intervene, over which they have no control, such as an act of God, and an accident results therefrom, they would not be li-

able. * * * Transportation companies are not, as a matter of law, insurers of the safety of their passengers. The law requires of them the highest degree of care and caution in the purchase of equipment and the operation of their vehicles. However, when they have fulfilled these burdens, then if from some outside cause not under their control and not avoidable by the exercise of the highest degree of care and caution about which you have been instructed, an accident happens, the carrier would be absolved from liability." This instruction is in no way similar to the one given in the instant case.

In Middleton v. California St. Cable Ry. Co., this court held that the giving of an instruction on the *theory* of unavoidable accident was proper. The specific instruction does not appear in the opinion and the case, therefore, is not helpful. It is no authority for the erroneous instruction given in this case. In the Pickwick case, it might be said that instructions were likewise given on the *theory* of unavoidable accident. Instructions on such a *theory* are not objectionable provided they contain an accurate statement of the applicable law.

[6] The defendant City and County advances the argument that even though the challenged instruction may have been error, yet, under Article VI, Section 4½ of the Constitution of the State of California, the judgment should not be reversed. Defendant supports this argument by pointing out that the jury was fully instructed elsewhere in the instructions on the duties of a common carrier. It is true that the jury was fully instructed in this regard. The effect, however, was only to create a conflict in the instructions. The giving of conflicting instructions on a material point is error. Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768; Torvend v. Patterson, 136 Cal.App. 120, 28 P.2d 413; Gillette v. City and County of San Francisco, 41 Cal.App.2d 758, 107 P.2d 627; Belletich v. Pollock, 75 Cal.App.2d 142, 171 P.2d 57; Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675. Still, it is only where the substantial rights of a party have been affected that a reversal is justified. James v. E. G. Lyons Co., 147 Cal. 69, 81 P. 275; Fassett v. Nascimiento, 108 Cal.App. 14, 291 P. 269; Miller v. Dollar Steamship Lines, Inc., 19 Cal.App.2d 206, 64 P.2d 1163.

A reviewing court, of course, cannot anticipate what the evidence upon another trial may disclose. This is especially true where, as in this case, a co-defendant, because of the granting of a non-suit, did not present its defense in the first trial. Assuming that the present record contains no evidence from which it may be inferred that the defendant City and County was in any way responsible for the obstruction of the cable slot; yet, from this fact, it does not necessarily follow that this defendant fulfilled its entire duty to the plaintiff. This defendant, in effect, concedes that it had a continuing duty to inspect and maintain not only its tracks, but the cable slot as well. To show a fulfillment of this obligation, it called as witnesses its division superintendent and the superintendent of cable machinery. The former testified that the company employed a track inspector who made "two round trip inspections daily" and who would "try the slots on the surface as far as he went along and tried to see if there was anything wrong with the slots." However, to the question, "Did he do that on this [referring to the day of the accident] day?", he answered, "I assume that he did." The superintendent of cable machinery testified that the company records show that on the date in question a track inspector was on duty in the "neighborhood" of the accident. This inspector, however, was not produced as a witness, and no testimony was offered as to the manner or time of inspection. On the day before the accident, the defendant admittedly was aware of the fact that workmen of the other company were engaged in maintenance work at a point where the tracks of the two companies intersect. Yet, the record contains no direct testimony that any inspection was ever made, either before the repairs were undertaken, during the progress of the work, or thereafter.

Since the giving of instructions which are contradictory make it impossible to determine which charge controlled the determination of the jury, Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675; Chidester v.

Consolidated Peoples Ditch Co., 53 Cal. 56; Buttrick v. Pacific Elec. Ry. Co., 86 Cal. App. 136, 260 P. 588; Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988; Noce v. United Railroads, 53 Cal.App. 512, 200 P. 819, we have concluded that the erroneous instruction on unavoidable accident was sufficiently prejudicial to require a reversal of the judgment in favor of the City and County of San Francisco.

The judgment as to each defendant is reversed.

NOURSE, P. J., and DOOLING, J., concur.



115 Cal.App.2d 235

PEOPLE v. CARDAROPALI.

Cr. 922.

District Court of Appeal, Fourth District, California.

Jan. 7, 1953.

Defendant was convicted in the Superior Court of Orange County, Kenneth E. Morrison, J., of rape with force and violence, and from order denying motion for new trial he appealed. The District Court of Appeal, Barnard, P. J., held that Superior Court did not err in failing to give, on its own motion, instruction that jury might find defendant guilty of merely assault with intent to commit rape or of simple assault, and instruction on circumstantial evidence.

Order affirmed.

1. Criminal Law ⇐814(20)

In rape prosecution, wherein evidence of prosecution disclosed a rape and not a mere attempt, and wherein defendant relied entirely on contention that he was not present where alleged rape occurred, court did not err in failing to give, on its own motion, instruction that jury might find defendant guilty of assault with intent to rape or guilty of simple assault.

2. Criminal Law ⇐1173(2)

Failure of court to give instruction on circumstantial evidence is not prejudicial error if proof consists mainly of direct evidence, and circumstantial evidence is merely incidental to and corroborative of direct evidence.

3. Criminal Law ⇐829(15)

Where prosecutrix testified that defendant accomplished rape through use of fear and violence, and there was corroborating evidence in testimony of doctor and officers who investigated immediately afterward, and court instructed that if jury could with equal propriety draw two conclusions from evidence, one of guilt, and other of innocence, it was jury's duty to find defendant not guilty, court did not err in failing to give, on its own motion, instruction with respect to circumstantial evidence.

Monroe, Chula & Lines, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of rape with force and violence. A jury found him guilty, and he has appealed from an order denying his motion for a new trial.

No contention is made that the evidence is not sufficient to support the verdict. The prosecuting witness lived with her husband and two-year-old son in a house at Seal Beach. On July 1, 1951, her brother and the defendant, both of whom were in the Marine Corps, came to the home and ate Sunday dinner with the family. The fact that the husband worked on a swing shift from 4:00 P.M. to midnight was discussed. Shortly after the husband left for his work the defendant and the brother went to a bar a few blocks away. Early in the evening the brother returned to the Marine Base at Camp Pendleton. The defendant remained at the bar until about 10:00 P.M. when he

returned to the home of the prosecuting witness. After striking her, leaving a cut and a bump above one eye, he grabbed her by the throat, threatened to kill her and pushed her to the floor where he succeeded in raping her. There is ample evidence that this was accomplished through the use of fear and violence and there is corroborating evidence in the testimony of a doctor and of officers who investigated immediately afterward.

The defendant testified that the brother was with him at the bar until about 7:00 P.M.; that he remained and later became drowsy from drinking; that later that night two women, with whom he had been talking in the bar, offered to drive him to a point near Camp Pendleton; that he remembered leaving the bar and getting into a car; that someone woke him up and said he was at the Base; and that "Then I woke up the next morning."

It is first contended that the court erred in failing to instruct the jury that it might find the defendant guilty of an assault with intent to commit rape, or of simple assault; that these were necessarily included offenses; and that the jury might well have found him guilty of simple assault had such an instruction been given.

[1] No such instruction was requested and, under the circumstances here appearing, the court was not required to give one on its own motion. The evidence disclosed a rape and not a mere attempt. While the defendant struck the complaining witness this was incidental to the commission of the rape, and it is inconceivable that the jury could have believed that part of the complaining witness' testimony without believing the rest of it. The defendant relied entirely on the contention that he was not there, and having rested his case on that ground he is in no position to complain that a miscarriage of justice resulted from any failure to instruct the jury with respect to the inclusion of a lesser offense. People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847; People v. Ross, 89 Cal.App. 132, 264 P. 314. There was no evidence which would tend to reduce the offense from that charged in the information, the defense offered no evidence contradictory to that offered by the prosecution in this regard, and neither error nor prejudice appears from the court's failure to give such an instruction on its own motion. People v. Chavez, 103 Cal. 407, 37 P. 389.

The only other point raised is that the court erred in failing to give an "instruction on circumstantial evidence." No such instruction was requested, and it is not now stated what this instruction should have been. The defendant relies on People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469 and People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812.

[2, 3] While an instruction along the lines suggested by these cases is sometimes necessary it is well settled that the failure to give such an instruction is not prejudicial error where the proof consists mainly of direct evidence, and where such circumstantial evidence as appears is merely incidental to and corroborative of the direct evidence. People v. Jerman, 29 Cal.2d 189, 173 P.2d 805; People v. Hill, 76 Cal.App.2d 330, 173 P.2d 26. The court here, at the request of the defendant, gave the following instruction: "You are instructed that if from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case, it is your duty to adopt the one of innocence and find the defendant not guilty." Under the circumstances shown by the record, no further instruction was required, and it is unthinkable that any further instruction with respect to circumstantial evidence could have affected the verdict.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

115 Cal.App.2d 111

PACIFIC FIRE RATING BUREAU v. BOOKBINDERS' AND BINDERY WOMEN'S UNION NO. 31–125.

Civ. No. 15124.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1952.

Application by employer for order vacating arbitration award on ground that arbitrator was guilty of misconduct in, inter alia, refusing to hear evidence and argument that closed-shop provisions was illegal. The Superior Court, City and County of San Francisco, Preston Devine, J., entered an order confirming the award, and the employer appealed. The District Court of Appeal, Goodell, J., held that such issue was not implicit in issues raised concerning whether employer was bound by the union contracts, which were with other employers, and since such issue had not been expressly raised by submission agreement, arbitrator in refusing to entertain evidence and argument thereon was not guilty of misconduct.

Affirmed.

1. Arbitration and Award ⇨29

The powers of an arbitrator are limited and circumscribed by agreement or stipulation of submission of issues. Code Civ.Proc. § 1288(c).

2. Labor Relations ⇨433

Agreement to submit to arbitrator question of illegality of closed-shop provisions of labor contracts with other employers was not implicit in arbitration submission agreement raising issue whether employer should be required to comply with such provisions. Code Civ.Proc. § 1288(c); Labor Management Relations Act of 1947. 29 U.S.C.A. § 141 et seq.

3. Labor Relations ⇨457

Where illegality of closed-shop provisions of union contracts was not raised by submission agreement raising question as to whether employer was bound by such contracts which were with other employers, arbitrator, in refusing to hear evidence and argument on illegality of such provisions, was not guilty of misconduct in refusing to hear evidence, pertinent and material to the controversy. Code Civ.Proc. § 1288(c); Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

4. Labor Relations ⇨483

Question as to whether two disputants could agree to abide by decision of arbitrator as to whether certain provisions in union contracts were in violation of Taft-Hartley Act would not be determined on appeal from order confirming arbitration award where disputants had not so agreed and arbitrator had declined to entertain the question. Code Civ.Proc. § 1288(c); Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

Long & Levit, Bert W. Levit and David C. Bogert, San Francisco, for appellant.

Charles P. Scully, San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order confirming an award in an arbitration.

Appellant is a rating organization licensed by the Insurance Commissioner, with its offices in San Francisco where it has a plant for compiling its printed materials. Respondent union had contracts with two San Francisco employer organizations, i. e., the Employing Printers' Association and the Printing Trades Conference, dealing with wage scales and arbitration. The Bureau is not a member of either organization and did not sign either of these contracts, but from time to time when in need of hands in its plant it employed the union's members.

The contracts between the union and the two employer organizations provided (sec. 9) that "The Employers * * * agree not to arbitrarily operate with a non-union crew any department of their shops now unionized * * *." and (sec. 10) that "The Employers will employ in their binding departments none but members of the Union to do any mechanical work that comes under the jurisdiction of said Union."

A controversy arose between the Bureau and the Union which they agreed to arbitrate.

The Bureau's contentions at the arbitration were (1) that it was not, and never had been, a party to the agreements and was not bound by them; (2) that it had not violated the closed-shop provisions, and (3) that in any event such provisions contravened the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq. and were therefore illegal and not binding on the Bureau.

The arbitrator held that notwithstanding the Bureau was not a member of either employer organization it was bound by the agreements and that it had violated the closed-shop provisions thereof. He declined to rule upon the third question, that of illegality. Indeed, from the outset he refused to recognize that question as a subject for arbitration, or within the scope of the submission. Early in the hearing he said: "Because I think it is very essential in arbitrations, even before we proceed I should like to see if the parties are in agreement at least as to what issues the arbitrator is to determine. Obviously the parties cannot agree as to the result of the issues; otherwise there would be no arbitration. That is the reason that earlier in this discussion I was looking at the language of the first 'whereas' and was wondering what the term 'including' meant. It would indicate that possibly there were some other differences." It is apparent that the arbitrator had before him that "submission agreement" (quoted later). He then said: "If there is a question of the illegality of the contract being raised, there is a great doubt in my mind that that matter can be settled by arbitration. If you will read a very recent case by our Supreme Court, it was held that the question of the legality or illegality of a contract is a legal point to be determined by the courts and not by arbitration." The case to which he referred is Loving & Evans v. Vlick, 33 Cal. 2d 603, 204 P.2d 23.

The Bureau's application for an order vacating the award was based on the grounds that the arbitrator was guilty of misconduct in refusing to hear evidence and argument that the agreement sought to be enforced by the Union was illegal in that it contained closed-shop provisions in violation of the Taft-Hartley Act, in refusing to rule thereon, and that he had exceeded his powers in making the award since the agreement was illegal and invalid in that it contained such closed-shop provisions, and that such "provisions were specifically enforced by said award". Appellant did not challenge the arbitrator's holding that the Bureau was subject to the contracts and bound by their closed-shop provisions (although not a signatory), or his holding that it had violated such provisions—the issues defined by the submission agreement—but confined its attack to the claimed illegality of those provisions—a matter not mentioned in the submission agreement.

In denying appellant's application the court announced that the award was "confirmed on the following propositions: 1. An agreement to submit the question of 'illegality' does not appear. 2. Whether or not a contract violates the Taft-Hartley Act is not a subject for private ligitation but is a matter for the National Labor Relations Board to take up as an unfair labor practice if the Board in its discretion decides to act. (Citations.) The Court in confirming the award does not enforce an illegal contract. It affirms the decision that the parties are bound by the contract which, if it produces unfair labor practices can be brought to the attention of the N.L.R.B."

Take the first point: "An agreement to submit the question of 'illegality' does not appear". The "submission agreement" signed by the Union and the Bureau recites that differences have arisen between the Union and the Bureau concerning the application of the agreements already mentioned "including the application of Section 9 and Section 10 of the Arbitration Agreement with respect to the employment of individuals performing services in punching, gathering, jogging, counting, stitching, padding and wrapping at their plant in San Francisco". They then agree to "* * * Submit said dispute (to arbitration) and to be bound by the determination of a majority of said arbitrators as determined in an award in writing duly signed by them concerning the subject matter referred to them * * *."

The parties had a further opportunity to define the issues, in another stipulation which was made later. Therein they agreed on one arbitrator instead of three, and made provision for the consideration of the question of back wages. Nothing was said therein about illegality.

With respect to the scope of the proceeding, the arbitrator in his award said: "So far as this arbitration is concerned, this purported third issue (illegality) does not exist and the Arbitrator so rules, since there was no agreement between the parties to submit that question to this Arbitrator * * *."

Appellant contends that the question of illegality "had to be decided by the arbitrator in order to fully and finally determine whether appellant should be required to comply with these 'closed-shop' provisions. No separate and specific submission of this question to the arbitrator was necessary. It was implicit in and essential to the determination of those issues which appellant and respondent submitted to arbitration." At the same time, appellant concedes that the National Labor Relations Board has "exclusive jurisdiction to prevent and redress unfair labor practices" but adds that "it does not follow therefrom that two persons cannot agree to abide by the decision of an arbitrator as to whether or not certain provisions in a union contract are in violation of the Taft-Hartley Act."

In neither of the stipulations did the parties "agree to abide by the decision of an arbitrator" on anything beyond the *application* of sections 9 and 10, the claimed violation thereof, and the question of back wages. And the arbitrator himself declined to treat illegality as an included issue.

In the face of these two stipulations defining three issues but omitting illegality, plus appellant's concession that the N.L.R.B. has exclusive jurisdiction, the argument is not a convincing one that the question of illegality was implicit in the issues which were stated with particularity.

[1] The powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission. Bierlein v. Johnson, 73 Cal.App.2d 728, 733, 166 P.2d 644. In its brief appellant says: "Here, the parties entered into a separate written submission agreement. It follows, of necessity, that the scope of the arbitration and the powers and duties of the arbitrator must be determined from the terms of such submission agreement". This statement, with which we agree, seems inconsistent with appellant's argument that the question of illegality is necessarily embraced within the questions specifically set out in the stipulations.

[2, 3] We agree with the trial court's holding that "An agreement to submit the question of 'illegality' does not appear." For this reason appellant's attack on the award does not come within the provision of subdivision (c) of Sec. 1288, Code Civ. Proc. that an arbitrator is guilty of misconduct "in refusing to hear evidence, pertinent and material to the controversy".

[4] Appellant's position is tantamount to the assertion of the claim that the failure to treat illegality as an issue vitiates the award as made. The grievance which precipitated the arbitration was the union's claim that the Bureau had violated the closed-shop provisions; on that issue the holding was against the Bureau. Next, the Bureau claimed that it was not bound by the contracts and on that issue also the holding was against the Bureau. Lastly, on the issue of back wages the holding was in favor of the Bureau. On neither of the adverse holdings did the Bureau move to vacate the award. In other words, the award was confirmed on all the points on which the arbitrator exercised jurisdiction. Appellant frankly concedes that "the National Labor Relations Act gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices". The question, raised by appellant, whether two disputants can "agree to abide by the decision of an arbitrator as to whether or not certain provisions in a union contract are in violation of the Taft-Hartley Act" requires no answer since here (1) there was no such agreement and (2) the arbitrator declined to entertain the question.

The present record does not present a case where an arbitrator arbitrarily refuses to pass upon an issue submitted to him.

There is nothing this court can do but affirm the order which denied appellant's application to vacate the award, thereby leaving appellant to proceedings before the National Labor Relations Board, the tribunal which concededly has exclusive jurisdiction of the question of unfair labor practices.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



115 Cal.App.2d 124

SMITH v. BUSNIEWSKI.

Civ. 15171.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1952.

Rehearing Denied Jan. 28, 1953.

Hearing Denied Feb. 26, 1953.

Suit to vacate default judgment entered in action for conversion of automobile. The Superior Court, San Mateo County, Murray Draper, J., granted the relief sought, and the defendant appealed. The District Court of Appeals, Wagler, J. pro tem., held that the evidence sustained the trial court's determination.

Affirmed.

1. Judgment ⇐435

Where default judgment entered against individual defendant was only judgment entered in action and there had never been a trial on merits as to any of other defendants, there had been no fair adversary trial and therefore mistake, if any, resulting in such default was "extrinsic", within meaning of rule that final judgment can be attacked in equity, after time for appeal or direct attack has expired, only if alleged mistake is "extrinsic" rather than intrinsic. Code Civ.Proc. § 473.

2. Judgment ⇐435, 443(1)

Equity will relieve an injured party from effect of judgment procured by extrinsic fraud, mistake or excusable neglect which was not the result of negligence or laches on the part of such party.

3. Appeal and Error ⇐1012(1)

In suit to set aside default judgment, it was function of trial court to evaluate testimony and resolve conflicts therein.

4. Appeal and Error ⇐989

Power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial judge.

5. Judgment ⇐461(3)

In suit to set aside default judgment, evidence sustained trial court's finding that the default had been the result of an unavoidable mistake that could not have been anticipated or avoided in the exercise of due diligence. Code Civ.Proc. § 473.

6. Judgment ⇐460(10)

In suit to set aside default judgment, it was incumbent upon plaintiff to plead and prove that result in main action would have been different had mistake not occurred, since equity will not grant relief to party who claims only barren right of being permitted to defend against claim to which he has no defense.

7. Pleading ⇐8(9)

Statement, contained in complaint to set aside default judgment, to effect that plaintiff had a good and sufficient defense in the main action, stated a mere conclusion and, standing alone, would have been insufficient.

8. Pleading ⇐8(1)

When facts are alleged, additional statements which are mere conclusions of law do not vitiate a pleading.

9. Judgment ⇐460(1)

Allegation, in complaint to set aside default judgment rendered in action for conversion of automobile, to effect that plaintiff was able to show that he had not converted said automobile to his own uses or

to the uses of any person or persons whomsoever, was sufficient.

10. Judgment ⇐460(6), 461(3)

Requirement that complaint allege a meritorious case does not require an absolute guarantee of victory, and the same is true of evidence as to probability of success in main action when offered in support of petition to vacate default judgment entered in such main action.

11. Judgment ⇐461(3)

Statement that affiant had been informed by his attorney that he had a good and meritorious defense to main action was objectionable, both as hearsay and as an opinion and conclusion invading province of trial court; but when affidavit containing such statement was only evidence from entire record on issue as to probability of affiant's success in event default judgment entered against him were set aside, it was sufficient to support finding of trial court that trial on merits in main action would result in judgment favorable to affiant.

Joseph F. O'Malley, Burlingame, William W. Penaluna, San Mateo, and Alan H. Critcher, San Francisco, of counsel, for appellant.

Millington, Dell'Ergo, Weeks & Morrissey, Redwood City, for respondent.

WAGLER, Justice pro tem.

This is an appeal by the defendant Busniewski from a decree in equity setting aside and vacating a judgment by default, secured by him against the plaintiff Smith in an earlier action in the superior court of San Mateo County.

The plaintiff herein first sought relief in the original action under section 473 of the Code of Civil Procedure. However, the statutory time had expired and relief was denied. He then instituted the instant action and was granted the relief sought. The trial court found: (1) "that the default of plaintiff" (the defendant in the main action) "was made and entered by reason of an unavoidable mistake of the plaintiff which could not have been anticipated or avoided by plaintiff in the exercise of due diligence", and (2) "* * * that plaintiff has a good and meritorious defense to the action in which said default and default judgment were made and entered if said defense is established in the trial of said action upon its merits."

The defendant contends that the evidence is insufficient to support either of the findings above set forth and that there is no sufficient allegation in the complaint that a trial on the merits would result in a judgment favorable to the plaintiff.

[1] So far as the sufficiency of the evidence to support the first finding is concerned, the record shows that the main action was one for damages for the conversion of an automobile, and that the defendants named in the main action are as follows: Auto Acceptance Corporation, a corporation; Auto Acceptance and Loan Corporation, a corporation; Federal Credit Bureau, a corporation; John Doe Merchasim and First Doe, individually and doing business as copartners under the fictitious name and style of Federal Credit Bureau; California Auto Recovery, a corporation; John Doe Smith and First Doe, individually and doing business as copartners under the fictitious name and style of California Auto Recovery, a copartnership; M. Sidlow and Barney Roed, individually and as copartners doing business under the firm name and style of Cabin Garage. The plaintiff, sued as First Doe, was served with complaint and summons in said action in Alameda County on September 4, 1948. On November 15, 1948, his default was taken and on December 13, 1948, a default judgment was entered against him in the sum of $2,695, plus interest and costs. The default judgment against Smith is the only judgment entered in the action. There has never been a trial on the merits as to any of the other defendants. It is clear from the record before us that in the main action there was never any fair adversary trial. The mistake, therefore, if any, was extrinsic. U. S. v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93; In re Griffith's Estate, 84 Cal. 107, 23 P. 528, 24 P. 381; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A.

336; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105; Hallett v. Slaughter, 22 Cal.2d 552, 140 P.2d 3.

Plaintiff testified that within a week or ten days after the service of the summons and complaint upon him, he telephoned one John Foley, an attorney at law, with offices in the City and County of San Francisco and discussed the case. That Mr. Foley told him that he would take care of the matter and instructed him to mail the papers to his office, which he did. The plaintiff asked Mr. Foley when the case would come up for trial and was told: "Don't worry about it. I will let you know." The next time plaintiff heard of the case was when he received a letter from the Federal Credit Bureau of Los Angeles notifying him that a judgment had been entered against him. The plaintiff thereupon telephoned Mr. Foley's office, and was informed that Mr. Foley had died on March 14, 1949. On the following day Mr. Jack Flinn, an office associate of Mr. Foley, notified plaintiff by telephone that the files had been located, and that the matter "hadn't been taken care of due to the fact that Mr. Foley had been ill off and on and had kind of let things slip."

The only conflict in the evidence deals with the physical condition of Mr. Foley during the months preceding his death. Both his widow and a former secretary testified that Mr. Foley had been able to attend to his office duties until about seven days before his death, which was the result of a heart attack. However, Mr. Flinn testified that following his (Mr. Flinn's return from the Navy, Mr. Foley had never been the same. That he was an ill man, but that he worked at the office; that his hours were irregular; that he would leave the office at any time of the day; that he would go home; that he would phone that he wasn't coming in because he was ill. Mr. Flinn also testified that he found the complaint and summons which had been served on the plaintiff herein (the defendant in the main action) among Mr. Foley's papers after his death.

[2] It is well settled that equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake or excusable neglect which was not the result of negligence or laches on the part of the complainant. Anglo-California Trust Co. v. Kelley, 117 Cal.App. 692, 4 P.2d 604; Sohler v. Sohler, 135 Cal. 323, 67 P. 282; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 221 P. 368; Clavey v. Loney, 80 Cal.App. 20, 251 P. 232; Jeffords v. Young, 98 Cal.App. 400, 277 P. 163; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Wilson v. Wilson, 55 Cal.App.2d 421, 130 P.2d 782; Hallett v. Slaughter, 22 Cal.2d 552, 140 P.2d 3.

In Jeffords v. Young, supra, 98 Cal.App. at pages 404–405, 277 P. at page 165, the court said: "The serious illness of complainant's counsel, which prevents an appearance at the trial or a fair presentation of his cause, and which situation by the exercise of due diligence could not have been anticipated or avoided, may warrant the intervention of equity. 3 Freeman on Judgments, 5th Ed. 2598, § 1247."

[3] The defendant Busniewski argues that the default judgment was the result of negligence on the part of plaintiff Smith and his counsel, and that the trial court therefore should have denied plaintiff any relief. Defendant's argument, in effect, is that the testimony of his witnesses should be accepted, and that of plaintiff's witnesses should be rejected. It was the function of the trial court to evaluate the testimony and resolve the conflicts therein. Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183.

[4, 5] In Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 596, the court said: "* * * as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible." Since the power of this court be-

gins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial judge, Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689, and since the evidence on the issue of extrinsic mistake was conflicting, the findings of the trial court on this issue must be sustained.

[6] It was incumbent upon the plaintiff in the instant case to *plead* and *prove* that the result in the main action would have been different had the mistake not occurred, Wilson v. Wilson, 55 Cal.App.2d 421, 130 P.2d 782; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328, since equity will not grant relief to a party who claims only the barren right of being permitted to defend against a claim to which he has no defense. Gibbons v. Scott, 15 Cal. 284; Whitney v. Kelley, 94 Cal. 146, 29 P. 624, 15 L.R.A. 813; Lee v. Colquhoun, 175 Cal. 16, 164 P. 894. In his complaint the plaintiff has alleged "that plaintiff herein had and has a good and sufficient defense in the action in which the default and default judgment has been entered and taken against him and is able to show that said action was against this plaintiff and many other defendants for damages allegedly arising out of the alleged conversion of personal property, to wit: an automobile; that in truth and in fact, plaintiff did not convert said automobile to his own uses or to the uses of any person or persons whomsoever."

[7–9] Defendant Busniewski contends that the above allegation is a mere conclusion of law and is an insufficient allegation that a trial on the merits would result in a judgment favorable to the plaintiff. The statement "that plaintiff herein had and has a good and sufficient defense in the action" is, of course a mere conclusion, and standing alone would be insufficient. 15 Cal. Jur. 537; Lee v. Colquhoun, 175 Cal. 16, 164 P. 894; Brozey v. Alesen, 116 Cal.App. 641, 3 P.2d 68. The remainder of the allegation, however, is not a mere conclusion. It is the allegation of an ultimate fact, Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P.2d 768, which, if proved, would constitute a complete defense to the main action. When facts are alleged, additional statements which are mere conclusions of law, do not vitiate a pleading. Payne v. Treadwell, 16 Cal. 220; Koehler v. Board of Trustees, 83 Cal.App. 648, 257 P. 187; Union Bank & Trust Company of Los Angeles v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442. In the absence of a special demurrer, and none appears in the record, we find no reasons to doubt the sufficiency of the allegation in question. See: Green v. Darling, 73 Cal.App. 700, 239 P. 70; Frasch v. London & Lancashire Fire Insurance Co., 213 Cal. 219, 2 P.2d 147; New v. Mutual Benefit Health & Accident Association, 24 Cal.App.2d 681, 76 P.2d 131; 21 Cal.Jur. 108.

[10, 11] The defendant also questions the sufficiency of the proof to support the finding made by the trial court on this issue. No testimony at all was offered at the trial in support thereof. The entire file, however, in the case in main was by stipulation received in evidence. This file contains the affidavit of Smith, the defendant therein, filed in support of his motion under 473 of the Code of Civil Procedure. Smith's affidavit contains the following allegation: "That your affiant has fully and fairly stated to his said attorneys all the facts of the case and they have informed him that he has a good and meritorious defense to said action. Affiant therefore states that he has a good defense to said action * * *." This is the only allegation in any of the affidavits with reference to the merits of the main case. It therefore constitutes the only evidence in the entire record on this issue. As such, it is sufficient to support the finding of the trial court that a trial on the merits would result in a judgment favorable to the plaintiff.

It must be conceded that the statement in Smith's affidavit is objectionable both as hearsay and as an opinion and conclusion which invades the province of the trial court. This does not mean, however, that

it will not support a finding when admitted without objection.

In Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156, 158, the court said: "Appellants attack the finding that respondents were laid off for lack of funds and not for lack of work as being supported only by testimony of hearsay statements made by certain foremen and the superintendent of painters. Much, though not all, of this evidence was admitted without objection, and, as to that so admitted, it is the settled rule that incompetent evidence admitted without objection is sufficient to support a finding."

In Re Estate of Kay, 30 Cal.2d 215, 224, 181 P.2d 1, 6, where it was held that a statement by an unqualified witness that he considered a sale of the ward's property to be for the latter's best interest was properly considered by the trial court, the court said: "Whether or not an objection to this opinion, if made at the hearing, would have to be sustained (see, 7 Wigmore on Evidence, sec. 1960), it is clear that in the absence of any objection by petitioner, the opinion was properly considered * * *."

In Parsons v. Easton, 184 Cal. 764, 769, 195 P. 419, 421, the court said, when reviewing the sufficiency of the evidence: "Although this evidence was technically incompetent, it was admitted without objection. It must therefore be given as much weight in this court, in reviewing the question of the sufficiency of the evidence, as if it were competent." See also: Williams v. Hawley, 144 Cal. 97, 77 P. 762; Abbott v. Limited Mutual Compensation Insurance Co., 30 Cal.App.2d 157, 85 P.2d 961; Yule v. Miller, 80 Cal.App. 609, 252 P. 733; Mercantile Trust Co. of San Francisco v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037; Janson v. Brooks, 29 Cal. 214, 223; Curiac v. Packard, 29 Cal. 194, 197; McCloud v. O'Neall, 16 Cal. 393, 397.

It is to be remembered, too, that in an action of this character "The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory", Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564, 569, 140 A.L.R. 1328, and that "The same observation may be made concerning the proof produced by plaintiff in support of [his] allegations". Hallett v. Slaughter, 22 Cal.2d 552, 558, 140 P.2d 3, 6. To require such a degree of proof in this suit would render idle the act of conducting a trial on the merits in the main action.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



CITY OF LOS ANGELES v. RANCHO HOMES, Inc. *

Civ. 19127.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1952.

Rehearing Denied Jan. 23, 1953.

Hearing Granted Feb. 26, 1953.

Action by city against dealer in realty for delinquent license taxes imposed by ordinance on gross receipts from sales of property. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered judgment granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment of dismissal of complaint, and defendant appealed. The District Court of Appeal, Fox, J., held that the proceeds received by defendant from sale of improved realty were not taxable gross receipts, since ordinance involved defined "sale" as relating solely to tangible personal property.

Reversed.

1. Statutes ⇐193

Under rule of noscitur a sociis, general and specific words in a statute which are associated together take color from each other in that the general words are restricted to the less general and are deemed to have been used not to the wide extent which they may bear if standing alone, but as related to words of more definite and particular meaning with which they are associated.

* Subsequent opinion 256 P.2d 305.

2. Statutes ⇐179

Definitions of terms contained within structure of particular statute govern meaning of those terms as used therein.

3. Statutes ⇐203

Where statute is clear and unambiguous and appears to embody and express complete and consciously articulated intent of legislature, court may not insert words for purposes of construction. Code Civ. Proc. § 1858.

4. Statutes ⇐212.1

The presumption that a legislature, in amending or re-enacting a statute, is familiar with construction which courts have put on terms used therein does not necessarily apply to all constructions or practices adopted by administrative boards, and should not be too generally indulged in absence of showing that such construction or practice was brought to legislature's attention.

5. Statutes ⇐219

Administrative interpretations of statute cannot be controlling where clearly erroneous and made without authority or repugnant to provisions of the statute.

6. Licenses ⇐15.1(4)

Administrative interpretation that license tax ordinance imposed tax on sale of realty by dealer in realty would be disregarded where ordinance defined "sale" as relating only to tangible personal property.

7. Licenses ⇐15.1(7)

Act of conveying title to realty by dealer in realty was merely an incident of sale of the property and did not render gross receipts from sale subject to license tax imposed by ordinance on gross receipts received for performance of any act.

8. Licenses ⇐15.1(4)

Proceeds received by dealer in realty from sale of improved real property were not gross receipts subject to license tax imposed by ordinance on gross receipts from sales, in view of fact that ordinance defined "sale" as relating solely to tangible personal property.

9. Statutes ⇐188

Legislation when not expressed in technical terms is addressed to common run of men and is therefore to be understood according to sense of the thing as ordinary man has a right to rely on words addressed to him.

Robert S. McClean, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and James A. Doherty, Deputy City Atty., Los Angeles, for respondent.

FOX, Justice.

Plaintiff brought an action to recover a sum allegedly owed by defendant for delinquent license taxes. Both sides filed a motion for summary judgment with supporting affidavits. Defendant appeals from a judgment granting plaintiff's motion for a summary judgment in the sum of $3,085 with interest and denying its motion for a summary judgment of dismissal of plaintiff's complaint.

There is no controversy respecting defendant's operations, as set forth in the affidavit of its president, Mark A. Thoreson. Defendant was incorporated under the laws of California in January, 1948. Its articles of incorporation include the following among the purposes for which the corporation was formed: "Two (a) To carry on the business of acquiring, subdividing, improving, selling and otherwise dealing in and disposing of real property, and to carry on all other businesses incident thereto or connected therewith." In June, 1948, defendant acquired 159 unimproved lots in a tract located in Los Angeles. Defendant thereupon contracted with the Thoreson Construction Company to improve this property by leveling it and constructing streets, curbings, sewage and utility facilities. Defendant also contracted with the Thoreson Construction Company for the erection of 150 single dwellings on the lots zoned for residential use and for the construction of commercial buildings on the nine lots zoned for commercial pur-

poses. During the years 1948 through 1951, defendant paid the Thoreson Construction Company for its performance under the above contracts, and the Thoreson Company paid a business license tax to the city of Los Angeles computed in part upon the gross receipts derived from these transactions.

Upon completion of the 150 residential units, defendant sold every one of these dwellings during the years 1949 through 1950, realizing gross proceeds in the amount of $1,539,445. Because of defendant's failure to procure a license and pay a license tax as the result of these activities, the plaintiff city of Los Angeles commenced this action, alleging defendant's failure to pay the sum of $3,085 due as a license tax under the provisions of a general ordinance, No. 77,000 (Art. I, chap. 2, Los Angeles Municipal Code), which imposes license taxes on a multifarious variety of business enterprises. Section 21.49 of the general ordinance last referred to reads in part as follows: "* * * a license is required to be obtained by every person engaged in any of the businesses, trades, callings, or professions specified in the following sections of this Article; and for such license a tax is hereby imposed in the amount prescribed in the applicable section."

Plaintiff's complaint refers to section 21.190 as the section herein applicable, from which is quoted the portion pertinent to this appeal: "Every person engaged in any trade, calling, occupation, vocation, profession, or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $12.00 per calendar year or fractional part thereof for the first $12,000 or less of gross receipts, and in addition thereto, the sum of $1.00 per year for each additional $1,000 or fractional part thereof, of gross receipts in excess of $12,000." The affidavit of Walter C. Peterson, the City Clerk of Los Angeles, describes the administrative interpretation which has been placed on this section, popularly referred to as the "catch-all" provision of the license ordinance and under which more than 200 distinct businesses, affecting over 30,000 persons, are required to pay license taxes. The Peterson affidavit declares that the city clerk has established as one of the classifications affected by this section that of "owner-builder," which is described as a type of business engaged in by an owner of real property who causes buildings to be constructed on his land with the objective of selling such improved property. The city clerk has required such so-called "owner-builders" to pay a license tax under section 21.190 during each year since its enactment in April, 1946.

Pursuant to section 21.26 of the Los Angeles Municipal Code, the city clerk wrote a letter to defendant corporation informing it that an assessment was levied on its operations for the years 1949 to 1951 as a Business License Tax under section 21.190. Defendant made no application for a hearing on this matter, as provided by the administrative procedure set up in the License Ordinance, whereupon plaintiff commenced the present action.

Defendant attacks the judgment of the lower court on several grounds, one of which alone is decisive of this case. Defendant contends that, assuming its operations are the type of business activity intended to be covered by the phraseology of the ordinance requiring a license fee from those engaged in any "trade, calling, vocation, profession or other means of livelihood as an independent contractor and not as an employee of another," nevertheless the proceeds received by it from the sale of its improved real property are not "gross receipts" within the meaning of section 21.190. We believe this position to be well founded.

Section 21.08(i) of general ordinance No. 77,000 defines the term "gross receipts" as "The total amount of the *sales price of all sales,* the total amount charged or received from *the performance of any act,* service or employment of whatever nature it may be, whether such service, act or employment is done as a part of, or in connection with, the sale of goods, wares, merchandise *or not*

for which a charge is made or credit allowed * * *." (Emphasis added.) It is clear that when looked at to ascertain its essential nature, defendant's business is that of a seller of improved real property, and all of its gross receipts here under consideration flow from its sales of 150 single family dwellings. Whether its operations come within the purview of section 21.190 is dependent on whether its sales constitute a transaction taxable under this Business License Ordinance. We are guided in this matter by section 21.08(s), which defines the words "sale" and "sell" as follows: "The words 'sale' and 'sell' shall be deemed to include and refer to: the making of any transfer of title, in any manner or by any means whatsoever, to *tangible personal property* for a price, and to the serving, supplying or furnishing, for a price, of any *tangible personal property* fabricated or made at the special order of consumers. * * * A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall likewise be deemed a sale. The foregoing definitions shall not be deemed to exclude any transaction which is or which, in effect, results in a sale within the contemplation of law." (Emphasis added.)

[1] It is thus manifest that this definition of "sale" restricting its applicability to sales of "tangible personal property" compel a construction of the initial clause of section 21.08(i) in the following sense: "The total amount of the sales price of all sales (of tangible personal property). * * *" When so interpreted by the integration of the various parts of the ordinance, the conclusion is inescapable that the provisions of section 21.190 relating to the computation of the Business License Tax upon a basis of "gross receipts" is inapplicable to a seller of real property, since the term "gross receipts," when referring to the amount received from sales, is circumscribed by the language of the statute to proceeds received from sales of tangible personal property. "Where an act passed by the Legislature embodies a definition, it is binding on the courts." 50 Am. Jur., Stats. p. 254; Tieman v. Red Top Cab Co., 117 Cal.App. 40, 43, 3 P.2d 381. While it is true that the penultimate sentence of section 21.08(s) employs the word "property" without the qualifying phrase "tangible personal" previously used, it is apparent, by reference to the context and general design of the paragraph, that neither that sentence nor the final one was intended to enlarge or expand the scope of the section to embrace other than tangible personal property. Their evident function was to illustrate that certain types of transactions, not denominated as outright sales, were within the meaning of the term "sale" and to clarify the status of transactions having the legal effect of a sale which the parties thereto might attempt to camouflage by the use of other terminology. Furthermore, under the rule of *noscitur a sociis*, "general and specific words in a statute which are associated together, * * * take color from each other, in that the general words are restricted to the less general. * * * The general words are deemed to have been used not to the wide extent which they may bear if standing alone, but as related to words of more definite and particular meaning with which they are associated." 50 Am.Jur., Stats., p. 244. See Vilardo v. County of Sacramento, 54 Cal.App.2d 413, 420, 129 P.2d 165. Where, as here, a sentence containing the words "tangible personal property" is definitive of the meaning of the term "sale," and is placed in juxtaposition with another sentence using the term "property" in a fashion which purports solely to describe the legal effect of a particular transaction (here a conditional sale), the general word "property," in such a context, assimilates the complexion and limitations of the more specific kindred term with which it is associated.

[2] Plaintiff argues that in analyzing section 21.08(s), emphasis should be placed on the fact that its opening clause reads: "The words 'sale' and 'sell' should be deemed to include and refer to: the making of any transfer of title * * * to tangible personal property for a price. * * *" and contends that the word "include," being generally construed as a word of enlargement, cannot be held to limit the meaning

of the word "sale" to transfers of tangible personal property. Although we fully appreciate that the word "include" is commonly employed as a term of amplification, this is not unalterably true. The word has at least two shades of meaning. Achelis v. Musgrove, 212 Ala. 47, 101 So. 670; Webster's New International Dictionary, 2d Ed. When used as a term of enlargement, it has the sense of "embracing" or "comprising" and imports addition. People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25. However, it may serve as a word of restriction, as where it is used as a term of particular or exclusive specification when only a single genus is mentioned in a statute. Montello Salt Co. v. State of Utah, 221 U.S. 452, 465, 31 S.Ct. 706, 55 L.Ed. 810; Bunge v. Kirchhoff, 251 Ill.App. 119. The exact meaning intended must be determined from its particular context. Where, as in the ordinance before us, the sole type of property alluded to in the statutory definition of "sale" is tangible personal property, and the entire phrase used is "include and refer to," and the term "refer" has a usual meaning of "relate to" or "allude," we are satisfied that as here used the phrase "include and refer to" is a term of limitation or restriction and has the effect of confining the term "sale" to the character of property specifically mentioned. In re Martinez, 56 Cal.App.2d 473, 477–478, 132 P.2d 901. This conclusion is fortified by the consideration that the City Council which passed the ordinance was unquestionably cognizant of such well-defined catagories of property as tangible and intangible personal property and real property, yet in drafting the statute it explicitly chose to limit the application of the word "sale" to tangible personal property. "* * * the draftsmen of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the legislature had intended to include the United States within the purview of the statute, ' "the ordinary dignities of speech would have led" to its mention by name (citing case).' " Estate of Burnison, 33 Cal.2d 638, 641, 204 P.2d 330, 332. It is an established rule that definitions of terms contained within the structure of a particular statute govern the meaning of those terms as used therein. In re Martinez, supra, 56 Cal.App.2d at page 477, 132 P.2d 901.

[3] The proper functioning of a court does not extend to the insertion of words in a statute which is clear and unambiguous, and appears to embody and express the complete and consciously articulated intent of the Legislature. See Code Civ.Proc., § 1858; City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 606, 212 P.2d 894. "While courts are no longer confined to the language (of the statute), they are still confined by it. Violence must not be done to the words chosen by the legislature." People v. Knowles, 35 Cal.2d 175, 182, 217 P.2d 1, 5. An illuminating illustration of this principle of statutory construction is contained in In re Miller, 31 Cal.2d 191, 187 P.2d 722, involving a question similar to the one here presented. In that case decedent accumulated substantial separate property after marriage while living in Iowa, which would have been community property if decedent had been domiciled in California. Decedent and his wife then came to California with the property in question, where it was invested in real and intangible personal property at the time of the decedent's death. The inheritance tax appraiser confined the community property exemption to the intangible personal property and taxed the real property as if it were the separate property of the decedent. The widow objected on the ground that for inheritance tax purposes both the real and personal property were community property. The Supreme Court reversed the trial court which had sustained the widow's contentions, correlating the meaning of the inheritance tax provision, Rev. & Tax.Code, sec. 13555, with that of the similarly worded section 201.5 of the Probate Code.[1] In

1. Section 201.5 reads: "Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which

relation to section 201.5, the court said, "* * * it is significant that the statute refers solely to 'personal property' as the subject words to which the modifying language relating to acquisition at a former domicile points." In re Miller, supra, 31 Cal.2d at page 197, 187 P.2d 722, 726. In deciding that section 201.5 of the Probate Code and section 13555 of the Revenue and Taxation Code must be limited to personal property, the court stated: "It is true that section 164 of the Civil Code, in attempting to fix the rights of living husbands and wives in marital property acquired elsewhere and brought into California, included 'real property situated in this State and personal property wherever situated,' while the comparable phrase in section 201.5 of the Probate Code is confined to 'personal property, wherever situated.' Why the legislature in the latter enactment omitted the express reference to real property does not appear. But the meaning of a statute is to be sought in the language used by the legislature (citing cases). Since only personal property is specified in section 201.5 of the Probate Code, an interpretation nevertheless including therein real property would require reading into the statute words that are not there * * *." 31 Cal. 2d at page 198, 187 P.2d at page 726.

[4–6] Plaintiff urges that administrative interpretation of a statute, when reinforced by legislative acquiescence, is entitled to great weight in determining the meaning of terms used by the legislature. In support of such contention, it points out that the city clerk has interpreted the law as applying to "owner-builder" since 1946, during which time the ordinance has been amended five times without any indication of disapproval of the Clerk's practice. "The presumption that a Legislature, in amending or reenacting a statute, is familiar with the construction which the courts have put upon terms used therein, is well recognized; but such presumption does not necessarily apply to all constructions or practices adopted by administrative boards, and should not be too generally indulged in the absence of a showing that such construction or practice has been brought to the attention of the Legislature (citing cases)." Pacific Greyhound Lines v. Johnson, 54 Cal.App.2d 297, 303, 129 P.2d 32, 35. Furthermore, such interpretations cannot be controlling where, as in the case at bar, it is clearly erroneous and "* * * made without the authority of or repugnant to the provisions of a statute * * *." Coca-Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, 2.

[7–9] Finally, plaintiff argues that even if the term "sale" is limited to sales of tangible personal property, defendant's proceeds from the sale of real property still constitute "gross receipts" within the meaning of section 21.08(s),[2] since they are "amounts charged or received" by defendants for the performance of the act of conveying title to the real property in question. This argument is singularly lacking in force. Defendant's "gross receipts" from the sale of real property are not proceeds derived from the "act" of executing a deed to its vendees, since this is but an incident of the principal transaction, which consisted of an owner's sale of real property to a purchaser for a consideration. Considered as a whole, the language employed in the Business License Ordinance is not such as would reasonably apprise a vendor of real property that such operations are intended to be embraced therein. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the

would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code."

2. Section 21.08 defines gross receipts to include: "The total amount charged or received for the performance of any act, service or employment of whatever nature it may be, whether such service, act or employment is done as a part of, or in connection with, the sale of goods, wares and merchandise or not. * * *"

thing, as the ordinary man has a right to rely on ordinary words addressed to him." People v. Knowles, supra, 35 Cal.2d at page 183, 217 P.2d at page 5 quoting from Addison v. Holly Hill Fruit Products Co., 322 U.S. 607, 618, 64 S.Ct. 1215, 88 L.Ed. 1488.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.



115 Cal.App.2d 138

HAYUTIN et al. v. RUDNICK.

Civ. 18914.

District Court of Appeal, Second District, Division 3, California.

Dec. 29, 1952.

Action on contract against defendant individually and as executor of the estate of his deceased wife. From an order of the court, William J. Palmer, J., granting defendant's motion for change of place of trial, plaintiff appealed. The District Court of Appeal, Vallée, J., held that since plaintiff failed to clearly show right to retain cause in county where action was commenced, all doubt must be resolved in favor of defendant's right to have cause tried in county of his residence.

Affirmed.

1. Appeal and Error ⇐996, 1011(2)

When an issue is tried on affidavits, the rule on appeal is that affidavits favoring the contention of the prevailing party establish facts stated therein and all facts which can reasonably be inferred therefrom and where there is conflict in facts stated, the determination of controverted facts by trial court will not be disturbed.

2. Domicile ⇐11

The question of one's residence is a question of fact.

3. Venue ⇐70

In action on a contract, affidavits in support of defendant's motion to change place of trial from Los Angeles County to Kern County, sustained the determination that defendant, at time of commencement of the action and at time of determination was a resident of the County of Kern, and, therefore, that county was the proper county for the trial. Code Civ.Proc. § 395.

4. Venue ⇐72

The right to a change of place of trial must be determined from the pleadings of record at the time the motion for a change is filed.

5. Pleading ⇐45

A pleader is required to frame his complaint so as to clearly show his right to retain the cause in the county in which the action is commenced, and all doubts and ambiguities must be resolved in favor of defendant's right to have the cause tried in the county of his residence.

6. Appeal and Error ⇐854(1)

Fact that trial court based its decision to change place of trial to Kern County on ground that Kern County had "jurisdiction of deceased defendant's estate" rather than on proper ground that other defendant was a resident of Kern County was immaterial, as appellate court is only concerned with correctness of trial court's action and not reasons assigned. Code Civ.Proc. § 395.

Desser, Rau, Christensen & Hoffman, Adele I. Springer and Sheldon R. Caplow, Beverly Hills, for appellants.

Borton, Petrini & Conron and Harry M. Conron, Bakersfield, for respondent.

VALLÉE, Justice.

Plaintiffs appeal from an order granting defendant's motion for change of the place of trial from the county of Los Angeles to the county of Kern.

The action was filed in the county of Los Angeles. Defendant was sued individually and as executor of the estate of Libbie Rudnick, his deceased wife. He was served

in both capacities in the county of Kern. The complaint, containing six causes of action, is grounded on an oral contract of "joint venture or partnership" alleged to have been made between plaintiffs and defendant Rudnick and his deceased wife, whereby plaintiffs, in return for services rendered, were to share with defendant and his deceased wife in certain profits which the latter were to obtain from a written contract made by them with third persons.

Defendant filed a motion for change of the place of trial to the county of Kern on two grounds: 1) defendant at the time of the commencement of the action was, and still is, a resident of the county of Kern, and 2) Libbie Rudnick was a resident of the county of Kern, and her estate is now being probated in the county of Kern. Affidavits in support of the motion were made by defendant, an officer of a bank, and a neighbor residing in Bakersfield, who had known defendant for some thirty years. Counter-affidavits resisting the motion were filed on behalf of plaintiffs. A minute order of the court was entered granting the motion without specifying the grounds therefor. Two days later a written order was made granting the motion "on the ground that Section 395.1 of the Code of Civil Procedure requires that the action be transferred to the county which has jurisdiction of the deceased defendant's estate."

[1–3] The order is sustainable on the ground that defendant was at the time of the commencement of the action, and still is, a resident of the county of Kern. The affidavits and counter-affidavits are conflicting. Those in support of defendant's motion state: 1) defendant's attorney has stated to him that he has a good and valid defense to plaintiffs' action; 2) defendant at the time of the commencement of the action and for some thirty years prior thereto was, and still is, a resident of the county of Kern and during that time maintained his home there; 3) the estate of defendant's deceased wife is being probated in the county of Kern; 4) defendant is registered to vote as a resident of the city of Bakersfield, county of Kern, and for many years last past has voted therein; 5) defendant did not, nor did his deceased wife, at any time enter into any oral or written joint venture or partnership agreement with plaintiff in Los Angeles County or in any other place. Under these circumstances, this court is bound by the same rule that controls where oral testimony is presented for review: When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and when there is a substantial conflict in the facts stated, the determination of the controverted facts by the trial court will not be disturbed. Baratti v. Baratti, 109 Cal. App.2d 917, 922, 242 P.2d 22. The question of one's residence is a question of fact. Ludwig v. Harry, 126 Cal. 377, 378, 58 P. 858. It is, therefore, established that defendant, at the time of the commencement of the action was, and still is, a resident of the county of Kern, and that county is the proper county for the trial of the action. Code of Civ.Proc. § 395.

[4 5] The order is not subject to attack on the ground the oral agreement was to be performed, or that it was entered into, in the county of Los Angeles. The complaint did not allege where the agreement was to be performed nor where it was entered into. The right to a change of place of trial must be determined from the pleadings of record at the time the motion for a change is filed. Neet v. Holmes, 19 Cal. 2d 605, 607, 122 P.2d 557; Abbey v. Schaefer, 108 Cal.App.2d 554, 556, 239 P.2d 44; Ellis v. National Casualty Co., 99 Cal.App. 2d 77, 79, 221 P.2d 127. A pleader is required to frame his complaint so as to clearly show his right to retain the cause in the county in which the action is commenced, and all doubts and ambiguities must be resolved in favor of a defendant's right to have the cause tried in the county of his residence. Sheeley v. Jones, 192 Cal. 256, 257, 258, 219 P. 744. At the time the motion was filed the complaint did not show any right in plaintiffs to retain the cause in the county of Los Angeles. Plaintiff's counter-affidavits sought to show that the agreement was made in the county of Los

Angeles. If these could be considered they would not assist plaintiffs since they merely created a conflict with the affidavit of defendant which the court resolved in favor of defendant.

[6] The fact that the order recites that it is based on the ground stated is immaterial. An appellate court is concerned only with the correctness of a trial court's action and not with the reasons assigned therefor. Bealmear v. Southern Cal. Edison Co., 22 Cal.2d 337, 339, 139 P.2d 20.

In view of our conclusion, it is not necessary to consider whether, assuming defendant was a resident of the county of Los Angeles, section 395.1 of the Code of Civil Procedure does not compel transfer of the cause to the county of Kern because defendant is sued in his official capacity as executor on a claim for the recovery of money, or other points made by plaintiffs.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



115 Cal.App.2d 171

STAMLER v. KISSINGER et al.

Civ. 18668.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1952.

Hearing Denied Feb. 26, 1953.

Action for an accounting of the assets, receipts, disbursements and net profits of joint venture between plaintiff and defendants for construction of certain dwelling houses. The Superior Court of Los Angeles County, Arthur Coates, J., entered judgment for plaintiff, and denied defendants' motion for new trial, and defendants appealed. The District Court of Appeal, McComb, J., held that evidence sustained trial court's finding that the joint venture agreement between the parties had not been rescinded and abrogated by agreement of the parties.

Judgment affirmed.

1. Joint Adventures ⇐1.15, 5(2)

In action for an accounting with reference to joint venture of plaintiff and defendants with reference to construction by defendants of dwelling houses on tract furnished and subdivided by plaintiff, evidence sustained findings with reference to existence of joint adventure agreement and refusal of defendants to give plaintiff an accounting with reference thereto.

2. Appeal and Error ⇐989

On appeal from judgment for plaintiff after trial before court without jury in action for accounting of assets of joint venture, court would disregard conflicting evidence and evidence of defendants contrary to that of plaintiff.

3. Joint Adventures ⇐5(2)

In action for an accounting of the assets, receipts, disbursements and net profits of a joint venture between plaintiff and defendant, evidence sustained trial court's finding that the joint venture agreement between the parties had not been rescinded and abrogated by agreement of the parties.

4. Appeal and Error ⇐1010(1)

Determination of trial court in action for accounting with reference to joint venture, that original contract had not been modified by an executed oral agreement, or abrogated or rescinded by agreement of the parties, when supported by substantial evidence, was conclusive on appeal.

5. Joint Adventures ⇐5(1)

Where corporation was but an agent of individual defendants with reference to joint venture agreement with plaintiff, corporation was not an indispensable party to plaintiff's action for accounting.

6. Joint Adventures ⇐5(1)

Where defendants, who had entered into joint venture agreement with plaintiff with reference to construction of certain dwelling houses, had repudiated their agreement, plaintiff was entitled to an accounting even though there may not have been any profits arising from the venture, since only by taking an accounting was it possible to determine whether there had been any profits.

7. Appeal and Error ⇐110

An order denying a new trial is not appealable.

Reynolds, Painter & Cherniss, Los Angeles, for appellants.

Ernest C. Griffith and Oscar W. Fehsel, Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial before the court without a jury in an action for an accounting of the assets, receipts, disbursements and net profits of a joint venture. There is also a purported appeal from the order denying a new trial.

Facts: The evidence being viewed in the light most favorable to plaintiff (respondent) discloses that plaintiff and defendants entered into a joint venture agreement on March 19, 1947. Plaintiff, a subdivider and general building contractor, owned a tract of land containing 19 lots. Defendant Kissinger was a building contractor. Defendant Nu-Mode Homes, Ltd., was a partnership composed of Kissinger, Hayes and Deethardt engaged in the business of constructing dwelling houses.

Under the joint venture agreement of March 19, 1947, plaintiff agreed to deliver the tract fully improved, ready for building, to the venture at an agreed total price to him of $33,250. He also agreed to submit the tract and building program to a lending institution for approval of construction loans and also for F.H.A. He was to retain title to the lots until sold but agreed to sign all trust deeds and necessary papers for completion of construction loans. When all the lots were sold and after payment of costs and deductions, the net profits were to be divided equally.

Nu-Mode agreed to erect and deliver the units upon a cost plus 10 per cent basis and to employ the services of Kissinger and Hayes in connection therewith. After the joint venture agreement had been executed, the three individual defendants on November 5, 1947, entered into an agreement with Kissinger & Hayes corporation reading in part as follows:

"1st. That the second party hereto (Kissinger & Hayes, Inc.) take and hold title to said building lots, *for first parties hereto* from the said Sidney Stamler for the total consideration of $31,824.00 for which the second party agrees to execute trust deeds in like amount in favor of said Sidney Stamler, said trust deeds to be drawn in accordance with escrow instructions at the Bank of America in Burbank and to contain release clauses on a basis of $1750.00 per lot plus a charge of $18.00 per lot for water meter installation, making a total payment of $1768.00 for each release.

"2nd. That the first parties hereto engage second party *to act for said first parties* to arrange construction loans, necessary bank or other loans and to build and complete all of the 18 houses in accordance with the plans and specifications as prepared by and agreed upon by the parties of the first part.

"3rd. That the second party hereto agrees to keep an account of the net cost of said dwellings and to such cost the following charges are authorized to be collected and retained by the party of the second part for their reimbursement: for compensation insurance, withholding tax and social security 1½ per cent of building net cost; for overhead and office expense $75.00 per house; for supervision and building overhead $200.00 per house, for all additional money advanced by party of the second part necessary to the completion of said building, said amount to bear interest at the rate of 6 per cent, said interest to be figured on only the amounts advanced and the length of time in use.

"4th. That after the within conditions are complied with, all such dwellings be offered for sale or for rent as may be determined and that *all profits from either source be equally distributed to the first parties, namely, George*

E. Deethardt one-third interest, George Hayes one-third interest and Jane Reed Kissinger one-third interest.

"5th. That in the event sale of these or any of these dwellings do not bring in sufficient cash to (1) pay for the lots in full to Stamler, (2) pay to the party of the second part in full for the construction costs, (3) reimburse party of the second part in full for any moneys advanced, then said party of the second part to retain title to all said properties not otherwise deeded until sufficient cash has been received to discharge the above outlined obligations, after which all net profits are to be distributed either in cash or in kind as may be agreed upon at that time." (Italics added.)

Defendants on December 12, 1949, repudiated their agreement with plaintiff by refusing to give him an accounting.

After trial the court found the facts set forth above and that plaintiff was entitled to an accounting and ordered the same to be taken.

Questions: First: *Was there substantial evidence to sustain the trial court's findings?*

[1, 2] *Yes.* We have examined the record and find substantial evidence to sustain each and every finding of fact upon which the trial court's decree was predicated. In addition to the written evidence of the agreement, plaintiff gave direct testimony in support of the questioned findings. We must of course disregard conflicting evidence and evidence of defendants contrary to that of plaintiff. A detailed statement of the evidence here would serve no useful purpose. (See Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

Second: *Was there substantial evidence to sustain the trial court's finding that the joint venture agreement between the parties had not been rescinded and abrogated?*

[3] *Yes.* Plaintiff gave direct testimony which sustains the trial court's finding that the original agreement had not been abrogated or rescinded, and that any changes were simply minor modifications of the original agreement assented to by the parties.

Bendien v. Solov, 89 Cal.App.2d 904, 202 P.2d 96, merely held that there was substantial evidence to sustain the trial court's finding.

[4] Tucker v. Schumacher, 90 Cal.App. 2d 71, 202 P.2d 327, falls in the same category. Whether or not the original contract had been modified by an executed oral agreement, abrogated or rescinded, was a question of fact for the determination of the trial court whose findings, supported as they were in the present case by substantial evidence, are conclusive on appeal.

Third: *Was Kissinger & Hayes Corporation an indispensable party to this action?*

[5] *No.* From the portions of the agreement between defendants and the corporation set forth supra, it is apparent that the corporation was merely the agent of defendants and that it had nothing to do with the joint venture agreement between plaintiff and defendants. Therefore it was not an indispensable party to this action.

Fourth: *Was plaintiff entitled to an accounting?*

[6] *Yes.* Defendants on December 12, 1949, repudiated their agreement with plaintiff. Thereupon plaintiff became entitled to an accounting and it is immaterial that there may have been no profits arising from the venture. (Green v. Brooks, 81 Cal. 328, 333, 22 P. 849.) It is obvious that only by taking an accounting is it possible to determine whether or not there were profits.

[7] The purported appeal from the order denying a new trial is dismissed because such order is nonappealable.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SCHAUER, J., dissenting.

WEISS et al. v. STATE BOARD OF EQUALIZATION et al.*

Civ. 18947.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1952.

Rehearing Denied Jan. 8, 1953.
Hearing Granted Feb. 19, 1953.

Action for writ of mandate to compel State Board of Equalization to issue an off sale license to sell beer and wine at a delicatessen. From an adverse judgment of the Superior Court of Los Angeles County, Frank G. Swain, J., petitioners appealed. The District Court of Appeal, Shinn, P. J., held that refusal to grant license because premises were located in the immediate vicinity of a school was arbitrary and discriminatory, in view of licenses already issued for other premises in the vicinity.

Judgment reversed with directions.

Wood, J., dissented.

1. Intoxicating Liquors ⇐59(2)

Immediate proximity to a school is a statutory ground for denial of on sale liquor license but not for denial of an off sale license. Gen.Laws, Act 3796; Const. art. 20, § 22.

2. Intoxicating Liquors ⇐71

The State Board of Equalization has discretionary but not arbitrary powers and may deny a liquor license only for good cause. Gen.Laws, Act 3796; Const. art. 20, § 22.

3. Intoxicating Liquors ⇐71

Denial of application for off sale license to sell beer and wine at delicatessen, located across the street from grounds of high school but approximately 1,000 feet from school buildings, on ground that licensing such premises in immediate vicinity of school would be contrary to public welfare and morals was arbitrary and discriminatory, in view of fact that 7 licenses, two of them on sale licenses, had already been issued to other premises within 600 feet of school grounds. Gen.Laws, Act 3796, § 1; Const. art. 20, § 22.

4. Intoxicating Liquors ⇐46½

The number of liquor licenses that may be issued in a given locality is not limited by statute. Gen.Laws, Act 3796.

5. Intoxicating Liquors ⇐61(1)

The powers of State Board of Equalization are not so broad as to authorize it to grant monopolies to favored individuals. Gen.Laws, Act 3796; Const. art. 20, § 22.

Riedman & Silverberg, Long Beach, for appellants.

Edmund G. Brown, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondents.

SHINN, Presiding Justice.

Alfred K. Weiss and Buddy Weiss operate a delicatessen. They sell kosher meats and "appetizers" on the northwest corner of Rosewood and Fairfax, in Los Angeles. On the east side of Fairfax the grounds of the Fairfax High School extend from Rosewood two blocks to the north, to Melrose. The school buildings are in the northern area about 1,000 feet from the Weiss premises. The grounds are surrounded by a fence with gates which are usually locked, and the southerly portion of the area is the school athletic field. The Weiss brothers applied to the State Board of Equalization for an off sale license to sell beer and wine, and after a hearing their application was denied. The board found that said "premises are located in the immediate vicinity of a school," and from this fact alone determined that to grant the application would be contrary to public welfare and morals. A petition for reconsideration was filed and denied. Petitioners then went to the superior court seeking a writ of mandate, and they appeal from an adverse judgment of the court.

In the hearing before the board the following facts were established: The Weiss brothers bear good reputations; they have not heretofore held a license; 99½ per cent of their customers are adult; they have no trade with school children; a great majority of the residents of the

* Subsequent opinion 256 P.2d 1.

neighborhood are Jewish; there is a demand among the customers and neighbors for sacramental wine and no other type of wine, and there is no demand among the customers for beer, nor have the petitioners facilities for storing a stock of beer. Buddy Barden Weiss testified: "Well, it is predominantly a Jewish neighborhood that use all the time sacramental wine Friday night services and holidays where it is the only wine they use."

No one appeared at the hearing to protest. The witnesses who did appear, and who were familiar with the facts above stated, favored the granting of the application. A survey made at the instance of the board developed the following facts: At Fairfax and Melrose, in the immediate vicinity of the school buildings, there is a drug store which carries a line of distilled spirits. On the southwest corner of Rosewood and Fairfax, immediately across Rosewood from the premises of the petitioners is a Safeway Store which is licensed to sell wine and beer. On the same side of the street, and within the same block, are three other licensed grog shops holding off sale licenses, and there are two establishments holding on sale licenses where various types of liquor may be consumed on the premises. All of these are within a radius of 600 feet of the school premises. There was no evidence as to whether any of these shops or drinking establishments carry sacramental wine.

[1–3] Respondent board may deny an application for a license or revoke one "if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." Const., Art. XX, § 22. Immediate proximity to a school is made a ground for denial of an "on sale" license, but not an off sale license by section 13 of Alcoholic Beverage Control Act, 1935, Deering's General Laws, Act 3796. The board may deny a license only for good cause. It has discretionary but not arbitrary powers. If it had been the policy of the board to keep liquor away from the vicinity of the school grounds altogether, we would readily agree that the public welfare and morals would have been served. But when there is already a colony of licenses within 600 feet of the school grounds, we can but classify as arbitrary the denial of another off sale license under the circumstances.

[4, 5] The law does not limit the number of liquor licenses that may be issued in a given locality. The powers of the board are not so broad as to authorize it to grant monopolies to favored individuals, which it could do if it possessed arbitrary powers. We do not hold that the board has not the discretionary power to limit the number of licenses by regulations that are reasonable and operate uniformly. There was no evidence of the existence of any such regulation. If there is one it was not the basis of the denial of petitioners' application. The board made a finding and upon that finding made its order. This was the cause for denial of the application. There was no other. The question here is whether the board, having issued seven licenses, two of them on sale licenses, within 600 feet of high school grounds, proceeded upon good cause to deny the application of these petitioners. It is too clear for argument that the action of the board evidences discrimination which has no rational justification. If it was consistent with public welfare and morals that seven places be licensed where customers could buy what they liked and carry it away or consume it on the premises as they desired, why would an eighth license for the sale of beer and wine in the same territory be contrary to public morals and welfare? Is it demoralizing for Jewish people to purchase wine for religious purposes, when others can purchase any liquor they desire for purposes and reasons too numerous to mention? We should look at the problem realistically. Proximity to the school grounds was the sole reason for the board's decision. The welfare of the high school children was its professed concern. We cannot visualize any harm to youth which would result from the granting of a license to petitioners. Denial of the license did not improve existing conditions and granting it would not have made them worse. We

doubt that any case of juvenile delinquency has been traced to the purchase of a bottle of Manischewitz in a Kosher delicatessen, or that a school boy would pass up several gin parlors on his way to a malt shop and then suddenly discover that what he really wanted was a pint of sacramental wine. To pretend that petitioners' license was denied because it is contrary to the public welfare and morals to have a liquor store near high school grounds is the ultimate in sophistry. It is utterly inconsistent with the policy which allows all the other liquor places to operate in the immediate locality.

We are not to be understood as holding that a liquor license should be granted against the opposition of those who live or have business in the community. See Hansen v. State Board of Equalization, 43 Cal. App.2d 176, 110 P.2d 453. This is not such a case. It appears from all the evidence that no one opposed the application and that granting of the license would be consistent with the wishes of the community.

In adopting the Alcoholic Beverage Control Act, the legislature declared that the purpose of control of the liquor traffic in accordance with law is to promote temperance in the use and consumption of alcoholic beverages and to further the economic, social and moral well-being, and the safety of the state and of all its people. § 1 of the Act. It seems to us that it would be especially within the stated purposes to recognize the religious beliefs and customs of the people in the neighborhood of the Weiss store and their desire for sacramental wine. We do not hold that such desire would always be a sufficient reason for granting a license, but that it was a factor to be considered in determining the question of the public welfare and morals of the community.

The judgment is reversed with directions to annul the order of the board denying the application, and to refer the matter to the respondents for further consideration.

VALLÉE, J., concurs.

PARKER WOOD, Justice.

I dissent. I do not agree with the law or the philosophy proclaimed in the majority opinion. That opinion announces in effect that as a matter of law the board's denial of the application for license to sell beer and wine 80 feet from the high school grounds was not a denial for good cause.

The State Board of Equalization has the right to deny, for good cause, an application for a liquor license. The board denied the application for the reason that appellants' premises are located in the immediate vicinity of Fairfax High School. The board found that appellants' premises are about 80 feet from the school grounds, and that the issuance of the license would be contrary to public welfare and morals.

The superior court upheld the action of the board. The superior court found that the board had determined, for good cause, that the granting of the license would be contrary to public welfare and morals; that the findings of the board are supported by substantial evidence; and that the board did not abuse its discretion.

The board did not abuse its discretion or act arbitrarily when it refused to permit Alfred and Buddy Weiss to edge up, as close as possible to the school grounds, with a beer and wine store. The proposed beer store could not have been closer to the school grounds without actually being upon the grounds. Only the street (Fairfax Avenue—80 feet wide) separates appellants' store from the school grounds and the R.O.T.C. building in the corner of the grounds.

The school grounds are bounded on the west by Fairfax Avenue (for a distance of two blocks), on the south by Rosewood Avenue, and on the north by Melrose Avenue. Appellants' store is on the northwest corner of the intersection of Fairfax and Rosewood. A corner of the school grounds is at the northeast corner of that intersection, and in that corner there is an R.O.T.C. building. In other words, the said corner of the school grounds and the R.O.T.C. building are directly across Fairfax Avenue from the store. Fairfax Avenue is about 80 feet wide.

In the two blocks on the west side of Fairfax Avenue, which are directly across the street from the school grounds, there

is no place which has a liquor license. (Appellants' store is within those two blocks and is at the south end of the southerly block.)

In the 800-foot-long block on Fairfax Avenue south of appellants' store and across Rosewood Avenue from appellants' store, and farther from the school grounds, there are five places which have off-sale licenses, and two places which have on-sale licenses, for beer and wine. The first of those places, on the *west side* of Fairfax, is a Safeway Store which is about 100 feet from appellants' store and about 175 feet from the school grounds. (A witness for appellants did testify, however, that the Safeway Store was just across Rosewood or 40 feet from his store. Apparently, he was attempting to minimize the distance to the Safeway by stating the distance to the edge of the 60-foot-wide parking lot of Safeway instead of stating the distance to the store building.) The second of those places is about 300 feet from the school grounds. The other places on the west side are, respectively, about 350 feet, 500 feet, and 600 feet, from the grounds. On the *east side* of Fairfax, the first place is about 600 feet, and the other place is about 800 feet, from the grounds.

At the northeast corner of Melrose and Fairfax Avenues (two blocks north of appellants' store) there is a drug store which has a liquor license. The drug store is across Melrose from the school grounds. Melrose is about 80 feet wide. The drug store and appellants' place are approximately the same distance from the grounds.

Buddy Weiss testified that he intended to sell wine for sacramental purposes; that he was not interested in beer because there was no room in the store for it, but if the store were larger he would seriously consider selling beer. A real estate agent, and a meat market proprietor, testified that the residents in the neighborhood are predominantly Jewish, and that the issuance of the license would not do any harm to the neighborhood.

The majority opinion states that if the board had kept liquor away from the vicinity of the school grounds altogether, they (my associates) would readily agree that the public welfare and morals would have been served, but since a colony of licenses is within 600 feet of the grounds, the denial of "another" license is an arbitrary act. The import of this assertion is that the public welfare and morals would have been served if, in the first instance, no liquor license had been granted in the vicinity of the school, but since some mistakes have been made in regulating liquor traffic in the neighborhood it would be an arbitrary act for the board (even if the board should be comprised of new personnel) to stop making such mistakes.

The majority opinion also states that if it was consistent with public welfare and morals that seven places be licensed, why would an eighth place in the same territory be contrary to public welfare and morals? The import thereof is that appellants' place is "in the same territory" as the other places. Appellants' place is 80 feet, and directly across the street, from the school grounds and the reserve officers' training building. None of the other places on Fairfax is opposite the school grounds and none is closer to the grounds. Only the drug store, across Melrose, is as near to the grounds as appellants' place is, but it is not as near to the training building as appellants' place is. As above shown, the other places are south of Rosewood and are much farther away.

My associates also say that they "cannot visualize any harm to youth which would result from the granting" of the license. This is a prediction as to what the behavior of high school pupils would be if a beer and wine store were allowed to operate directly across the street from the grounds and the reserve officers' training building. It pertains to a question of fact which was for the determination of the administrative agency, the board.

The majority opinion also states that a denial of the license would not improve conditions, and the granting of it would not make them worse. This is an appellate court finding regarding a factual question which was for the determination of the administrative agency.

The majority opinion also states that to pretend that the license was denied because it was contrary to public welfare and morals to have a liquor store "near high school grounds is the ultimate in sophistry." The import thereof is that the hearing officer, the board, and the superior court were announcing the utmost in deceptively subtle reasoning when they held that it was contrary to public morals to have the proposed beer and wine store about 80 feet from the school grounds and the officers' training building.

The majority opinion also states that it seems that it would be within the purposes of the Alcoholic Beverage Control Act to recognize the religious beliefs of the people in the neighborhood and their desire for sacramental wine. This assumes that it is a fact that appellants wanted the beer and wine license for the purpose of selling sacramental wine only. The board was empowered to decide the facts. The hearing officer was in the best position to decide the credibility of Buddy Weiss. His testimony that he was not interested in beer is refuted by his other testimony that if his store were larger he would seriously consider selling beer. The hearing officer and the board might well have concluded that Buddy was not trustworthy and that his main concern was to get a beer license. It is not clear why he should have such a commercial interest in a wine which is limited allegedly to use for religious purposes. I agree, as suggested in the majority opinion, that we "should look at the problem realistically." The realistic view is indicated by Buddy's statement that he would seriously consider selling beer if his store were larger. Of course, it would be an easy matter, after obtaining a beer license, to find space in his store for the beer. Also it is obvious that, after getting the license, they could sell all kinds of wine for other "purposes and reasons too numerous to mention."

I do not agree with the implication in the majority opinion that after a few or several mistakes have been made by the Board of Equalization in granting liquor licenses near a school that thereafter, as a matter of law, the board, even if it be comprised of new personnel, cannot deny a liquor license, upon the basis of violation of good morals, for a place which is closer to the school grounds and a building thereon than the other licensed places.

Under the majority opinion the board would not be justified hereafter in denying, upon the basis of violation of good morals, an application for a liquor license at any place on Melrose or Fairfax Avenues directly opposite the school or at any place within 600 feet of the school.

It is established and well known that the sale of intoxicating liquor in the immediate vicinity of a public school is against public welfare and morals. That standard of good morals is not changed as a matter of fact or law by an act or acts of the Board of Equalization in permitting the sale of liquor in violation of that standard. The standard remains the same even though at times it is disregarded. Even though the board at times has failed to observe that standard of good morals in granting a license, it is not required by reason of such failure to keep on failing to observe the standard. Certainly the board, upon discovering the error of its way, has the right to stop making the error. Certainly a new board would not be compelled to grant a license, in violation of good morals, because a former board had granted such a license.

I do not agree with the philosophy that two or more wrongs make a right, or that a few errors justify the making of another error.

The alleged principle that after a license has been granted in violation of good morals other such licenses should be granted in order to prevent discrimination and a monoply of the liquor business by a favored few is based upon the commercial aspect of the liquor traffic and is of no importance in comparison with the duty of the board to maintain the high moral principle that public school pupils and the public school system must be protected from encroachments of the liquor traffic. The pupils and the school were entitled to the protection which they received at the hands

of the board, in the Weiss application, without the necessity of a protest. It was not necessary to protest on the basis that the Weiss beer store would be too near the school or on the basis that there were too many licenses already in the community. Upon either basis the question of good morals would be involved. The order of the board denying the application was for good cause under either basis.

The matter was within the discretionary powers of the Board of Equalization. The board is to be commended for its sound judgment in denying the application. I agree with the hearing officer, the board, and the superior judge. In my opinion the judgment should be affirmed.

Rehearing denied; PARKER WOOD, J., dissenting.



115 Cal.App.2d 201

PEOPLE v. CRAVENS.

Cr. 2858.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1953.

Proceedings on motion to set aside order revoking suspension of sentence and on motion to withdraw plea of guilty as to subsequent offense. The Superior Court of the State of California in and for the City and County of San Francisco, Melvyn I. Cronin, J., denied the motions, and the movant appealed. The District Court of Appeal, Nourse, P. J., held that even though the denial of probation after conviction for grand theft had been inconsistent with the granting of suspension of execution of the sentence, only the suspension and not the sentence had been thereby invalidated, and that therefore revocation of the suspension had been correct, irrespective of the validity of the suspension.

Affirmed.

1. Criminal Law ⇐1001

A court has no power to suspend execution of a sentence otherwise than by granting probation, and if a court tries to do otherwise, suspension is void; however it is only the suspension that is void, and the sentence remains valid. Pen.Code, § 1203.1.

2. Judgment ⇐489

A judgment void for want of jurisdiction, apparent on face of judgment roll, is always subject to collateral attack.

3. Criminal Law ⇐1001

Revocation of suspension of sentence was correct, even though court had exceeded its jurisdiction by suspending sentence otherwise than by granting probation, since only the suspension and not the sentence had thereby been invalidated. Pen. Code, § 1203.1.

4. Criminal Law ⇐997

Not coram nobis but habeas corpus is remedy for collateral attack on judgment of conviction obtained in violation of fundamental constitutional rights.

5. Criminal Law ⇐274

Burden of proof by substantial and credible evidence was on defendant seeking to have plea of guilty withdrawn because of duress in its procurement.

6. Criminal Law ⇐274

On appeal from order refusing permission to withdraw guilty plea, wherein appellant contended that there had been no serious hearing, record established that guilty plea had been result of an agreement to avoid prosecution for other offenses and sustained action of public defender, acting for defendant, in submitting motions with concession that there was no basis for them.

Kenneth S. Carey, San Franciso, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Wallace Colthurst, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant appeals from two orders made June 6, 1952, denying two motions made by him. One was to set aside an order of June

22, 1950, revoking the suspension of sentence, which suspended sentence had been imposed on July 11, 1947, the other to permit appellant to withdraw a plea of guilty made on June 22, 1950, as to a count of violation of sec. 476a, Penal Code (issuing check without sufficient funds) on the basis of which plea he had been sentenced and the suspension of the prior sentence has been revoked.

In 1946–1947 appellant had been found guilty of two counts of grand theft (false pretenses). In People v. Cravens, 79 Cal. App.2d 658, 180 P.2d 453 (May, 1947) this court affirmed the conviction on one count but reversed the conviction on the other, because it related to the formation by appellant of a partnership with his victim and there was not sufficient evidence as to the separate amounts which he appropriated from that partnership. During said appeal appellant remained in jail. When after said decision appellant appeared in the superior court for sentence his motion for probation was denied, but because he had been in jail for sixteen months the court ruled that he had been sufficiently incarcerated. On July 11, 1947, on motion of the district attorney the count involved in the reversal was dismissed and on the count affirmed appellant was sentenced to San Quentin, but sentence suspended "on the condition of his having served sixteen months and on further condition that he make complete and final restitution * * or satisfy the complainant." The court stated that the matter was not to be handled by the Probation Department and that appellant was "finally released."

On May 26, 1950, appellant in a new information was charged with two counts of other felonies and one count of issuing checks without sufficient funds. § 476a, Penal Code. Appellant was held to answer on all three counts. The district attorney also moved to revoke the probation allegedly granted on July 11, 1947. His attorney made a tentative agreement that appellant would plead guilty to the sec. 476a count, that the other two counts would be dismissed, that the suspension of the earlier sentence would be revoked but that said sentence and the one as to 476a would be made to run concurrently. Appellant and the judge consented to this arrangement and on June 22, 1950, appellant was sentenced accordingly. After having tried more than once unsuccessfully to obtain his release on habeas corpus or coram nobis appellant on May 16, 1952, filed motions to set aside the revocation of the probation on the ground that it was fraudulently withheld from the court that there was no valid probation that could be revoked and to be permitted to withdraw the plea of guilty on the 476a count on the ground of duress (threats that his broker's license would be revoked and that the nonexisting probation would be revoked notwithstanding the fact that he had a defense to the bad check count). Both motions were denied without any serious hearing, the deputy public defender acting for defendant having submitted the motions conceding that there was no basis for them.

[1] Appellant contends that the revocation is void because the granting of the suspended sentence was void. The latter contention finds support in People v. Rickson, 112 Cal.App.2d 475, 246 P.2d 700; Ellis v. Dept. of Motor Vehicles, 51 Cal.App.2d 753, 757, 125 P.2d 521; In re Eyre, 1 Cal. App.2d 451, 453, 36 P.2d 842; In re Taylor, 140 Cal.App. 102, 34 P.2d 1036; In re Clark, 70 Cal.App. 643, 646, 234 P. 109. All these cases hold that a court has no power to suspend the execution of a sentence otherwise than by granting probation and that if the court tries to do otherwise the suspension is void. In this case not only was probation expressly denied but the court also stated that the matter was not to be handled by the probation department and that appellant was finally released. However the above cases hold that the suspension only is void and that the sentence remains valid. The latter part of these decisions appellant attacks vigorously on the ground that a defendant is prejudiced by having an unknown threat of imprisonment hanging over his head. Although this may be true it does not follow that, as desired by appellant, the defendant should be considered acquitted.

[2] Respondent points out that appellant could have brought out the same matter on

appeal of the suspended judgment in 1950 and contends that then he is not allowed to move to set aside the judgment and appeal from an order denying his motion. Although this is the general rule, 8 Cal.Jur. 495, it does not apply when the order is void on the face of the record. See People v. Scranton, 50 Cal.App.2d 492, 494, 123 P.2d 132; People v. Flohr, 30 Cal.App.2d 576, 579, 86 P.2d 862. In Lesser v. Collins, 1 Cal.App.2d 161, 165, 36 P.2d 411, this court held that a judgment void for want of jurisdiction, apparent on the face of the judgment roll, is always subject to collateral attack. Next respondent contends that the order was a valid order granting probation, which can according to section 1203.1, Penal Code, be made in two manners, by suspending imposition of sentence or suspending execution of sentence. The denial of probation was intended only to deny suspension of imposition of sentence but the court granted suspension of execution of sentence as probation and did not intend to deny this form of probation. (That probation is sometimes used in the meaning of suspension of imposition of sentence only in contradistinction to suspension of execution of sentence is shown by said distinction made in section 11715.6, Health and Safety Code and section 4 of the Dangerous Weapons' Control Law of 1923, Gen.Laws, Act 1970.) However this reasoning, although not illogical, is contrary to the above-cited authorities, which hold that denial of probation is inconsistent with granting of suspension of execution of sentence as a form of probation. There seems in this case the more reason to follow said authorities because the further statements of the court seem to indicate that he actually did not intend to put the defendant on probation.

[3] Finally it is argued correctly that if the suspension is void the judgment remains valid and must be served, citing also In re Collins, 8 Cal.App. 367, 370, 97 P. 188. In In re Martin, 82 Cal.App.2d 16, 22, 185 P.2d 645, it was held that an order for probation was properly revoked when it was wholly void, and that there need not be prejudice because the Adult Authority will not refuse to consider the particular conditions of the case. We must hold, therefore, that the revocation was correct irrespective of the validity of the suspension.

[4] Appellant contends that the allegations of coercion in his said motion were investigated only pro forma, and not seriously, by the judge and the public defender appointed by the judge to represent appellant. He relies on People v. Odlum, 91 Cal.App.2d 761, 205 P.2d 1106, in which case it was held on the authority of People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657, that a motion to set aside a plea and judgment in the nature of a petition for a writ of coram nobis lies when the plea "has been procured by fraud or duress or by any force which operates to preclude the exercise of free will and judgment by the party" [91 Cal.App.2d 761, 205 P.2d 1112], and in which case a denial of the motion without hearing or decision on the merits was reversed. Respondent contends correctly that not coram nobis but habeas corpus is the remedy for collateral attack on a judgment of conviction obtained in violation of fundamental constitutional rights, citing People v. Adamson, 34 Cal.2d 320, 327, 210 P.2d 13; People v. Sorensen, 111 Cal.App.2d 404, 244 P.2d 734.

[5, 6] Finally respondent urges that the denial of the motion to set aside was correct on the merits. The exhibits of the petition, affidavits, letters and transcript of preliminary hearing do not show undue coercion or existence of a good defense, but rather indicate that defendant's attorney advised the plea of guilty because there was no defense and to obtain dismissal of the other two counts and the concurrent running of the sentences on the new count and the one as to which execution had been suspended. But on appeal the argument as to this point is not that the motion and its exhibits required granting of the motion, but only that there was no serious hearing (so that appellant had no opportunity to offer additional evidence) and that the reasons for the denial are not given. The contentions are of little merit. The court had studied the motion and exhibits and had thought the evidence insufficient. The burden of proof by substantial and credible

evidence was on appellant. People v. Devora, 105 Cal.App.2d 457, 459, 233 P.2d 653. Appellant was represented by a deputy public defender. This counsel did not offer any supplementary evidence. He did not believe that appellant was taken advantage of and submitted the matter. Appellant does not contend that if the aid of the public defender had been more substantial or that if he had communicated with appellant, better evidence could have been offered at the hearing. Nor does he contend that any evidence material to his cause was available to him or that such evidence was suppressed by the State.

The record fails to disclose that the plea of guilty was procured by any fraud or misrepresentations. To the contrary it appears that plea was the result of an agreement to save appellant from prosecution for other offenses.

The appeal has been argued by counsel assigned by this court for that purpose and we appreciate his efforts in a case of little merit.

The orders are affirmed.

DOOLING, J., concurs.



115 Cal.App.2d 92

SMITH v. SMITH.

Civ. Nos. 19083, 19199.

District Court of Appeal, Second District, Division 3, California.

Dec. 26, 1952.
Rehearing Denied Jan. 12, 1953.
Hearing Denied Feb. 19, 1953.

Action by wife to have Kansas divorce decree, as amended nunc pro tunc, made a judgment of the Superior Court of California. The Superior Court of Los Angeles County, Mildred L. Lillie, Lewis Drucker and Ben R. Ragain, JJ., entered judgment granting relief requested, and order adjudging defendant to be in contempt, and defendant appealed. The District Court of Appeal, Vallée, J., held that the superior court had power to order defendant to comply with property settlement agreement provisions of Kansas divorce decree which had been determined to be valid.

Judgment affirmed.

1. Appearance ⇐18

Where a cause of action is within the general jurisdiction of a court, the appearance of the parties and the submission of the cause on its merits, confers jurisdiction to try the issues presented, including an unpleaded issue which has become an issue in the case by trial without objection.

2. Divorce ⇐331

Where wife's complaint in Kansas divorce action did not contain allegation with reference to property settlement agreement or division of property, or prayer therefor, and husband appeared and answered, and issue of property settlement was tendered by the parties, and judgment was permitted to become final, it could not thereafter be collaterally attacked on ground that Kansas court had been without jurisdiction to adjudicate property settlement issue which had become issue in case by trial without objection.

3. Judgment ⇐306

"Clerical errors" are ordinarily deemed to be those errors, mistakes, or omissions which are not the result of the judicial function, with the distinction between them and "judicial errors" being dependent, not upon determination as to by whom the error was made, but upon whether it was deliberate result of judicial reasoning and determination.

See publication Words and Phrases, for other judicial constructions and definitions of "Clerical Errors" and "Judicial Errors".

4. Divorce ⇐326

The validity and finality of Kansas divorce decree embodying property settlement, was determinable according to the law of Kansas where judgment was rendered.

5. Judgment ⇐326

Under Kansas law, a court may, on motion of an interested party or on its own motion, at any time, correct or amend by a nunc pro tunc order, any clerical error

for purpose of making the record speak the truth by showing the judgment which was actually rendered by the court.

6. Judgment ⇐326

Under Kansas law, the function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered, with the inquiry being as to what order was in fact made by trial judge.

7. Appeal and Error ⇐991, 1010(1)

On hearing of a motion for a nunc pro tunc order, question of what transpired when judgment was announced is, under Kansas law, factual, and where the findings thereon are supported by substantial evidence, they are conclusive.

8. Judgment ⇐326

Under Kansas law, an amendment by a nunc pro tunc order may be made upon any satisfactory evidence.

9. Divorce ⇐254

Where Kansas nunc pro tunc order recited that court had examined the files, and had reviewed the court's minutes and the law involved, and minutes revealed that judge, when entering divorce decree, had not only approved property settlement agreement but had stated that property settlement agreement was to become a part of the decree, it was within Kansas court's inherent power to correct the journal entry to conform to the judgment actually rendered, and to include property settlement provisions omitted in journal entry, the error of omission being clerical rather than judicial.

10. Courts ⇐117

The court's minutes are presumably a trustworthy chronicle of events as they transpired at the trial, and are ordinarily controlling on the question of what order was in fact made.

11. Judges ⇐32
Judgment ⇐323

Under Kansas law, notice is not necessary to confer jurisdiction to make a nunc pro tunc order correcting a clerical error, nor is order invalidated by fact that it is signed by judge other than one granting original decree.

12. Divorce ⇐331

An order directing disposition of property of spouses pursuant to a property settlement agreement incorporated in foreign divorce decree is valid under authority of court to order a party to perform a specific act within his power.

13. Judgment ⇐822(1), 823

A judgment of a sister state is of the same effect in California as in the state where it was made, except that it can be enforced in California only by an action or special proceeding.

14. Divorce ⇐222, 331

Action by wife in whose favor Kansas court had entered divorce decree incorporating property settlement agreement, to establish the Kansas decree as judgment of Superior Court of California, was not one for a mere money judgment, but decree would give Kansas decree same force and effect as if it had originally been rendered in California, and attorneys' fees could properly be awarded to wife.

15. Appeal and Error ⇐984(5)
Husband and Wife ⇐205(6)

An allowance of attorneys' fees in a matrimonial action is proper only if, before the services are performed, there has been an application by plaintiff for such fees and a stipulation by defendant or an order of the court that the fixing of the amount thereof could be postponed until the services have been performed, and when there is such an application and order, amount of award of attorney's fees is within discretion of the trial judge, and his decision will not be disturbed in absence of clear abuse of that discretion.

16. Divorce ⇐227(2)

Award of $2,000 attorneys' fees to wife who brought action to have Kansas decree of divorce, as amended by a nunc pro tunc order, made the judgment of the Superior Court of California, was not excessive in view of the services shown by the record to have been rendered.

17. Appeal and Error ⇐1122(1)
Divorce ⇐331

In action by wife to have Kansas divorce decree made judgment of Superior

Court, wherein it appeared that decree had directed transfer of certain stock to wife, and that husband had sold same, allegedly for purpose of defrauding wife of her rights therein, issues as to such matters had no relevancy to relief sought, and findings thereon were improper, and they would be excised in lieu of a formal reversal.

18. Divorce ⇐280

Order adjudging defendant to be in contempt for failure to comply with Kansas divorce decree which had been made judgment of superior court of California, was not appealable.

Bertrand Rhine and Robert Kingsley, Los Angeles, for appellant.

Charles C. Montgomery, Jr., Burbank, for respondent.

VALLÉE, Justice.

Two appeals by defendant are here consolidated.

In No. 19083, defendant appeals from a judgment in favor of plaintiff decreeing that a Kansas decree of divorce, as amended by a *nunc pro tunc* order, be made a judgment of the superior court of California.

In No. 19199, defendant appeals from an order, dated March 28, 1952, made on the recommendation of a commissioner, finding him in contempt but permitting him to purge himself on payment of certain monthly sums, and from an order, dated April 18, 1952, made after exceptions to the order of March 28, 1952, had been filed and heard, which disallowed the exceptions and affirmed the order of March 28, 1952.

Chronologically the facts are:

January 17, 1949, plaintiff filed a petition in the District Court of Sedgwick County, Kansas, seeking a decree of divorce from defendant, alimony, attorney's fees, and general relief.

February 15, 1949, defendant appeared, answered, and filed a cross-petition for a decree of divorce.

Thereafter, several pretrial conferences were had between the attorneys for the parties, respecting a property settlement agreement. Shortly before the action came on for trial, plaintiff, her attorney, and the attorney for defendant, appeared in the chambers of Judge Ross McCormick [1] and discussed with him the property settlement, in which discussion all of the property of the parties was disclosed to the judge. Included among the items which the parties agreed plaintiff should receive were 1000 shares of the common stock of Beech Aircraft Corporation, which had been accumulated by the parties during their marriage, and the payment of $2,000 by defendant to plaintiff. Defendant's attorney disclosed that defendant had sold the stock approximately one month after plaintiff had filed her petition for divorce and about a week before the conference, but agreed that defendant would deliver to plaintiff 1000 shares "even if it was necessary for him to purchase it on the market." As a result of the conference, the rights of the parties in their property were determined and its disposition agreed upon with the approval of the court. Defendant's attorney informed the court that defendant would not prosecute his cross-petition but would let the answer stand as a matter of record. Prior to the trial a "Journal Entry of Judgment and Decree of Divorce" was approved and signed by the attorneys for the parties.[2]

February 25, 1949, the matter came on for hearing before Judge Ross McCormick. At the conclusion of plaintiff's testimony and that of her corroborating witness, the trial judge said: "She is granted the divorce and the property settlement is approved and that settlement is approved by the Court and becomes a part of the decree of this Court." The judge thereupon signed the

1. Judge of Division No. 1 of the District Court of Sedgwick County, Kansas.

2. There was evidence that it is the practice in Kansas, when the disposition of the property is agreed upon and the only matter left is the presentation of the evidence for a divorce, that a "Journal Entry of Judgment and Decree of Divorce" be drawn and presented to the opposing counsel for his approval prior to the appearance in court of the plaintiff to present evidence.

"Journal Entry of Judgment and Decree of Divorce."

The "Journal Entry of Judgment and Decree of Divorce" contains, among others, the following findings:

"The court further finds that the parties have heretofore entered into a property settlement dividing and fully determining and settling their property rights, the substance of which settlement is submitted to the court, and the court finds that the respective parties were both fully advised by their respective counsel concerning their respective rights, and that said settlement was fairly entered into and the property settlement concerning all of the said matters should be and is by the court approved. [Here follow findings as to specific items of property which plaintiff and defendant were to receive, with which we are not here concerned.]

"The court further finds that the defendant shall deliver and transfer unto the plaintiff or her attorneys one thousand shares of the common stock of Beech Aircraft Corporation of Wichita, Kansas, and the further sum of Two Thousand Dollars ($2,000) to be paid at the rate of Two Hundred Fifty ($250) Dollars per month, beginning on the 1st day of April, 1949, and each and every month thereafter until paid." The decree of divorce read that: "It is further by the Court considered, ordered, adjudged and decreed that the property settlement between the parties be and the same is hereby approved in accordance with the foregoing findings of the Court," but did not make an award of the specific items of property which each party was to receive under the findings. No appeal was taken from the judgment and it became final.

Thereafter, steps were taken by plaintiff to have the Kansas decree amended, and a *nunc pro tunc* order was made correcting the "Journal Entry of Judgment and Decree of Divorce" by ordering that the parties perform the property settlement agreement, directing the defendant to transfer and deliver to plaintiff or her attorneys the 1000 shares of stock and to pay to her the sum of $2,000 at the rate of $250 a month beginning on April 1, 1949. The order was signed by Judge Charles T. McClintock who was sitting for Judge Ross McCormick.

Plaintiff then commenced the present action to have the Kansas judgment, as amended by the *nunc pro tunc* order, made the judgment of the superior court of California. Judgment was rendered in favor of plaintiff, defendant was ordered to forthwith transfer and deliver the stock to plaintiff or her attorney, to pay her the $2,000, and to pay her attorney's fees in the sum of $2,000, from which judgment defendant appeals.

The Appeal from the Judgment

[1, 2] Defendant first contends that the judgment directing transfer and delivery of the stock and the payment of $2000 to plaintiff is not enforceable because the Kansas court was without jurisdiction to adjudicate the same since the plaintiff's complaint in the Kansas action did not contain any allegation with reference to any property settlement agreement or any division of property, or any prayer therefor, but simply prayed for a divorce, alimony, attorney's fees and general relief. Defendant appeared and answered in the Kansas action, and thereafter the issue of a property settlement was tendered by the parties themselves. No appeal was taken, the judgment became final, and it is not now subject to collateral attack upon the ground urged. Where a cause of action is within the general jurisdiction of a court, the appearance of the parties and the submission of the cause on its merits confer jurisdiction to try the issues presented.[3] An unpleaded issue tried without objection becomes an issue in the case.[4]

3. Calkins v. Calkins, 155 Kan. 43, 122 P. 2d 750; Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 5, 200 P. 616; Wells Fargo & Co. v. City, etc., of San Francisco, 25 Cal.2d 37, 43, 152 P.2d 625; see, also 1 Freeman on Judgments, 5 ed. 603, § 305.

4. Moeller v. Packard, 86 Cal.App. 459, 460, 261 P. 315.

Defendant next contends the *nunc pro tunc* order is void on its face because 1) it made a substantive change and corrected a judicial error rather than a clerical error, and 2) it was made without notice and by a judge other than the one who rendered the original judgment.

[3] "Clerical" errors are, generally speaking, those errors, mistakes, or omissions which are not the result of the judicial function. Mistakes of the court are not necessarily judicial errors. The distinction between a "clerical" error and a "judicial" one does not depend so much upon the person making the error as upon whether it was the deliberate result of judicial reasoning and determination.[5]

[4–10] The law of Kansas, the jurisdiction where the judgment was rendered, is controlling as to its validity and finality.[6] In line with the general rule, it is settled in Kansas that a court, on motion of an interested party or on its own motion, may, at any time, correct or amend by a *nunc pro tunc* order any clerical error so as to make the record speak the truth and show the judgment which was actually rendered by the court.[7] The function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then, but to enter now for then an order previously made.[8] The question presented to the court on a hearing of a motion for a *nunc pro tunc* order is: What order was in fact made at the time by the trial judge?[9] What transpired when the judgment was announced is a question of fact; and where the findings thereon are supported by substantial evidence, they are conclusive.[10] An amendment by a *nunc pro tunc* order may be made upon any satisfactory evidence.[11] The *nunc pro tunc* order here recites that the court examined the files, and reviewed the court's minutes and the law involved. These minutes are presumably a trustworthy chronicle of events as they transpired at the trial and are ordinarily controlling on the question of what order was in fact made.[12] The minutes here revealed that the judge not only approved the property settlement agreement but stated at the time the divorce decree was granted that the property settlement agreement was to become "a part of the decree of this Court." It was, therefore, within the court's inherent power to correct the "Journal Entry of Judgment and Decree of Divorce" so as to conform to the judgment actually rendered by the court. The fact that the original journal entry referred to eight items in the property settlement agreement, four in fa-

5. 1 Freeman on Judgment, 5 ed., 283, § 146; La Mar v. Superior Court, 87 Cal. App.2d 126, 130, 196 P.2d 98; Benway v. Benway, 69 Cal.App.2d 574, 580, 159 P.2d 682; 14 Cal.Jur. 995, § 72; 49 C.J. S., Judgments, § 237, page 449.

6. 15 Cal.Jur. 241, § 246; 50 C.J.S., Judgments, § 869, page 444.

7. Cazzell v. Cazzell, 133 Kan. 766, 3 P.2d 479, 481; Elliott v. Elliott, 154 Kan. 145, 114 P.2d 823, 826; Bush v. Bush, 158 Kan. 760, 150 P.2d 168, 170; Gates v. Gates, 160 Kan. 428, 163 P.2d 395, 398; Hinshaw v. Hinshaw, 166 Kan. 481, 203 P.2d 201, 205.

8. Bush v. Bush, 158 Kan. 760, 150 P.2d 168, 170; Schneider v. Schneider, 147 Kan. 621, 78 P.2d 16, 18; Elliott v. Elliott, 154 Kan. 145, 114 P.2d 823, 825; Hinshaw v. Hinshaw, 166 Kan. 481, 203 P.2d 201, 205.

9. Elliott v. Elliott, 154 Kan. 145, 114 P.2d 823, 825; Schneider v. Schneider, 147 Kan. 621, 78 P.2d 16, 18; Aydelotte v. John S. Brittain & Co., 29 Kan. 98; Martindale v. Battey, 73 Kan. 92, 84 P. 527, 529.

10. Gates v. Gates, 160 Kan. 428, 163 P. 2d 395, 398; Christisen v. Bartlett, 73 Kan. 401, 84 P. 530, 85 P. 594; Tincknell v. Tincknell, 141 Kan. 873, 44 P.2d 212, 214.

11. Gates v. Gates, 160 Kan. 428, 163 P.2d 395, 398; Bush v. Bush, 158 Kan. 760, 150 P.2d 168, 170; Martindale v. Battey, 73 Kan. 92, 84 P. 527, 529; Christisen v. Bartlett, 73 Kan. 401, 84 P. 530, 85 P. 594; United Zinc & Chemical Co. v. Morrison, 76 Kan. 799, 92 P. 1114, 1115–1116.

12. Bush v. Bush, 158 Kan. 760, 150 P.2d 168, 170; Elliott v. Elliott, 154 Kan. 145, 114 P.2d 823, 825; Aydelotte v. John S. Brittain & Co., 29 Kan. 98; Boatman v. Boatman, 142 Kan. 107, 45 P. 2d 592, 593.

vor of defendant and two in favor of plaintiff, and that only two of the eight items were carried into the judgment by the *nunc pro tunc* order does not indicate that the making of the latter order was judicial rather than clerical. It appears from the journal entry and the evidence that the six items not included in the *nunc pro tunc* order had been executed prior to the making of the latter order. The error corrected was a "clerical" and not a "judicial" one.

[11] Defendant claims that notice of the application of the *nunc pro tunc* order was jurisdictional and that since the order shows on its face that it was made on *ex parte* application, it is void. This contention is without merit. It is settled in Kansas that notice is not necessary to confer jurisdiction to make a *nunc pro tunc* order correcting a clerical error.[13]

It is likewise of no consequence that the *nunc pro tunc* order was signed by a judge other than the one granting the original decree. It follows from the principle that a court has inherent power *at any time* to correct clerical errors so as to make the record speak the truth, that under some circumstances, whether it be the mere passage of time, absence, transfer, or other similar reason, the judge rendering the original judgment is not available and another must, therefore, correct the error. Where the record affords the evidence of the clerical error, as distinguished from the personal knowledge and recollection of the judge who made the error, there is no reason why another judge should not correct the error.[14] The clerical error in the present case appeared on the face of the record. There was no disputed question of fact. A *nunc pro tunc* order correcting a clerical error in a judgment made by a judge other than the judge who rendered the judgment has been upheld by the Supreme Court of Kansas.[15] Further there was evidence to the effect that under the law of Kansas if the records of the court show the discrepancy or ambiguity or omission, another judge sitting in the same court may enter an order *nunc pro tunc* correcting the error.

[12, 13] It is asserted that the judgment in the present action is void in purporting to order defendant to comply with the Kansas decree. It is well settled that a court may validly order a party to perform a specific act within his power, and that in ordering disposition of property of spouses pursuant to a property settlement agreement such an order is valid.[16] Since the Kansas decree was valid in this respect, the superior court had power to order defendant to comply therewith. The effect of a judgment of a sister state is the same in this state as in the state where it was made except that it can be enforced here only by an action or special proceeding.[17] To hold as contended by defendant would be to deny full faith and credit to the Kansas decree.

[14] Defendant next contends the court erred in awarding attorneys' fees in the present action because it is not one "to establish a foreign alimony suit, but rather to establish a judgment for division of property, or to enforce a simple contract.

13. Christisen v. Bartlett, 85 P. 594, at page 595, on rehearing after opinion in 84 P. 530, where the court said: "A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may creep into them. This power is not lost by lapse of time or the expiration of a term of court. The duty of a court to see that its records speak the truth is an affirmative and active one, and it is not a jurisdictional prerequisite to its performance that one party should invoke it by motion or that the other should have notice before action is taken."

14. See In re Estate of Goldberg, 10 Cal. 2d 709, 76 P.2d 508; La Mar v. Superior Court, 87 Cal.App.2d 126, 196 P. 2d 98.

15. Bush v. Bush, 158 Kan. 760, 150 P.2d 168; Aydelotte v. John S. Brittain & Co., 29 Kan. 98.

16. In re Lazar, 37 Cal.App.2d 327, 99 P. 2d 342; Creager v. Superior Court, 126 Cal.App. 280, 14 P.2d 552; Tomkins v. Tomkins, 89 Cal.App.2d 243, 200 P.2d 821; Palen v. Palen, 12 Cal.App.2d 357, 55 P.2d 228.

17. Code Civ.Proc. § 1913.

The judgment of the Court below was, neither in form nor in substance, a decree for alimony. And this action was brought long after marital status between the parties had terminated." The property settlement which the parties themselves put in issue in the Kansas action was not only approved by that court but its terms were incorporated in the decree and performance ordered. Plaintiff in the present action did not, as defendant argues, seek a mere money judgment but sought one establishing the Kansas decree as a judgment of the superior court of this state. By the judgment here the Kansas decree was so established, with the same force and effect as if it originally had been rendered in this state. Wilson v. Wilson, 33 Cal.2d 107, 199 P.2d 671, was an appeal from an order that the defendant pay certain "community debts" incurred by the plaintiff, his former wife, during their marriage, and from an order awarding attorneys' fees to the plaintiff's counsel. The trial court awarded the attorneys' fees for services rendered after the divorce decree had become final in connection with efforts of the wife's counsel to compel the defendant to comply with the decree directing him to pay "community debts." In holding that the trial court had power to make the award of attorneys' fees, it was said, 33 Cal.2d at page 115, 199 P.2d at page 676: "* * * [T]he trial court's power to award suit money does not cease merely because a final decree of divorce has been entered and no appeal therefrom has been taken within the time prescribed by law. Such an allowance may be made, after the decree has become final, to enable a former wife to force payment of alimony ordered [citation] or to resist her former husband's application to have an allowance of alimony modified or terminated [citations].

"There is no essential difference in principle between an allowance of attorneys' fees in such cases and an allowance in a case such as this, where the wife seeks to compel compliance with an order made to accomplish a just division of the property of the parties." [18] This principle applies here.

[15] It is next contended that the award of $2000 attorneys' fees is excessive. An allowance of attorney's fees is proper only if, before the services are performed, there has been an application by plaintiff for such fees and a stipulation by defendant or an order of the court that the fixing of the amount thereof could be postponed until the services had been performed.[19] In the present case there was such an application and such an order. An award of attorney's fees under circumstances such as are present here is a matter in the sound discretion of the trial judge, and his decision will not be disturbed in the absence of a clear abuse of discretion.[20] Although the case took only two days of actual trial, as defendant points out, other court appearances by plaintiff's attorneys were necessary on demurrers and a motion for summary judgment filed by defendant. The action required arrangements by the attorneys for the taking of depositions in Kansas and for the application for the *nunc pro tunc* order, considerable research and study by them of Kansas law, and a study and analysis of the Kansas proceedings. The record reveals the wife has no income. On the other hand, defendant, who is unmarried, earns a salary of $818 a month. The amount in controversy was about $20,000. "Among the factors to be considered in determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding are the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed." [21]

18. See, 39 Cal.L.Rev. 259.

19. 1 Cal.Jur. 999, § 52.

20. Parker v. Parker, 22 Cal.App.2d 139, 142, 70 P.2d 1003; Gebhardt v. Gebhardt, 69 Cal.App.2d 723, 728, 160 P.2d 177.

21. Berry v. Chaplin, 74 Cal.App.2d 669, 679, 169 P.2d 453, 460.

We cannot say that the amount awarded is in excess of the reasonable value of the services rendered.

[16] The court in the present action found (Findings Nos. IV and VI) that defendant sold the Beech Aircraft Corporation stock for the purpose and with the intent of defrauding plaintiff of her rights therein, and that he converted the stock to his own use in fraud of plaintiff's ownership and rights therein. Defendant asserts the court erred in making these findings. We agree. The judgment merely establishes the Kansas decree as a judgment of the superior court, directs compliance therewith, and awards attorney's fees. The findings complained of have no relevancy to the issues adjudicated. They are not material and should be excised. The error can be corrected without the necessity of a formal reversal.[22] Accordingly, those parts of findings IV and VI quoted in the margin[23] are stricken from the findings; and as thus modified, findings IV and VI are adopted as the findings of this court. On the oral argument counsel for plaintiff suggested that if defendant should be adjudged a bankrupt these findings would prevent his discharge from the obligations of the judgment. If the facts found are true, defendant will not be released of his obligation to transfer and deliver the stock by his discharge in bankruptcy.[24]

22. Warden v. Stoll, 210 Cal. 374, 376, 291 P. 835.

23. (Finding IV): "It is true that said transfer of said stock by the Defendant Lee H. Smith was for the purpose and with the intent of defrauding the Plaintiff of her rights therein and to the stock awarded to her under and by virtue of said Kansas Judgment." (Finding VI): "It is true that the Defendant Lee H. Smith has converted said one thousand shares of stock of the Beach Aircraft Corporation of Wichita, Kansas to his own use and benefit and in fraud of the Plaintiff's ownership and rights therein."

24. 11 U.S.C.A. § 35.

25. Code Civ.Proc. § 1222; John Breuner Co. v. Bryant, 36 Cal.2d 877, 878, 229 P. 2d 356.

The Appeal from the Orders Adjudging Defendant in Contempt.

[17] Defendant did not comply with the judgment appealed from. He was cited for contempt for not complying. The court adjudged him in contempt, sentenced him to five days in the county jail, and suspended the sentence on condition that he pay plaintiff $250 monthly.

[18] The order, dated March 28, 1952, heretofore referred to, was made after a hearing before a commissioner and his report thereon on the same day the report of the commissioner was filed without awaiting the five days for exceptions prescribed by section 259(2) of the Code of Civil Procedure. Defendant filed exceptions to the report of the commissioner, and on April 18, 1952, the court made an order disallowing the exceptions and affirming the order of March 28, 1952. Defendant appealed from the orders of March 28 and April 18, 1952, insofar as they adjudged him in contempt. The orders adjudging defendant in contempt are not appealable, and the appeals therefrom must be dismissed.[25]

The appeals from the orders of March 28 and April 18, 1952, are dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

115 Cal.App.2d 180

MacLEOD et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19295.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1952.

Rehearing Denied Jan. 27, 1953.

Hearing Denied Feb. 26, 1953.

Original proceeding in mandamus to require Superior Court to set aside order authorizing the taking of depositions to perpetuate testimony. The District Court of Appeal, Wood, J., held that where application for order to perpetuate testimony alleged that applicant expected to be party to an action in State, the names of persons expected to be adverse parties, names of witnesses to be examined and their addresses, and a general outline of facts expected to be proved, and subpoena duces tecum was not sought, application was sufficient, even though it allegedly showed on its face that plaintiff could not become party to action contemplated.

Writ denied and alternative writ discharged.

1. Depositions ⇐32

Where application for order to perpetuate testimony alleged that applicant expected to be party to an action in state, the names of persons expected to be adverse parties, names of witnesses to be examined and their addresses, and a general outline of facts expected to be proved, and subpoena duces tecum was not sought, application was sufficient, even though it allegedly showed on its face that plaintiff could not become party to action contemplated. Code Civ.Proc. § 2084, subds. 1, 3.

2. Depositions ⇐8

Literal compliance with statutory provision permitting the taking of depositions to perpetuate testimony is sufficient. Code Civ.Proc. § 2084, subds. 1, 3.

3. Constitutional Law ⇐70(3)

Statute permitting taking of depositions to perpetuate testimony permits a proceeding brought for the sole purpose of annoying, harassing or embarrassing another, or for some ulterior object, and it permits one who does not have a cause of action to indulge in a fishing expedition, but remedy lies in the field of legislation. Code Civ. Proc. § 2084, subds. 1, 3.

Hill, Farrer & Burrill, Elliott H. Pentz and Wiliam McD. Miller, Los Angeles, for petitioner Elizabeth MacLeod.

Latham & Watkins, Austin H. Peck, Jr., and John S. Welch, Los Angeles, for petitioners John MacLeod, Fred H. Brown, and George W. Loring.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

Vaughan, Brandlin & Wehrle, and Warren J. Lane, Los Angeles, for real party in interest.

WOOD, Justice.

This is an original proceeding in mandamus to require the superior court to set aside its order authorizing the taking of depositions to perpetuate testimony.

Ruth Norris filed an application in the superior court, for an order authorizing the examination of witnesses, in which she alleged that: She expects to be a party to an action in the superior court of this state. She expects the adverse parties to be John MacLeod, Fred H. Brown, Elizabeth MacLeod, George W. Loring, Highland Builders, Inc., and Macco Corporation (setting forth the address of each one). She is, and has been since January 10, 1948, an owner of common stock in Macco Corporation. At all times therein mentioned John MacLeod is and was a director and president of Macco, Elizabeth MacLeod was his wife, Fred H. Brown was a director and officer of Macco, and George W. Loring was an attorney for Macco. At all times therein mentioned Fred H. Brown was a director and president of Highland Builders, Inc., a corporation, and Elizabeth MacLeod was a director and secretary of Highland Builders. At all times therein mentioned Fred H. Brown, George W. Loring and Elizabeth MacLeod were the agents of John MacLeod. Upon information and belief, Ruth Norris alleges that prior to June 3, 1944, Macco entered into a contract, performance of which is not yet completed, to build an

addition to Mills Field Airport, and to furnish the sand, gravel, dirt and other fill material; about June 13, 1944, John MacLeod caused Highland Builders, through his agents Brown, Elizabeth MacLeod and Loring, to purchase certain real property, referred to as the "quarry property," located within 3 miles of Mills Field; said quarry property was purchased for the purpose of selling earth therefrom to Macco for its use in performing its contract to enlarge Mills Field and other construction work; the purchase price of the quarry property was $51,500, of which amount $15,000 was paid in cash and the balance was payable in seven monthly installments—the first on July 1, 1944, and the last on January 1, 1945; from July 1, 1944, to the present, Highland Builders has sold Macco large quantities of gravel, rock and other fill materials which Macco used in extending Mills Field and in other construction work, and that Highland Builders received large profits from said sale. The quarry property was needed by Macco in its ordinary operations, particularly in the performance of its contracts at Mills Field, which need was known by John MacLeod and the other petitioners herein. The purchase by Highland Builders constituted the seizure of a corporate opportunity, and by reason of said seizure Macco Corporation sustained damages in excess of $50,000. Said mentioned adverse parties, except Macco, have received large profits and advantages, and all of the profits and advantages which they have received and which they will receive in the future are the property of Macco and are held by said adverse parties as constructive trustees for the use and benefit of Macco. By reason of the purchase of the quarry property and of the sale of sand and other materials therefrom to Macco, John MacLeod and Fred H. Brown violated their fiduciary duties as directors and officers of Macco. John and Elizabeth MacLeod, Fred H. Brown and George W. Loring will be necessary and material witnesses for Ruth Norris in the trial of the expected action, and they have knowledge, information and documents pertaining to the facts, in regard to which such action is expected, which will be necessary and material evidence therein. Ruth Norris expects to prove and establish by their testimony and documents all the facts above set forth.

On January 25, 1952, the superior court made an order directing that the petitioners herein be examined and their depositions taken in accordance with the provisions of Section 2086 of the Code of Civil Procedure.

Thereafter, petitioners made motions for an order vacating the said order for examination of petitioners on the grounds, among others, that the application of Ruth Norris does not state facts sufficient to entitle her to such examination of witnesses; that she was never at any time a stockholder of Macco Corporation, dissolved on January 5, 1948; that she did not become a registered shareholder until August 9, 1950; and that it affirmatively appears from the application that the transaction of which she complains occurred in 1944 and that she was not a shareholder at that time.

In support of said motions, two affidavits of H. O. Miller were filed in which it is recited that Mr. Miller is a trust officer of Citizens National Trust and Savings Bank and, as such, is the official custodian of the stock register of Macco Corporation; and that Ruth Norris first became a registered shareholder of Macco Corporation on August 9, 1950. An affidavit of W. B. Von Kleinsmid was also filed, in support of one of said motions, which recited that Macco Construction Co. was organized on January 31, 1929; on September 5, 1946, said corporation changed its name to Macco Corporation; on January 5, 1948, said corporation was dissolved; from November 1, 1943, to and including January 5, 1948, Mr. Von Kleinsmid was the secretary of said corporation and had custody of the records of said corporation; Ruth Norris was never a stockholder of said Macco Corporation, now dissolved; on October 8, 1947, Macco Corporation of California was organized, and on January 6, 1948, it changed its name to Macco Corporation; Mr. Von Kleinsmid is and has been since October 16, 1947, the secretary of said corporation and has custody of the records of said corporation; the name of Ruth Norris did not appear on the records of said corporation as a stock-

holder until August 9, 1950. Ruth Norris filed an affidavit, in opposition to said motions to vacate the order for examination of petitioners, in which it was recited that on January 10, 1948, she and her husband acquired, out of community funds, common stock of Macco Corporation, which stock was registered in her husband's name; that on October 5, 1951, she acquired said stock as her separate property and it was registered in her name on March 17, 1952.

The superior court made an order denying said motions of petitioners; and it made a further order setting a time for taking the depositions and ordering petitioners to comply with the order for examination made on January 25, 1952.

It is alleged in the petition for a writ of mandamus herein that the orders made in said proceeding to perpetuate testimony are without the jurisdiction of the superior court, in that, said application of Ruth Norris shows on its face that she can never become a party to the action contemplated by her.

Petitioners contend that the application for the order to perpetuate testimony should show that the applicant, Ruth Norris, was a registered shareholder of Macco at the time of the transaction or during a part of the transaction. Their contention is based upon section 834 of the Corporations Code which provides in part: "(a) No action may be instituted or maintained in the right of any * * * corporation by the holder * * * of shares * * * of such corporation unless * * *: (1) The plaintiff alleges in the complaint that he was a registered shareholder * * * at the time of the transaction or any part thereof complained of. * * *" They argue that "the transaction," whereby Highland Builders allegedly seized a corporate opportunity of Macco, was the buying of the quarry property; that the transaction was commenced in June, 1944, and ended in January, 1945; that Ruth Norris was not a registered shareholder of Macco at any time during the transaction, and her application shows that she cannot become a party to the action contemplated by her.

Respondent, Ruth Norris, argues that the transaction was a continuing scheme —the corporate opportunity was not only the buying of the quarry property but the continued supplying of material from the quarry to Macco; and she asserts that she has been an owner of stock in Macco since January 10, 1948.

[1] Section 2084 of the Code of Civil Procedure requires that an application for an order to perpetuate testimony must state: "1. That the applicant expects to be a party to an action in a court in this State, and, in such case, the names of the persons whom he expects will be adverse parties; or, 2. * * *; and, 3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. * * *" If the application for the order complies with said section 2084, nothing more is required. Tone v. Superior Court, 111 Cal.App.2d 110, 112, 244 P.2d 13; see also Strauss v. Superior Court, 36 Cal. 2d 396, 400, 224 P.2d 726, and Demaree v. Superior Court, 10 Cal.2d 99, 103, 73 P.2d 605. The allegations of the application herein, as above shown, comply with the requirements of subdivisions 1 and 3 of said section. It was alleged that the applicant expected to be a party to an action in this state, the names of the persons expected to be adverse parties, the names of the witnesses to be examined and their addresses, and a general outline of the facts expected to be proved.

In Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 298 P. 1001, 1003, the applicant for an order to perpetuate testimony named two persons and a corporation as expected adverse parties, and he alleged that the two persons were in control of the corporation, and that he expected to prove by the witnesses certain facts concerning illegal transactions between the two persons relating to unlawful practices in business transactions and dealings between the said corporation and other corporations. The superior court therein made an order directing examination of the witnesses. In a petition for a writ of review in that case, the prospec-

tive adverse parties alleged, among other things, that the court was without jurisdiction to issue the order for the reason, among others, that the application "contained no averment respecting the issues to be tried in said action, or of the interest" of applicant in the expected controversy. In their petition for a hearing in the Supreme Court, they asserted that there was no showing that the applicant was a stockholder or a creditor of the corporation. In affirming the order therein to perpetuate testimony, the Supreme Court stated, 212 Cal. at page 344, 298 P. at page 1003, that an examination of the application to perpetuate testimony "discloses a literal compliance with subdivisions 1 and 3 of section 2084 of the Code of Civil Procedure," and that, 212 Cal. at page 345, 298 P. at page 1003, ordinarily "nothing more than the statutory requirements is necessary to be shown in the application".

It is to be noted that the present proceeding does not involve the issuance of a subpoena duces tecum. As was stated in the Kutner case, 212 Cal. at pages 346 and 347, 298 P. at page 1003, "When the order of the court and the proceedings otherwise do not direct the issuance of a *subpoena duces tecum* or the production of books, records, or other documents, we find no necessity for the extension of the requirements of the petition beyond those specified on the face of our code section. But, when the order or the subpoena issued pursuant thereto does direct the production of books, records, or other documents, section 19 of article 1 of the Constitution intervenes as a protection against unreasonable searches and seizures. * * * And, if the examination should proceed to the point of requiring the production of the records or papers of the petitioner corporation, the witnesses would be justified in refusing to produce the same and in continuing so to refuse until confronted with an order based upon a showing sufficient to safeguard the rights of interested parties under the constitutional guaranty above referred to."

A subpoena duces tecum was not sought herein. The application to perpetuate testimony complied with the provisions of the statute.

Peremptory writ of mandate is denied. The alternative writ is discharged.

VALLÉE, Justice.

[2, 3] I concur. I do so only because the Supreme Court says that literal compliance with the statute is sufficient. In my opinion, the rule stated in Irving v. Superior Court, 79 Cal.App. 361, 249 P. 236, should be followed. The statute, as written, permits a proceeding brought for the sole purpose of annoying, harassing or embarrassing another, or for some ulterior object. It permits one who does not have a cause of action to indulge in a meddlesome fishing expedition. That I think is this case. It should not be permitted. But the remedy lies in the field of legislation, and not in the creation of exceptions or qualifications under the guise of interpretation of the statute.

SHINN, P. J., concurs.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



115 Cal.App.2d 10

BALIAN v. RAINEY et al.

Civ. 18981.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1952.

Rehearing Denied Jan. 7, 1953.
Hearing Denied Feb. 19, 1953.

Action by partner against co-partners for dissolution of partnership and for an accounting. The Superior Court, Los Angeles County, Frank G. Swain, J., adopted as its finding the report of the referee, who determined that plaintiff should be charged $4550.00 for 91 weeks absence from partnership business immediately preceding institution of dissolution proceedings, under provision of partnership agreement that in case of extended absence of any partner, absent partner would forfeit $50.00 per week for time of absence, which amount would be charged to absent partner and distributed to

remaining partners. Plaintiff appealed. The District Court of Appeal, Fox, J., held that where plaintiff was charged, in 1948, $350.00 for an absence of seven weeks, without any objection on his part, and the accounts of the parties were then adjusted upon that basis, such interpretation of the partnership agreement by the partners was cogent and persuasive evidence of their intent and of the true meaning of the agreement, and supported order of trial court.

Orders affirmed.

Moore, P. J., dissented.

1. Partnership ⇐71

In construing a partnership agreement, effect must be given to intention of parties where such intention is not wholly at variance with correct legal interpretation of terms of contract.

2. Contracts ⇐170(1)

Where a contract is ambiguous, the practical construction placed by the parties upon the instrument is the best evidence of their intention.

3. Partnership ⇐336(3)

In action by partner against co-partners for dissolution of partnership and an accounting, fact that partner was charged $350 for seven weeks absence from work in 1948, without objection on his part, under provision of partnership agreement that, in case of extended absence of any partner, absent partner shall forfeit $50 per week for time of extended absence, which amount would be charged to absent partner and distributed to remaining partners, was cogent and persuasive evidence of partners' intent and of true meaning of agreement, and supported order charging account of partner with $4550 for 91 weeks absence immediately preceding dissolution proceedings.

4. Partnership ⇐83

Where partnership agreement provided that partners should devote all their time, energy and business experience to the partnership, that no salary was to be paid to the partners, and that in case of extended absence of partner, absent partner should forfeit $50 per week for time of such absence, which amount would be charged to absent partner and distributed to remaining partners, charges for absences were neither contingent upon partnership's making profit nor a forfeiture of capital investments, but were imposed to insure substantially equal personal service contributions to the enterprise.

5. Partnership ⇐83

Provision of partnership agreement that in case of extended absence of any partner, absent partner should forfeit $50 per week for time of absence, which amount would be charged to absent partner and distributed to remaining partners, was not waived by conduct of partners in failing to charge for various absences, where none of such absences were shown to have been extended absences within the provision.

6. Partnership ⇐345

In action by partner against co-partners for dissolution of partnership and for an accounting, wherein partner was charged $4550 for 91 weeks' absence from the business immediately preceding dissolution proceedings, under provision in contract that in case of extended absence of any partner, absent partner would forfeit $50 per week for time of absence, whether co-partners had waived such provision by telling partner that so far as they were concerned he could stay away, was for trial court's determination.

7. Partnership ⇐327(1)

Provision in partnership agreement that in case of extended absence of any partner, absent partner would forfeit $50 per week for time of absence, which amount would be charged to absent partner and distributed to remaining partners, was not a provision for liquidated damages, but such charge was simply an agreed compensation to firm for exercise of a privilege of which it was contemplated the partners might at some time desire to avail themselves, and thus there was no necessity, in action for dissolution and accounting, for a pleading raising the issue of liquidated damages.

8. Partnership ⇐336(3)

In action by partner against co-partners for dissolution of partnership and an accounting, wherein partner was charged $4550 for 91 weeks' absence from partner-

ship, under provision of partnership agreement that in case of extended absence, absent partner would be charged $50 per week for such period, which amount would be distributed to remaining partners, evidence sustained finding that partner was not required to stay away from the business as a result of co-partners' acts.

9. Appeal and Error ⇐996

Where conflicting inferences could be drawn from facts contained in referee's report which was adopted as finding of court, District Court of Appeal had duty to draw those inferences which would support the action of the trial court.

John A. White, Los Angeles, for appellant.

Killion & Clarke, North Hollywood, for respondents.

FOX, Justice.

By a written agreement executed at Detroit, Michigan, in February, 1946, the parties formed a partnership for the purpose of operating a machine shop, and manufacturing and selling dies, tools and other similar products. Later the partnership business was moved to Los Angeles where it continued in operation until plaintiff filed this action for dissolution and an accounting. Pursuant to stipulation, the court entered an interlocutory judgment dissolving the partnership and appointed a receiver to take over the assets of the partnership, and appointed a referee for the purpose of taking an accounting of all the partnership transactions, and to ascertain the amount that each partner was entitled to receive upon dissolution, and to report his findings to the court. The referee conducted hearings at which all parties were present and testified. Under the partnership agreement plaintiff Balian had a 20 percent interest, defendant Rainey had a 60 percent interest, and defendant Chakmakjian had a 20 percent interest. They were to share profits and losses on this percentage basis. The agreement further provided that all parties should devote all their time, energy and business experience to the business of the copartnership, and that no salaries were to be paid to any of the partners. "However, in case of extended absence of any partner, that partner shall forfeit $50 per week for the time of the extended absence, which amount will be charged to the absent partner and distributed to the remaining partners in the proportion that their respective shares of the profits and losses bear to one another."

The referee found that plaintiff Balian did no work for the partnership for a period of seven weeks in 1948, that he was charged the sum of $350 for such absence, and that he did not then object to that charge; the referee also found that he did no work for the partnership at any time after January 1, 1949, a total of 91 weeks.

The question thus presented to the court was whether the account of plaintiff Balian should be charged $4,550 for such absence and the accounts of the other two partners appropriately credited. The trial court ordered such deduction and credits. It is from this order that plaintiff appeals.

The referee further found that during various portions of 1949 plaintiff engaged in building operations constructing two store buildings as a partner of another person and remodeling his own home; that on various occasions he went to the plant of the partnership and obtained tools for use in his building operations.

[1, 2] The problem presented in this case is one of determining the intention of the parties to the partnership agreement. Effect must be given to such intention where it is not wholly at variance with correct legal interpretations of the terms of the contract. Where a contract is ambiguous, the "practical construction placed by the parties upon the instrument is the best evidence of their intention." Universal Sales Corp. v. Calif. etc. Mfg. Co., 20 Cal.2d 751, 761–2, 128 P.2d 665, 672; Moore v. Wood, 26 Cal.2d 621, 629, 160 P.2d 772; Vogel v. Bankers Bldg. Corp., 112 Cal.App.2d 160, 245 P.2d 1069, 1073.

[3] As a result of plaintiff's absence for seven weeks in 1948 a charge was made against him of $350 and he did not then make any objection to that charge, and

the accounts of the parties were adjusted upon that basis. Such interpretation of the partnership agreement by the parties is "cogent and persuasive evidence" of their intent and the true meaning of the agreement, Vogel v. Bankers Bldg. Corp., supra, and supports the order of the trial court.

Plaintiff argues that a charge of $50 per week covering the period of his absence is in the nature of a penalty and its imposition works a forfeiture of his capital investment. He points out that the law abhors a forfeiture and that where there are two possible constructions of a contract, one of which leads to a forfeiture and the other avoids it, the construction which avoids the forfeiture must be made if at all possible. Ballard v. MacCallum, 15 Cal.2d 439, 444, 101 P.2d 692. He then argues that a forfeiture may be avoided by saying that this clause "was intended to be a withholding from the profits distributed during a profit and loss period of $50 per week for extended absences of any partner during that period."

[4] There is no suggestion in the agreement that the $50 per week which is to be "charged to the absent partner" who is on an "extended absence" is contingent upon the partnership's making a profit; nor is there any logic to reading such a condition into the agreement. In fact, the absent partner's "business experience" might be more sorely needed when the firm was operating in the red. It might well be in such circumstances that if the absent partner were actively participating in the partnership business the investments of the other partners would not suffer.

The fact that the firm was making a profit when plaintiff was absent for a period of seven weeks in 1948 and his account accordingly charged for such period at the rate of $50 per week does not justify an implication that charges for such absences were to be made only in the event the firm was making a profit. It was a mere coincidence that such was the fact during that particular "extended absence."

No significance should be attached to the fact that this provision for charging an absent partner $50 per week is in the paragraph of the agreement entitled Division of Profits. The correct title for that paragraph should be Division of Profits and Losses, because it sets out how the parties "shall divide all profits and losses." The real explanation for this provision being in this particular paragraph is that the amount charged against a partner on an extended absence is to be "distributed to the remaining partners in the proportion that their respective shares of profit and losses bear to one another." The amount of the charges against a partner as a result of his "extended absence" was thus to be divided between the other two partners on the same basis that profits and losses of the firm's operations were to be shared.

By the terms of the partnership agreement the parties were required to "devote all their time, energy and business experience to the business of the Co-partnership." No salary was to be paid to any of the parties. Their "time, energy and business experience" may therefore be considered a partnership asset. It was recognized that one or more of the parties might have occasion for an "extended absence" thereby withdrawing such asset from the partnership for a period of time. Undoubtedly, to discourage such absences and because there were no salaries from which deductions could be made as a means of adjustment, and in order to insure substantially equal personal service contributions to the enterprise, the parties agreed upon the value of such services in the event one of the partners desired to avail himself of the privilege of being absent for an extended period, and that such amount should be "charged to the absent partner." As thus construed, the provision has a practical value and is in harmony with the plan and actual operations of the parties. Although the word "forfeit" is used, it is clear from the context of the agreement that it was not used in any strict or technical sense, and that a forfeiture was not in fact intended.

[5] Plaintiff argues that the $50 per week charged for an "extended absence" has been waived by the conduct of the parties and that defendants are estopped to enforce it. Plaintiff's first basis for this ar-

gument is that the referee found that "although each partner was at varying times and for varying reasons actually absent from the affairs of the business, no charge was ever made by the partners because of the absence of any partner from the business except" for the previously referred to absence of the plaintiff in 1948. None of such absences, however, are shown to have been "extended" absences, hence they do not come within the provisions of the partnership agreement authorizing a charge against such absent partner.

[6] Plaintiff's second argument in support of his theory of waiver is that he asked his partners if it were true that they did not want him to work, and "they told him that so far as they were concerned, he could stay away." It was for the trial court to determine the significance to be attached to this statement and the inference to be drawn therefrom. It did not necessarily mean that plaintiff was at liberty to stay away and that no charge would be made against him therefor under the terms of the partnership agreement. This statement did not require the trial court to draw an inference that the other partners intended to waive such charge.

[7] Plaintiff also argues that defendants should not be permitted to recover the sums credited to them due to his absence because there is no pleading which raises the issue of liquidated damages. There is no necessity for such pleading since the problem here presented is not one for the recovery of liquidated damages because no breach of contract is herein involved. The charge against a partner on an extended absence is simply an agreed compensation to the firm for the exercise of a privilege which it was contemplated some, or perhaps all, of the members might at some time desire to avail themselves. This was an action for an accounting which naturally involved an interpretation and enforcement of the partnership agreement which was pleaded. The pattern for this interpretation of the agreement and for making this charge had already been established as a result of plaintiff's absence in 1948. The court was therefore justified in applying it to this later "extended absence."

[8] Plaintiff argues that it is inequitable that defendants should profit by his absence when such absence was due in great part to their actions. In support of this argument plaintiff asserts defendants "destroyed the mutual confidence which is an all-important element between partners," and that by creating an attitude of tension and distrust they were able to keep plaintiff away from the business. As a basis for these inferences reference is made to the referee's finding that defendant Rainey suggested to plaintiff's wife that plaintiff pull out of the business. It is also asserted that defendants told plaintiff that they did not want him to work, and that so far as they were concerned he could stay away. Reliance is also placed on the referee's finding that plaintiff would have been uncomfortable in the presence of his partners. The first point to be noted is that the record does not support plaintiff's statement that defendants told him they did not want him to work. The comment of defendants to plaintiff that so far as they were concerned he could stay away cannot reasonably be construed as a refusal to permit him to participate in the firm's operations. As to the suggestion to plaintiff's wife that plaintiff pull out of the business, it should be borne in mind that Mrs. Balian is the mother of defendant Rainey and that Balian is the stepfather of Rainey. Although Mrs. Balian said she would convey to plaintiff what her son was telling her, there is no evidence that she did in fact communicate it to him. Even if plaintiff's wife did communicate to him the suggestion of defendant Rainey such statement could not be a justification for plaintiff's refusal to render services to the firm. In addition to the referee's finding that plaintiff would have been uncomfortable in the presence of his partners, it should also be pointed out that no physical interference was offered nor were any threats made against his entering the firm's premises. It is also to be further noted that during this period, while plaintiff was engaged in his building enterprises, he went to the plant of the partner-

ship and obtained tools which he used in these operations. It does not appear that any objection was made to the use by him of these tools or that any compensation was requested therefor by the other partners. It was for the trial court to draw inferences as to who was responsible for the alleged destruction of confidence between the partners and who was responsible for creating an attitude of tension or distrust and whether or not the circumstances justified plaintiff in staying away from the business. The trial court has impliedly drawn inferences on these questions adverse to plaintiff rather than in his favor. We cannot say, as a matter of law, that the court was not justified in so doing. Hence, it cannot be said that plaintiff was required to stay away from the business as a result of defendants' acts.

The inequity of plaintiff's construction of the partnership agreement is apparent. He agreed to devote his "time, energy and business experience to the business of the Co-partnership" without salary and in the event of his "extended absence" he would be subject to a charge of $50 per week for the benefit of the other partners. But he did no work for the partnership for 91 weeks, during which time, presumably, the other partners were actively devoting themselves to the partnership business. Throughout this period he was engaged in the construction business. He built two store buildings and remodeled his home, using in these operations tools which he obtained from the plant of the partnership. Yet when the assets of the partnership are to be distributed he claims he should receive the same share he would have received if he had been devoting his entire time and ability to the firm's business for these nearly two years. He wants to enjoy the benefits of the agreement but nevertheless seeks to avoid its burdens. Such a result could not have been contemplated by the parties.

[9] The referee's report was adopted as the finding of the court. Board of Education v. Mulcahy, 50 Cal.App.2d 418, 423, 123 P.2d 114. Conflicting inferences may be drawn from these facts. It is, of course, our duty to draw those which will support the action of the trial court. Levy v. Martin, 109 Cal.App.2d 730, 731, 241 P.2d 568.

The orders are affirmed.

McCOMB, J., concurs.

MOORE, Presiding Justice.

I dissent.

The interpretation of the contract adopted by the majority opinion does not square with prevailing ethical standards in trade, commerce and business. It is an emphatic approval of a man's taking from his partner the latter's substance without consideration. It is a reversal of the growing doctrine: "Live and help live." It even discourages the ancient adage, "Live and let live." Four thousand fifty dollars is more than two thirds of plaintiff's capital investment in the machine shop. That he had no more at the time of the dissolution is essentially due to the mismanagement of the enterprise by defendants. They boldly assert that for 91 weeks plaintiff was absent from the shop. Hence, they were by him unhindered. Now, that they have reached a parting of their ways they confront him with a contract which, they contend, binds him to pay them $50 a week for the "time of an extended absence." Since the business earned no profits under their unmolested control, they assert that the last quoted phrase is their authority to transfer his possessions in sufficient amount to pay themselves $4,550 for his absence. To approve their ethics is, in effect, to give judicial recognition to the art of plundering one's associate by a squinted view of a written contract which could not reasonably have contemplated such tragical results as must follow the order if affirmed.

The basis for the claim of defendants' and of the trial court's judgment is the fifth paragraph of the contract, to wit,

> "5. Division of Profits. That all parties shall devote all their time, energy and business experience to the business of the Co-partnership and shall divide all profits and losses as follows: Henry Rainey, 60%, Samuel Balian, 20%, Harry Chakmakjian, 20%.

"No salaries shall be paid to any of the partners. However, in case of extended absence of any partner, that partner shall forfeit $50.00 per week for the time of the extended absence, which amount will be charged to the absent partner and distributed to the remaining partners in the proportion that their respective shares of profits and losses bear to one another."

Such language relates solely to the division of profits. After designating the share to which each shall be entitled it specifically inhibits the payment of salaries to the partners. But in order to make effective the provision for all partners "to employ their best endeavors to promote and further the interest of said copartnership," the contract undertook to restrict participation in the earnings by withholding from each partner $50 of his share of *the profits* for every week during which he performed no service for the business. That this is a more reasonable interpretation of the contract than to say that they agreed to forfeit a portion of a partner's capital for his breach of a covenant appears readily when it is realized how far-reaching it would be so to construe such a contract as to empower two partners to confiscate the investment of the third. At the time of dissolution, the appraisal of the respective interests of the partners fixed Balian's share at $6,569.84; Chakmakjian's at $6,564.84, and Rainey's at $22,439.52. By the order approving the referee's report, the court took $4,550 from Balian and gave it to defendants as penalty for his absence from his business. Such a judgment is more devastating than storm or financial panic. Without proof that defendants had been injured in the slightest degree by Balian's absence from the business, more than two thirds of his investment was taken from him in addition to a shrinkage of $5,256 he had suffered while the business was under the domination of defendants.

The law abhors a forfeiture. Civ.Code, sec. 1442; Ballard v. MacCallum, 15 Cal.2d 439, 444, 101 P.2d 692. It cannot arise by implication, but can be effected only by clear and unambiguous language. Quatman v. McCray, 128 Cal. 285, 289, 60 P. 855; Cleary v. Folger, 84 Cal. 316, 321, 24 P. 280; Cullen v. Sprigg, 83 Cal. 56, 64, 23 P. 222. There is no such language in the contract of these parties. While the clause declares a "partner shall forfeit $50 per week for the time of the extended absence" it is clear from the context that the intention was to withhold $50 a week from the dividends earned by the absent partner during the period of his absence. The language does not indicate an intention to deprive a partner of his capital investment at all. It does not bind a partner to forfeit anything but $50 weekly out of his share of the earnings. The entire purpose of the partnership was to make profits, not to take the capital of one partner and give it to another. A fair interpretation of the contract compels the construction that in the event of a partner's extended absence he should pay a portion of his earnings to his partners in lieu of his contribution of labor to the business.

That the parties intended only profits should be "forfeited" is shown by their only interpretation of the contract prior to the unpleasant behavior of defendants after the fall of 1948. At that time there was no suggestion that any absent partner should be required to pay his associates any part of his investment on account of his "extended absence." When they disbursed "profits" on January 17, 1949, they deducted $350 from plaintiff's share of seven weeks' profits during his absence in the fall of 1948. At that time, when all was agreeable, there was no intimation that Balian should pay his partners out of his capital $50 per week for his absence. If such was their own interpretation in calmer hours of their business association, is it not more likely to have been their intention, in drafting the contract, to provide for a different division of the profits earned during an extended absence of one of them rather than out of his capital? See Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17.

But if it be conceded that the contract intended a forfeiture, such right was waived by defendants. The referee found that each partner was "at varying times and for varying reasons actually absent from the affairs of the business and that for such absences no charge was made except for Balian's

first absence of seven weeks when his share of profits was reduced by $350. When the parties became estranged and Balian asked defendants whether they desired him to work, their reply was that so far as they were concerned he could stay away. If they had intended to demand a forfeiture for his absence, honesty to a fiduciary required the reply: "Stay on the job if you do not wish to forfeit $50 a week." During the ninety-one weeks of plaintiff's "extended absence" from the plant, not once did defendants suggest or intimate that they entertained the idea of enforcing a forfeiture of plaintiff's capital investment. By their conduct they evinced an intention to allow Balian to go his way and leave them in peace. Thereby they waived whatever right they had to a forfeiture. "Evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes." Knarston v. Manhatten Life Insurance Company, 124 Cal. 74, 77, 56 P. 773, 774; Panno v. Russo, 82 Cal.App.2d 408, 412, 186 P.2d 452.

Defendants never made mention of a damage they had suffered by virtue of Balian's absence from the plant. For the first time in their brief, they argue that paragraph 5 "discloses an intent to avoid any forfeiture and to provide the partners with a means of indemnification in the event that one or more partners desire to remain aloof from the actual labors of the partnership." Now, the clause must have intended either a "forfeiture" of a weekly sum of $50, or such sum as liquidated damages. If they intended a forfeiture, their recovery is stymied by the doctrines that the law abhors a forfeiture; the provision must be strictly interpreted against him who asserts the claim thereto; and it must be expressed in unambiguous language. If the clause be deemed one for liquidated damages, defendants again find themselves in a blind alley; the contract contains no provision expressly declaring a reason for providing for liquidated damages or that from the nature of the case it would be impracticable or extremely difficult to fix the actual damage in the event of a breach of a material covenant. Civ.Code, sec. 1670. Neither did they file a pleading declaring either of those facts. Civ.Code, sec. 1671. Liquidated damages cannot be recovered in the absence of such allegations. Kekich v. Blum, 43 Cal.App.2d 525, 527, 111 P.2d 411; Olson v. Biola Corporation Raisin Growers' Association, 33 Cal.2d 664, 668, 204 P.2d 10, 12 A.L.R.2d 112; Bay Shore Motors v. Baker, 90 Cal.App.2d Supp. 895, 202 P.2d 865; Kelly v. McDonald, 98 Cal.App. 121, 123, 276 P. 404. The findings of the referee do not disclose that it was even suggested that the partnership was damaged by the absence of Balian, but rather does the invitation for him to remain away indicate defendants' opinion that their welfare was enhanced by his absence. Neither did they plead or prove any difficulty in demonstrating an actual damage. Even though paragraph 5 might have been intended as a provision for liquidated damages, that clause does not establish damage, nor could it mean the amount specified was payable in the absence of proof of damage. Kelly v. McDonald, supra, 98 Cal.App. at page 125, 276 P. 404. The parties were related: Balian is Rainey's stepfather, Chakmakjian is Rainey's father-in-law. It requires no Socrates to understand that the personal feeling subsisting among the three men would have increased with Balian's daily presence in the plant. If so, with him daily present amidst such feeling, the business would have suffered actual detriment. If such proof had been made under proper pleadings, it is readily to be seen that no actual damage could have been shown.

The order should be reversed.

Rehearing denied; MOORE, P. J., dissenting.

CITY OF SAN DIEGO v. SOUTHERN CALIFORNIA TELEPHONE CO.*

Civ. 4508.

District Court of Appeal, Fourth District, California.

Jan. 6, 1953.

Rehearing Denied Jan. 28, 1953.

Hearing Granted March 5, 1953.

Action to determine compensation due city for telephone company's use of franchise to maintain and operate poles and wires on public streets. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment determining such compensation, and both parties appealed. The District Court of Appeal, Barnard, P. J., held that since the city was entitled to two per cent of the company's gross revenue from use of the franchise, its compensation would be determined by attributing gross receipts to use of both public and private ways and apportioning them between the two ways on a relative mileage basis without consideration of plant investment.

Reversed with directions.

Telegraphs, Telephones and Radio ⇐10(9)

Where city was entitled to two per cent of telephone company's gross revenue from use of franchise to maintain and operate poles and wires on public streets, city's compensation would be determined by attributing gross receipts to use of both public and private ways, and apportioning them between the two ways on a relative mileage basis without consideration of plant investment.

J. F. DuPaul, City Atty., Shelley J. Higgins, Assistant City Attorney, San Diego, T. B. Cosgrove, Los Angeles, for appellant and respondent City.

John A. Sutro, Francis N. Marshall, Pillsbury, Madison & Sutro, San Francisco, Oscar Lawler, Leslie C. Tupper, Lawler, Felix & Hall, Los Angeles, for appellant and respondent Telephone Co.

BARNARD, Presiding Justice.

The City of San Diego, by its Ordinance No. 5681, granted the defendant company a franchise to maintain and operate a system of telephone poles and wires upon the public streets of the city for a period of 30 years from August 7, 1914, which provided that the company should pay the city 2% of its gross receipts arising from the exercise of this privilege. This ordinance was complied with until its expiration on August 7, 1944, whereupon the company elected not to apply for any franchise on the theory that none was needed under the provisions of Section 536 of the Civil Code.

The city brought this action to enjoin the company from thus occupying its public streets, alleys, etc., without a franchise. The court found that the matter was governed by the city charter with respect to what will be called the old city, being the city as it existed prior to the re-enactment of Section 536 in 1905, and by that section with respect to those parts of the city which had been subsequently annexed. It was further found that since August 8, 1944, the company had continued to occupy public streets of the old city in substantially the same manner as before, but without a franchise, and thus had committed and was continuing to commit a public nuisance. A judgment was entered on May 23, 1946, enjoining the company from thus occupying public streets of the old city after 30 days from the time the judgment should become final, and ordering the company to proceed within said 30 days to remove its poles, wires and equipment from the public streets and other public places within the old city. It was further provided, however, that if the company should apply to the city for a new franchise within this 30-day period, and should compensate the city for its use of the streets within the old city during the interim by paying to the city a "sum of money determined by applying the rate at which compensation for such franchise and privilege was fixed by said Ordinance No. 5681," the injunction should be of no force or effect, except on conditions not material here. The judgment also reserved jurisdiction to modify or change the relief granted, if this became advisable after final judgment. Both parties appealed and the judgment was affirmed. City of San Diego v. Southern California Telephone Co., 92 Cal.App.2d 793, 208 P.2d 27.

* Subsequent opinion 266 P.2d 14.

Within the time allowed the company applied for a franchise within the old city and paid $158,670.03 as compensation for the interim period, which the city refused to accept as a full payment claiming that it was entitled to $421,435.68. The controversy as to the correct amount of the required payment was submitted to the trial court, and after extended hearings the court found that the rate at which such compensation should be made was fixed by Ordinance No. 5681 as 2% "of the gross annual receipts arising from the use, operation or possession of the franchise," and that 2% of such gross annual receipts, as thus defined and applied to the old city for the period in question, is $239,337.23. Judgment was accordingly entered for the balance of $80,667.20 with interest from October 4, 1949, when the new franchise was applied for. Both parties have appealed from that judgment.

Certain facts brought out at the hearings are material in passing upon the respective contentions of the parties. The company operates a statewide and interstate communication system and for tariff purposes its service is divided into local exchange service and toll service. Exchange service is usually charged for at a flat monthly rate, the exchange areas being established by the Public Utilities Commission. However, an "extended area" service is sometimes provided whereby the subscribers' local calling area is extended into an area outside his local exchange without the payment of a toll charge. The San Diego "extended area" includes most of the present city of San Diego and a large part of the county, including exchanges in some near-by cities, several military reservations and much unincorporated area. Within this "extended area" subscribers in one exchange may talk to subscribers in other exchanges free of toll charges, but the lines between these exchanges, so far as here concerned, traverse the old city. The charges paid by a subscriber in the old city thus pays for the privilege of making and receiving calls anywhere within the "extended area." The company's gross revenue for the period in question from San Diego's "extended area" was $27,724,579.76. Its revenue for that period within the area of the old city was $21,017,085.16, which figure includes all charges for all phones located in the old city, plus 20% of the receipts from tolls for all calls originating from phones in the old city, which allocation was made by the company and seems to have been accepted by the city. The linear mileage of telephone plant on public streets and other public places within the old city is 446.30 miles, and the linear mileage of such plant on private property within the old city is 116.14 miles. The total plant mileage on both public and private property in the old city is 562.44 miles, and the percentage of that total which is located on public places is .7935%. The total plant mileage within the San Diego area but outside the limits of the old city is 1409.573 miles, of which 1026.214 miles is on public streets.

The city first contends that after finding that a nuisance existed, enjoining its continuance, and ordering the removal of the company's lines from the public streets, the court included in its prior judgment an order staying the enforcement of that injunction on the conditions named; that this was done under the court's general chancery powers to maintain, in justice to the litigants, the status quo of the parties pending an appeal; that the status quo which was to be preserved is "the last actual peaceable, uncontested status which preceded the pending controversy"; that between August 8, 1944, and the date of the judgment the company had occupied the streets without any right to do so; that the court knew the manner in which the compensation had been calculated for each of the 30 years preceding August 8, 1944; that it must be assumed that by its stay order the court intended to maintain the status quo by having the compensation calculated in substantially the same manner; that the amount due the city is not 2% of the gross receipts arising from the operation of any franchise, since no franchise existed, but is the amount specified in the judgment of May 23, 1946; that since it was found that the use of the streets was the same, the same manner of payment must have been intended by the court; and that this is the only way in which the status quo could be maintained. In its computa-

tion under this theory the city uses the figure $21,071,784.16 as the gross receipts from the old city during this period, and 2% of that amount is the $421,435.68 which the city demanded. Practically that amount would result if the same method of calculation was followed as that used by the company in making its payments during the 30 years the franchise was in effect. It appears, however, that this method of accounting leaves out of consideration the fact that only about 79% of the telephone lines in the old city are on public streets while the remainder are on private rights of way.

It is true that the amount of payment in question is that required by the judgment. Instead of requiring a payment to be determined in the exact manner followed during the life of the franchise, the judgment required the payment of a sum to be determined by applying the rate of compensation fixed by the expired ordinance. This was of course applicable to the period in question and limited to the area within the old city, and it called for payment in accordance with the company's actual obligation as fixed by the terms of the expired franchise. The terms of the judgment are controlling here and not the fact that the company may have misconceived its obligation under the ordinance during the years the franchise was in effect. If it be conceded that the court's jurisdiction to enter the stay order was dependent upon a maintenance of the status quo that was sufficiently accomplished by requiring the company to make compensation for the interim period in accordance with its prior obligation.

The problem in the present proceeding was, and is, to determine the amount due the city under the obligation imposed on the company by the terms of the prior judgment and of Ordinance No. 5681, which fixed the compensation at 2% of the gross receipts "arising from the use of" the privilege granted. The controlling question is as to what part of the gross receipts within the old city should be taken as arising from the company's use of the streets within the old city. Both parties rely, in part, on the mileage formula announced in the case of County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, although they differ widely as to the manner in which the principles there announced should be here applied. They agree, but for different reasons, that these principles were incorrectly applied by the trial court. In arriving at its decision, after pointing out that the problem here was somewhat different from that in the Tulare case, the court compared the amount of plant mileage on public streets within the old city with the plant mileage on public streets in the "extended area", finding that 43.15% of all such mileage was within the old city. It then took 43.15% of the total receipts from all of the "extended area" (plus a small amount from another exchange, which need not be explained here), as the part attributable to the use of the streets within the old city. Two percent of that sum is $239,337.23, which the court found should have been paid.

The city contends that the court ignored the evidence in many respects, and that it erred in considering the total receipts and mileage in the extended area, in comparing the plant mileage on public streets within the old city with the plant mileage on public streets in other parts of the extended area, and in not comparing the mileage on public streets and the mileage on private rights of way within the old city. It is then contended that a proper application of the mileage formula involves consideration of three known quantities, from which a fourth may readily be determined; that the known quantities disclosed by the record are (1) the mileage of company plant on both public and private property within the old city; (2) the mileage of company plant on public property alone within the old city; (3) the gross receipts from lines on both public and private property within the old city; and that the fourth quantity, the amount due may be determined by applying to the total gross receipts the percentage that the mileage of plant on public property bears to the total mileage on public and private property, both within the old city. The city applies this mileage formula by comparing the mileage of the company's plant on public streets, etc., within the old city (446.30 miles) with the mileage of the company's plant on both public and private places

within the old city (562.44 miles), which discloses that 79.35% of the total mileage of company plant on both public and private property within the old city is located on public places. Since the gross revenue within the old city was $21,017,085.16 the city take 79.35% of this amount, $16,667,-057.07, as the gross receipts arising from the use of the privilege within the old city. Two percent of this amount is $333,541.14, which the city contends is the amount due for the period in question on a correct application of the mileage formula.

The company also contends that the formula applied by the court is erroneous in that it failed to deduct an allocation of part of the gross receipts to plant which is entirely on private property, including central office buildings and equipment located in such buildings and on the private property of subscribers; in failing to take into account the fact that a substantial part of the company's outside plant is on private rights of way; and in apportioning the gross receipts "on the basis of relative mileage rather than relative plant investment." The company then contends that the Tulare case suggested that the mileage basis there discussed is not necessarily an exclusive method of distributing the gross receipts; that it was established in that case that a city cannot exact franchise payments for the use of any part of the plant situated on privately owned property; that the proportion of the company's plant occupying the public streets and private rights of way can be readily measured by the amount invested in that part of the plant, as compared with the total plant investment in the serving area; that this proportion applied to the total receipts in the area will give the proportion of such receipts which is properly attributable to the use of both public streets and other rights of way; that the next step is to determine what part of the amount so obtained is attributable to the occupancy of the streets for which a franchise is required; that this may be done by applying the ratio of street occupancy to the total of both street and private right of way occupancy, in the entire serving area, "to the allocated gross receipts attributable to total street and right of way occupancy"; and that while this last step could be done on a relative mileage basis it would be fairer, "in view of plant congestion in the central area", to also make this latter computation on a relative investment basis. Pursuant to this scheme and to its further contention that the "extended area", where one is used, is the smallest serving area for which the gross receipts within that area can be traced to the use of the plant within that area, the company compares its total plant investment in the San Diego extended area, in a portion of the Del Mar exchange which is not in the extended area but which covers a small corner of the old city, and in an adjusted portion of its plant in the State of California based on toll use, with that part of its total plant investment which occupies streets in the old city. Applying the percentages thus obtained to the total receipts in the San Diego extended area, in the Del Mar exchange, and from that part of the plant in the whole state, respectively, an amount of gross receipts is obtained which is attributed to the use of streets in the old city. Two percent of that amount, over the period in question, amounts to $158,-670.03, which the company contends is the extent of its obligation. While the company contends that this figure is the result of the direct application of some of the principles announced in the Tulare case, it was argued in the trial court that under the existing conditions the use of a mileage basis for computing the part of gross receipts attributable to the use of public streets in the old city was "inappropriate." It is now contended that the suggested investment formula is supported by the principles set forth in the Tulare case, and should be used throughout the computation.

In the Tulare case, 188 Cal. 664, 206 P. 983, the court was concerned with an interpretation of a part of the Broughton Act and the division, between two or more political subdivisions, of 2% of the gross receipts arising from the use of several franchises. It was pointed out that the gross receipts of that franchise holder, a power company, accrued from two distinct

factors, one being the power houses and the other the distributing system consisting of poles and wires extending partly over roads and streets and covered by franchises and partly over private easements owned by the company. It was held that the franchise charge could not properly be applied to the part of the gross receipts attributable to the privately owned power houses and rights of way. Without specifying the manner in which the part attributable to the power houses could be determined, the court held that the remainder could be divided among the franchise holders on a mileage basis, giving consideration to whether the distributing lines were on public roads or private rights of way. It was also pointed out that this allocation to the various rights of way on a mileage basis was not necessarily exclusive but was a practical one where the respective rights "cannot be otherwise determined," and that there might be instances where the extent or value of the distributing system over a given right of way might indicate its earning capacity.

While some of the principles of the Tulare case may be applicable, a different situation is here involved. The amount due under the judgment is payment at the rate fixed by the ordinance, which is 2% of the gross receipts arising from the use of the privilege. Only one privilege is involved and there is no question of apportionment between several public bodies. In the Tulare case, there was a natural distinction between the manufacture of a product in one place and the distribution of that product in other places, and both factors contributed to gross receipts which came from places both outside and inside the franchise areas. No such distinction between the manufacture of a product and its distribution can reasonably be made here, and the gross receipts from the one area involved, the old city, can be and were determined. These receipts come from furnishing a means of communication between people in different locations, which is purely a service involving nothing other than the furnishing of that service. Telephone subscribers within the old city are charged for this service and payment therefor includes also a right to some such service outside of the city and within the extended area. While this extended service is in part made possible by outside service in the extended area, paid for by others, those payments are not included in the income received in the old city. Not only is no further apportionment or deduction from the receipts within the old city required or justified by the existence of the extended service in the extended area, but all such calls, both ways, use the city streets in large part, and would be impossible without such use. While toll service stands on a different basis it also uses the city streets, and an allowance therefor in proportion to calls originating within the old city was included in the admitted gross receipts within the city, and no objection is made to that allocation.

The amount of gross receipts actually received within the old city is easily ascertainable and is clearly disclosed by the evidence. Obviously, the part thereof which may be said to arise from the use of the city streets, as distinguished from private rights of way in the city, must be determined and segregated. This can be determined, on a mileage basis, in proportion to whether the wires and conduits, the basic element making this communication service possible, are on public streets or on private rights of way. All telephone calls go through one of these rights of way, the public or the private. This is the service being paid for, which results in the gross receipts within the old city, and in a very real and practical sense all those gross receipts arise either from the use of the streets or the use of private rights of way within the old city.

The central office equipment and buildings, with the instruments, switchboards and equipment located on the property of the various subscribers, are merely incidental to the operation of the communication system, the basic element of which is the wires and lines enabling people in different locations to talk to each other. The value of such buildings and equipment is a false quantity insofar as the present problem is concerned, and should not be considered and used as a basis for a deduction

in arriving at the gross receipts within the city, within the meaning of that term as it is involved here. The matter of a proper return on the investment is one for a different forum. A consideration of the investment element, under the different situation prevailing here, is not required by the distinction made in the Tulare case between the manufacture of the product there involved and its distribution, and is not justified here since the basic figure to which the 2% is to be applied can here "be otherwise determined" in a fairer and more rational manner. Moreover, this is not an instance where the value of the equipment "over a given right of way may indicate its earning capacity" [188 Cal. 664, 206 P. 990] the possibility of which was suggested in the Tulare case. As we view the matter the gross receipts within the city here involved, which can be easily ascertained and which are disclosed by the evidence, must reasonably and logically be held to arise from two sources only, the lines of communication occupying the public streets and those occupying private ways, within the old city.

The company's further contention, that the allocation as between lines on public streets and those on private ways, within the old city, should also be made on a "relative plant investment basis" rather than on a mileage basis because of "plant congestion in the central area," adds an improper complication since it bears no direct relation to the use of the streets, since the allocation can more practically and reasonably be made on a mileage basis, as suggested in the Tulare case, and since a part of such congestion inevitably occurs on the public streets. The compensation for the use of streets, here involved, is based on the gross income accruing from the use of the privilege granted, and not on what it may have cost the company to put itself in a position to exercise that privilege. The proper allocation should be based on the extent to which the streets are used for telephone lines and not on the number or cost of the wires.

The actual gross receipts in the old city were collected within the old city and made possible by the system of wires in that area, which enabled the people therein to talk to each other, and to people in other areas by a further use of lines within the old city. These receipts are contributed to and arise from the use of wires passing over both public and private ways. The compensation for the privilege of such use, as fixed by Ordinance No. 5681 and the prior judgment, should be determined by attributing the gross receipts within the old city to the use of both public and private ways, and apportioning them between the two ways on a relative mileage basis.

We conclude that the city's second contention must be sustained, and that the amount of the payment here required is to be determined in this manner. This results in the figures contended for by the city in this connection. These figures, which are fully supported by the evidence, disclose that the correct amount of the payment required by the prior judgment is $333,541.14, of which $158,670.03 has been paid.

The judgment is reversed, with directions to enter judgment in favor of the city for $174,871.11, with interest from October 4, 1949. The city to recover its costs on this appeal.

GRIFFIN and MUSSELL, JJ., concur.

115 Cal.App.2d 188

Ex parte MARTIN.

Cr. 4893.

District Court of Appeal, Second District, Division 3, California.

Dec. 31, 1952.

Habeas corpus proceeding raising the question whether petitioner had been properly adjudged and imprisoned as an habitual criminal. The District Court of Appeal, Shinn, P. J., held that since one of the Texas convictions relied upon as rendering petitioner an habitual criminal had been for a crime which was a felony under Texas law but which was under the record presumed to be merely a misdemeanor under California law, petitioner had been improperly adjudged an habitual criminal, but in absence of evidence establishing his right to release from custody, the writ would be discharged and petitioner remanded.

Writ discharged and petitioner remanded.

1. Criminal Law ⇐1202(3)

Where prior offenses are relied upon as rendering party an habitual criminal, it will be presumed that such party was convicted of the least degree of offense enumerated in the statutes.

2. Criminal Law ⇐1202(3)

Where record of Texas judgment showed only that accused had been convicted of "theft, a felony," and under Texas law, theft of property valued at $50 or more was a felony, it would be presumed that such theft was of property worth less than $200 and was not from the person, in view of fact that under California law such theft as presumed constituted merely a misdemeanor. Pen.Code, §§ 182, 487, 488, 489, 490, 644, 668; Vernon's Ann.P.C.Tex. arts. 1421, 1422, 1437, 1438.

3. Criminal Law ⇐1202(1)

Where one Texas conviction relied upon as rendering defendant an habitual criminal was for a crime which was a felony under Texas law but which was under record presumed to be merely a misdemeanor under California law, defendant could not be adjudged an habitual criminal. Pen.Code, §§ 182, 487, 488, 489, 490, 644, 668; Vernon's Ann.P.C.Tex. arts. 1421, 1422, 1437, 1438.

4. Habeas Corpus ⇐30(3)

Propriety of habitual criminal adjudication could be raised by petition for writ of habeas corpus.

Richard E. Erwin, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

William H. Martin, in propria persona, petitioned for a writ of habeas corpus, which was issued. Richard E. Erwin, Esq., member of the Los Angeles County Bar Association Committee on Criminal Appeals, was appointed by the court to represent the petitioner. Upon order of the court under Rule 60, Rules on Appeal, the files in People v. Martin, No. 35323 in the superior court of the County of Riverside were transmitted to this court. They disclose the following facts.

By amended information filed May 13, 1942, Martin was accused in separate counts of three offenses of issuing fictitious checks of $20 each in violation of § 476 of the Penal Code. It was alleged in the information that Martin, under the name of Bill Cross, was previously, in the District Court of the State of Texas, in and for the County of El Paso, convicted of the crime of "conspiracy to commit theft from the person, a felony" and that under the name of William H. Cross, in the District Court of the State of Texas in and for the County of Harris, he had been convicted of the crime of "theft, a felony"; that judgments on each of said convictions had been rendered and that under each judgment Martin had served a term of imprisonment in the state prison. Martin pleaded guilty to the three offenses charged and he admitted the former convictions and terms of imprison-

ment alleged in the information. He was adjudged by the court to be an habitual criminal. He was sentenced to state prison for the term prescribed by law on each of the three counts, the sentence on count two to run concurrently with that on count one, and the sentence on count three to run consecutively with the concurrent sentences on counts one and two, and it was further ordered that he be punished by imprisonment for life.

The question before us is whether his status as an habitual criminal was lawfully established and adjudged. In order to aid the court in this inquiry, the attorney general has caused to be procured and there have been filed authenticated copies of the indictments of Martin, under the name of Cross, in the State of Texas, under which he suffered the convictions alleged in the information. These show that Martin was indicted for and pleaded guilty to "theft, a felony." The indictment did not state nor does the record show the value of the property that was stolen. He was also indicted, tried and convicted of "conspiracy to commit theft from the person" and was sentenced to state prison upon each charge.

The California statute in effect at the time of petitioner's conviction concerning habitual criminals was § 644 of the Penal Code, as it was amended by the Statutes of 1941; subsection (a) read as set out below.[1]

At the time of defendant's conviction in Riverside County, § 668 of the Penal Code read as set out below.[2]

It was said in People v. Lohr, 28 Cal. App.2d 397, 400, 82 P.2d 615, 617: "It was necessary for the prosecution to charge and prove that the prior convictions were among those set forth in section 644 in order to adjudge the defendant an habitual criminal. * * * People v. Morrison, 26 Cal.App.2d 616, 80 P.2d 94; People v. Carrow, 207 Cal. 366, 278 P. 857; People v. King, 64 Cal. 338, 30 P. 1028." In re McVickers, 29 Cal.2d 264, 267, 176 P.2d 40, 43 states: "It is also settled that the crimes enumerated in section 644 must be understood to be crimes *as defined in the laws of California* and, if committed elsewhere, regardless of the names by which they may be designated, *must in their substance come within California's definitions of the enumerated crimes.* [Citing cases.]"

In California there are two degrees of theft, grand theft and petty theft. The theft of property of the value exceeding $200 or from the person is grand theft Pen.Code, § 487; other thefts are petty theft, Pen.Code, § 488; the former is punishable as a felony, Pen.Code, § 489, the latter as a misdemeanor, Pen.Code, § 490. In In re Lamey, 85 Cal.App.2d 284, 289, 193 P.2d 66, 68, the court said: "* * * it has been held in numerous instances that when prior offenses are relied upon as rendering a party an habitual criminal, the assumption must be indulged that he was convicted of the least degree of offense enumerated in the statutes."

[1, 3] Under Articles 1437 and 1438 of Vernon's Texas Penal Code theft from

1. "Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a State prison, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life".

2. "Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed in sections 644, 666 and 667, and to the same extent as if such prior conviction had taken place in a court of this state."

the person is a felony, regardless of the amount of money or property taken. In California any theft from the person is grand theft, a felony. Conspiracy to commit grand theft is a felony. Pen.Code, § 182. The first charge of a prior conviction was of an offense which, if committed in California, would have been punishable as a felony. This is not true of the prior conviction of theft. In Texas the theft of money or other property of the value of $50 or more is a felony punishable by imprisonment in State prison of from two to ten years. Art. 1421. Theft of money or property of a value less than $50 is a misdemeanor punishable by imprisonment in a county jail for not more than two years. Art. 1422. There was no evidence before the California court that defendant had been convicted of theft which would have constituted grand theft if committed in this State. Under the doctrine of In re Lamey, supra, with which we are in complete agreement, it must be presumed that the value of the property in the Texas conviction was less than $200 and not from the person. See Nichols v. State, 28 Tex.App. 105, 12 S.W. 500. There was a deficiency of evidence before the trial court to prove defendant to be an habitual criminal.

[4] In re Seeley, 29 Cal.2d 294, at page 298, 176 P.2d 24, at page 27, stated: "The respondent fails to cite a case, and we have discovered none, in which the court has refused to examine into the petitioner's claim that the trial court exceeded its power by imposing an excessive sentence, when that claim was presented in a habeas corpus proceeding. Courts have inquired into the merits of such a claim in habeas corpus even where the question might have been determined on an appeal from the judgment of conviction. [Citing cases.]"

No ground has been established for defendant's release from custody at this time. However, he is entitled to be considered and treated by the authorities as one who had been convicted of one but not two felonies prior to the commission of the three offenses in California. In re McVickers, supra, 29 Cal.2d 264, 281, 176 P.2d 40.

The writ is discharged and the petitioner is remanded.

PARKER WOOD and VALLÉE, JJ., concur.



PEOPLE v. ASHLEY et al. *
Cr. 4712.

District Court of Appeal, Second District, Division 2, California.

Dec. 23, 1952.

Rehearing Denied Jan. 6, 1953.
Hearing Granted Jan. 22, 1953.

Defendant was convicted on four counts of grand theft. The Superior Court, Los Angeles County, William B. Neeley, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to support judgment of conviction.

Affirmed.

1. False Pretenses ⇐49(1)

In prosecution for grand theft, evidence was sufficient to support judgment of conviction.

2. Criminal Law ⇐1159(2)

On appeal from criminal conviction wherein sufficiency of evidence is raised, it is the function of the appellate court to decide only whether upon face of evidence it can be held that sufficient facts could not have been found to justify trial court in finding accused guilty.

3. Criminal Law ⇐1160

When jury has found accused guilty and trial judge has approved verdict, such verdict cannot be set aside for insufficiency of evidence unless it is made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support judgment.

* Subsequent opinion 267 P.2d 271.

4. Criminal Law ⇐317

In prosecution for grand theft, fact that accused did not testify was corroborative evidence of guilt and was properly considered against him.

5. Criminal Law ⇐317

Fact of prior conviction was no excuse for failure of defendant accused of grand theft to testify.

6. Criminal Law ⇐317

In prosecution for grand theft, wherein defendant alleged that money and property allegedly obtained were loaned to a corporation, failure to produce the president of the corporation was an effectual corroboration, and there was a presumption that her testimony would have been adverse, and such presumption was not overcome by evidence. Code Civ.Proc. § 1963, subds. 5, 6.

7. Indictment and Information ⇐71

Where defendant was present at examining trial and heard and read testimony of witness that defendant had swindled her of $4,200 trust deed, and evidence was that defendant had told witness he would discount trust deed and chattel mortgage obtained from witness at 10% and use funds to build theater and would give witness first mortgage on certain realty allegedly owned by him, defendant was not misled by allegation in charge that he had stolen $4,200. Pen.Code, § 956.

8. Criminal Law ⇐742(3)

Fact that witness who testified against accused may have contradicted herself or have been contradicted by a writing introduced by accused was not ground for disregarding her testimony, and whether witness was impeached by proof received was question for jury.

9. Criminal Law ⇐1160

Rule that value of contradictory testimony is not destroyed by its own contradictions nor rendered inherently improbable merely by virtue of contrary evidence in a writing has special application where trial judge, in denying motion for new trial, has disclosed that he deemed proof sufficient.

10. Constitutional Law ⇐268

In prosecution for grand theft, evidence was insufficient to establish that defendant was deprived of due process by denial of an impartial trial. U.S.C.A.Const. Amend. 14.

11. Criminal Law ⇐1176

In prosecution for grand theft, wherein defendant alleged that deputy district attorney had concealed evidence, and made numerous allegations to show that he was denied due process, but defendant failed to make any showing before case was submitted or on motion for new trial that he had sought process to rectify alleged prejudicial conduct, defendant suffered no harm by reason of court's denial of new trial. U.S.C.A.Const. Amend. 14.

12. Criminal Law ⇐720(6)

Where jury was instructed to find from evidence and not from arguments, it was not error for prosecutor to state his conclusions from specified facts in evidence.

13. Criminal Law ⇐1166½(12)

In prosecution for grand theft, evidence was insufficient to establish that acts of trial judge constituted prejudicial misconduct.

14. Criminal Law ⇐29

The crime of obtaining property by false pretenses is complete when the property has been obtained, and if at a subsequent time the thief takes other property while the victim is under the influence of same fraudulent representation, a second crime is committed.

15. Indictment and Information ⇐129(1)

Where defendant allegedly obtained $3,000 by false representations that he owned certain realty and promised that he would give witness first mortgage on part of realty, and 15 days later defendant took note secured by trust deed and chattel mortgage from witness on basis of same representations, two crimes were properly charged.

16. Criminal Law ⇐788

Instruction which informed jury that neither prosecution nor accused was obligated to call all witnesses shown to have

been present at, or who had knowledge of, any event involved in evidence was proper.

17. Criminal Law ⇐777

In prosecution for grand theft, instruction that a writing last known to be in possession of defendant is, in legal effect, a lost document and that its contents may be proved by parol was not erroneous.

18. Criminal Law ⇐808½

In prosecution for grand theft, instruction, taken from Code of Civil Procedure and which defined primary and secondary evidence, was not erroneous. Code Civ. Proc. §§ 1829, 1830.

19. Criminal Law ⇐785(7)

Where accused introduced testimony of expert, instruction that qualified experts may give opinions on questions in controversy to assist jury in deciding questions, and that jury may consider opinion with reasons stated therefor, if any, by expert, and that jury was not bound to accept opinion as conclusive, but should give it weight to which jury found it entitled, and that jury could disregard opinion if it found it unreasonable was not erroneous.

20. False Pretenses ⇐52

In prosecution for theft by false pretenses, instruction that it is immaterial whether defendant made false representations to obtain property for himself, or to accomplish its delivery to another person or organization, was not erroneous.

21. Criminal Law 772(2), 777

In prosecution for grand theft, instructions which defined theft, false token, and evidence of similar representations were proper.

22. False Pretenses ⇐52

In prosecution for grand theft, wherein instruction that corroboration required in order to establish crime of theft by false pretenses is corroboration of making of pretense, and if jury find there was no corroboration it must acquit accused was requested by accused and given by court, it was not error to instruct jury that the corroboration required upon a charge of obtaining money by false pretenses must be a similar alleged false pretense.

23. Criminal Law ⇐768(1)

In prosecution for grand theft, instruction which warned jury not to apply instructions which were not applicable to facts was not erroneous.

24. Criminal Law ⇐809, 814(1)

In prosecution for grand theft, court correctly rejected instructions which were not pertinent to theft, and which were calculated to confuse jury.

25. Criminal Law ⇐829(1)

It was not error to refuse to give instruction which was covered by an instruction given.

26. Criminal Law ⇐814(8)

In prosecution for theft by false pretenses, court properly refused instructions relating to novation and release of accused by one of complainants, in view of fact that alleged thefts were committed at times accused received the property allegedly obtained by false pretenses.

27. Criminal Law ⇐444

In prosecution for grand theft, wherein witness testified that the copy of a receipt given by accused to witness and surrendered to accused at his demand was a correct reproduction of the original receipt and embodied agreement of accused, receipt was properly admitted as proof of a memorandum of the agreement subscribed by defendant. Pen.Code, § 1110.

28. False Pretenses ⇐46

In prosecution for grand theft, trust deed and chattel mortgage alleged to have been obtained from prosecuting witness by false pretenses were proof of crime alleged and were properly admitted.

29. False Pretenses ⇐41

In prosecution for grand theft, where it was alleged that defendant promised prosecuting witness first mortgage on certain realty, admission of exhibit showing encumbrances against realty described in trust deed on different realty which was given as substitute to prosecuting witness was proper in view of fact that trust deed stated only that it was subject to encumbrances, and it proved inferiority of security given prosecuting witness.

30. Criminal Law ⇐419(1)

In prosecution for grand theft, wherein defendant was accused of obtaining money and securities by false pretenses and turning them over to corporation chartered for purpose of introducing people, testimony of witness with reference to investigation by Retail Credit Association of prospective members was properly excluded as hearsay and immaterial evidence.

31. Criminal Law ⇐1170½(5)

In prosecution for grand theft, evidence was insufficient to support allegation that defendant was prejudiced by court's denial of full cross-examination of prosecuting witness.

32. Indictment and Information ⇐114

Inclusion in information or indictment of charge of former crimes is not improper.

33. Criminal Law ⇐959

In prosecution for grand theft, evidence was insufficient to support allegation that defendant was denied right to argue affidavits or that court favored district attorney on hearing of motion for new trial.

34. Criminal Law ⇐1144(18)

Where defendant filed many affidavits in connection with his motion for new trial, trial judge was presumed to have read all affidavits.

35. Criminal Law ⇐1028

Where letter which was asserted to be new evidence was not presented to trial court, it could have no bearing on appeal.

36. Criminal Law ⇐544, 548

Where defendant was represented by counsel and was present at preliminary examination and was privileged to cross-examine witness, it was not error for court to admit the testimony of witness given at preliminary examination and such testimony was presumptively true. Pen.Code, § 686.

George H. Ashley, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted on four counts of grand theft. He appeals "from the verdicts and judgments as to each count" and from "the order denying motion for new trial." He grounds his appeal upon denial of due process; fraud practiced on the court by the district attorney; being compelled to undergo a trial on charges known to be false; lack of jurisdiction to enter a judgment on counts VII and VIII since there was no proof of his stealing $4,200 on December 4, 1948; the money and property were loaned to a corporation; admission of incompetent evidence; insufficient evidence to support the judgments; prejudicial misconduct of the district attorney; misconduct of the trial judge; refusal to hear appellant's argument for a new trial; denial of his motion for a new trial.

Count V alleges that defendant in Los Angeles County unlawfully took $13,590 from Mrs. Neal on June 19, 1948, and count VI pleads that he took $4,470 from the same lady August 3, 1948.

Count VII charges that on November 19, 1948, defendant feloniously took $3,000 from Mrs. Russ, and count VIII declares he unlawfully took $4,200 in money on December 4 from Mrs. Russ.

After verdicts had been returned against him on the four counts,[1] he moved for a new trial and applied for probation. The motion and the application were both denied.

The Evidence Sufficient.

The evidence in support of counts VII and VIII is the testimony of Mattie Russ, and documentary proof.

Appellant was "business manager" of "Life's Estate, Ltd.," a corporation chartered in 1947 for the purpose of "introducing people." Its president was Mrs. Wingrave; vice president, Leo Butts, the son-in-law of appellant. Mrs. Butts was secre-

1. Prior to the trial, 23 of the original 29 counts were dismissed under section 995 of the Penal Code. Counts 2 and 19 were dismissed on motion of court and district attorney, respectively.

tary-treasurer. They developed an institution with about 2,000 members. Their principal office was at 1537 La Brea Avenue, Los Angeles.

In 1948 Mrs. Russ, seventy years of age, visited the office of Life's Estate. She was introduced to appellant who had chosen to be addressed as Monsieur Georges. After Mrs. Wingrave's unsuccessful effort to sell her a membership, Monsieur took over and induced the hesitant visitress to join. Answering his telegraphic invitation to return, she called at the office of appellant where he gained her consent to become hostess of the club at $100 a month with an apartment. In conveying her home he drove by a Sunset Boulevard lot occupied by two sheet metal structures and told her that "he owned that property and they also owned the La Brea property at 1537." Having ascertained that she had some "ready cash" he said, "I am in need of money and if you will loan me the $3,000.00 I will give you a mortgage on the La Brea property * * * I will go on with the theater building." It was to be a first mortgage. He then developed that she held a first trust deed on her former home which she had sold to Mrs. Lee as well as a chattel mortgage on its furniture. The note so secured was for the sum of $4,200. Also, she had a trailer in which she lived.

Pursuant to appointment, appellant called for her on the following day, took her to a bank in Long Beach. He declined to accompany her into the bank, insisting that she enter, obtain the money and bring it to him. After she came forth with the $3,000 in currency, she accompanied him in his automobile to a bank at Westchester, a subdivision of Los Angeles. On arrival she handed the $3,000 to appellant believing she would get a first mortgage on the La Brea property and that her money was to be used toward the construction of a theater on the Sunset Boulevard lot which she believed he owned. He then drove to 1537 North La Brea on which he again told her she was to have a first mortgage for her $3,000 at six per cent interest. While at dinner he told her again he was badly in need of money and inquired whether she might increase her loan; he desired to finish the theater building. He promised her a first mortgage on the La Brea property upon her transferring her "first trust deed to him."

November 20 she delivered to appellant the trust deed and chattel mortgage and they then visited Mrs. Lee. Appellant notified her he was "taking over this trust deed and chattel mortgage" and reproached that lady for having moved the furniture from the house and threatened to foreclose. Also, on the same day, Mrs. Russ endorsed to appellant a cashier's check for $1,580 which she had received for her trailer. All such funds so transferred to appellant he promised to use in constructing a theater on the Sunset lot and she was to have a first mortgage on the La Brea realty as security. She relied upon such promises. But she got no mortgage. Thereafter their meetings were marked by bitter quarrels, because she "could not get a mortgage." Finally, he told her to "take this second trust deed" on a lot in the canyon "or nothing." Although she had advanced to him $8,623.04 and had requested it, she never received a note secured by a mortgage on the La Brea property. But on February 3, 1950, he took her for a drive "up the canyon," terrified her with curses and threats to drive her "over the mountain" unless she gave him "four checks" which he had given her on account of the moneys she had loaned him and which she had on her person. He thereupon threatened to commit suicide and instructed his associate Farnsworth who had mysteriously arrived on the scene to "cash" his life policy and pay Mrs. Russ. Subsequently, driven by fear, she accepted as security for $8,527.82 a second trust deed on a property already encumbered with a $5,000 mortgage.

At the time of her first payment of the $3,000 she received a writing signed by Life's Estate, Ltd. by Geo. H. Ashley, agent, and Edith Wingrave, president, purporting to receipt her for the $3,000 and to set forth her agreement to make the corporation an "unsecured loan including the three thousand dollars * * * plus two certain deeds of trust approximating $4,000, more or less plus proceeds of a trailer to be sold * * * for which the corporation

agrees to execute its unsecured promissory note, due and payable with interest at 6% per annum, four years from date of execution." That paper he demanded as a condition of his delivering to her the first mortgage he had promised. She returned it on his demand within three weeks after she had transferred the Lee trust deed to him, but did not receive the first mortgage. She made a copy of the "receipt" from memory promptly after its delivery to him.

In support of counts V and VI the testimony of Maud J. Neal taken at the preliminary hearing was submitted. She had returned to her North Carolina home. She had come to Inglewood in January of 1948 and learned of Life's Estate from an advertisement in a local newspaper. In March she met Leo Butts and visited the office at 1537 North La Brea. She was there introduced to "Monsieur Georges" by Mrs. Wingrave. He at once inquired about her home and her property. She had war bonds to the amount of $17,500 and they were in a lock-box in her eastern home town. Did she have children and if she should meet some fellow and liked him would she divorce her husband and marry the new man and if so would she turn her money over to him to use as he pleased? Thus queried the Monsieur. After gaining an affirmative response, he suggested her meeting with Dr. Meyer, in the same building. The introduction was accompanied by appellant's complimentary reference to "a very nice outstanding lady from the South where his mother came from."

Thereupon she subscribed to a membership in Life's Estate for which she agreed to, and did pay $40. During the three succeeding months appellant approached Mrs. Neal frequently about her lending him money. "I'm going to buy a theater," said he; "I have an option on the building; I need enough to make the down payment; it is El Patio Theater, worth $500,000; is located on North La Brea at Hollywood Boulevard, and is to cost me $165,000." He offered to give her a note against Life's Estate and a trust deed against the theater building. He told her that if she would loan him all her money she might live at Life's Estate with Mrs. Wingrave and he would put her in as chief hostess at $40 a week to run the business; that she required new clothes. He accompanied her to a famous emporium, selected her dresses for which she paid. He observed that she should have the services of a lawyer to prepare the papers, but he would choose one that she could trust. When Mrs. Neal offered to write her daughter in North Carolina to send her bonds, appellant objected: that was too slow; she should make a long distance call. On receipt of her bonds she undertook to discuss the matter of being secured for her money, whereupon the monsieur "flew into a rage; said I talked like I didn't trust him"; that it burned him up for anybody to question his integrity.

At 10 o'clock in the evening appellant sent for Mrs. Neal; suggested that if he had left the impression that they were not honest he was sorry. He then repeated how good her security would be; that Life's Estate was worth a half million dollars; they had $125,000 worth of equipment. After saying that if she were not a hill-billy she would not be afraid to lend his corporation the money, she agreed to make the loan. On the next day, June 19, 1948, he conveyed her to the bank at Inglewood where she delivered her bonds to him. In the presence of the witness Nelson he told her he needed the money to buy El Patio Theater. She received a cashier's check for such bonds as were cashed in the sum of $13,590. She endorsed and delivered it to appellant (count V), and he accepted it. She deposited her remaining bonds with the Westchester bank for transmission. Thereafter a check for $4,470 dated August 2, 1948, from the U. S. treasury was received by appellant. When she next called at his office he presented to her a new note for $17,500. He told her it was to take the place of the note for $13,500 which he had given her for her $13,590. Also, he asked her to endorse the check for $4,470. When she said she preferred to make use of that sum for other purposes he told her if she would let him have it he would buy her a new car. After some argument had produced no results, appellant frightened the "hill-billy" lady when he took a gun from a desk drawer, laid it on the table and said,

"Now look here, Mrs. Neal, I don't want no monkey business out of you, do you understand that?" He then commanded her to give him the note she had and to take the note for $17,500. She promptly obeyed and he kept her $4,470. (Count VI.) Subsequently he excused his failure to purchase El Patio with the statement that it had been condemned and he would build his own theater on Sunset Boulevard. While the activities of appellant were under investigation, he swore at Mrs. Neal and referred to her as a "freakish-looking North Carolina hill-billy" for "turning him in" and when he learned that she had reported Mr. Nelson at the bank as the witness to her first transaction with appellant, he declared, "Now we are ruined."

Although appellant promised to give Mrs. Neal a first trust deed on the La Brea property to secure her advances to him, he did nothing of the kind. All she ever received was interest payments totaling $649.94. Appellant did not prepare her room in Life's Estate or give her employment. She returned to North Carolina after having testified at the examining trial of appellant.

The witness Farnsworth testified that he worked for Life's Estate as investigator and later as salesman. It was a "philosophical society." Sylvia Butts, daughter of appellant, was its secretary-treasurer, and her husband, Leo, was its vice president. One half of the capital stock belonged to them; the remainder to Mrs. Wingrave. Farnsworth testified he inquired into the background of applicants for membership and gave his reports to appellant and at times to Dr. Meyer. All leads to prospective members were supplied by appellant. The purpose of the investigation was to enable them to match up people after having them psychoanalyzed and classified as to religious faiths and hobbies so "they would be congenial and possibly lead to matrimony." Appellant told him the Sunset property belonged to appellant; he had some plans for a theater, a stage, a parquet; "I went by myself to an architect."

He testified that he saw Mrs. Russ on the Nichols Canyon road; when he saw her he met appellant and Mrs. Russ driving toward him. He reversed his direction, passed them and parked his car. Mrs. Russ immediately left appellant's automobile and came to the witness. She was upset. Ashley came and "I gave him the envelope which was my mission and he opened it, give it to Mrs. Russ and she * * * read the paper." He then conversed with Mrs. Russ, made some changes in it, gave it to her and demanded some checks she had. Appellant told the witness to "come up in the canyon in half an hour and pick up my remains." The witness took Mrs. Russ home. She had the checks inside her dress all the time.

Mrs. Russ was further corroborated by the witness Robertson, a dealer in buying and selling trust deeds. January 15, 1949, he purchased from appellant the trust deed and note of Mrs. Lee in favor of Mrs. Russ for $3,000. Also, on November 9, 1948, appellant deposited $3,000 to the account of Life's Estate in the bank where Robertson was employed.

Documents filed showed that the Sunset property was conveyed to Life's Estate, and a trust deed of that corporation conveying the same to a local bank was executed as security for the payment of $40,000.

Dr. Louis Phillips testified that he had been owner of the premises, 1537 North La Brea, for fifteen years; had never leased it to appellant but had leased it for five years to Mrs. Wingrave; he had not authorized any one to place any encumbrance against it.

The books of the depositary bank of Life's Estate showed it deposited $3,000 November 19, 1948, when Mrs. Russ first gave her money to Ashley. At the beginning of that day there was an overdraft of $4,151.93, and it was stipulated that after the $3,000 was deposited, such sum was duly disbursed to pay the running expenses of the depositor.

It was stipulated that the trust deed held by the Long Beach bank was sold to Mr. Robertson and the proceeds, "approximately $3,000 were paid to Mr. Ashley and deposited to the account of Life's Estate and were thereafter disbursed for the normal running expense of the business."

The bank records also disclosed that the $1,580 received for the Russ trailer went into the same account and it was stipulated that it was used for Life's Estate for running expenses and that the same account showed a deposit of $2,600 after deducting $400 and that it was used to pay the running expense of Life's Estate.

[1–3] In view of the foregoing summary of the proof, no disinterested lawyer can reasonably assert that the jury did not have sufficient evidence to warrant the conviction of appellant for theft on the charge of false pretenses. Our function is to decide only whether upon the face of the evidence it can be held that "sufficient facts *could not* have been found" to justify the trial court in finding the accused guilty. People v. Jones, 36 Cal.2d 373, 375, 224 P.2d 353; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Under the cited decisions it is the rule that when the jury has found a prisoner guilty and the trial judge has approved the verdict, it cannot be set aside unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support the judgment. Despite the law thus announced appellant has repeatedly detailed much of the evidence adduced as though no verdict had been returned and as though this court were eagerly waiting to hear a discussion of the facts and to strike down the judgments which have brought him to an unhappy denouement.

Corroboration.

[4–6] The testimony of Mrs. Russ and Mrs. Neal was amply corroborated. The conduct of appellant in dealing with both of them followed a fixed pattern: each was promptly requested to divulge the kind and amount of property she owned; each was asked for a loan; each was crowded to complete the deal; each was to be the hostess of the club; each was terrified for the purpose of gaining an advantage. Despite all the evidence against him, he did not take the stand. That fact was corroborative. People v. Renteria, 60 Cal.App.2d 463, 472, 141 P.2d 37. His silence was ominously proof of a consciousness of guilt, People v. Adamson, 27 Cal.2d 478, 490, 491, 165 P.2d 3; People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17, and was properly considered against him. People v. Wiezel, 39 Cal.App. 2d 657, 663, 104 P.2d 70. His prior conviction is no excuse for his failure to testify. Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 1680, 91 L.Ed. 1903. Moreover, his failure to produce Mrs. Wingrave was an effectual corroboration. The presumption that her testimony would have been adverse, Code Civ.Proc. § 1963, subds. 5 and 6, was not overcome by any evidence.

Errors Asserted.

[7] Appellant contends that he was unjustly accused in count VIII of theft of $4,200 whereas he took from Mrs. Russ a trust deed and chattel mortgage[2]; he argues that "he must be apprised of the cause and nature of the accusations against him"; that he cannot be charged with stealing $4,200 in money and be convicted on evidence of his taking a trust deed, note, and chattel mortgage from the designated victim. Such contention is without support. He was not misled by the pleading. He was present at the examining trial, heard the testimony of Mrs. Russ that he had swindled her of the $4,200 trust deed and read it in the transcript of that trial. When an offense involves a private injury and it is described with sufficient certainty in other respects to identify the act, *an erroneous allegation as to the property involved is* not material. Penal Code, § 956. Where a defendant was charged with taking "the property of another * * * consisting of money in the sum of $2,282" and the evidence was that defendant fraudulently induced the injured witness "to execute and deliver to appellant an assignment" of the witness' pass-book to an auxiliary corporation of the loan company that had issued the pass-book, the indictment was sufficient. The accused was not misled but was fully and correctly informed of the criminal act charged. People v. Woodson, 11 Cal.App.2d 604, 605, 54 P.2d 33; see People v. Freeman, 29 Cal.App. 543, 544, 156 P. 994; People v. Rabe, 202

2. No accusation was filed on the trailer money.

Cal. 409, 422, 261 P. 303. When appellant obtained possession of the trust deed and chattel mortgage, he told Mrs. Russ that he would discount them at ten per cent and use the funds to build the theater and she should have a first mortgage on the La Brea property and that he would include the $1,580 trailer money in the mortgage. He knew all the facts and he had read all the proof before the trial and could not therefore have been misled by the pleading.

[8, 9] Appellant labors under the confused notion that because Mrs. Russ may have contradicted herself or some writing introduced by him, her incriminating testimony should be disregarded. Such is not the law. Whether a witness was impeached by any proof received is a question for the jury's determination, People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467, even though the witness was contradicted by his own testimony or is shown to have testified falsely in part. The jury's function is to separate the true from the false and thus to decide factual questions. People v. Jackson, 63 Cal.App.2d 586, 592, 147 P.2d 94. The value of testimony is not destroyed by its own contradictions; neither is it inherently improbable merely by virtue of contrary evidence in a writing. Especially is this true where in denying the motion for a new trial the judge has disclosed that he deemed the proof sufficient. See People v. Kuches, 120 Cal. 566, 569, 52 P. 1002. Also, the repeated assertions of appellant that he was convicted on uncorroborated and perjured testimony is disposed of by the clear and emphatic language in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. This court is helpless to accord any relief to appellant if the record reveals substantial evidence favorable to the verdict regardless of contradictions and inconsistencies. People v. Warrington, 80 Cal.App. 167, 172, 251 P. 327.

[10] In his argument upon the asserted insufficiency of the evidence, appellant makes a number of unsupported claims. He argues that an impartial trial was denied him in violation of the 5th and 14th amendments to the federal constitution. After a close inspection, it does not appear that such constitutional provisions or any other were ignored. Neither the deputy prosecutor nor any other officer confiscated exhibits or other documentary proof. No evidence was suppressed, slyly or otherwise. Such claim was made by appellant on his motion for a new trial. The denial of that motion was a complete answer to the charges. The court had before it the affidavits of the deputy district attorney, and Lieutenant McClure of the Bureau of Investigation which disclosed that the latter officer called at the 1537 North La Brea office of appellant promptly after the complaint had been filed; found Ashley "gone"; searched the premises, seized the books and records of Life's Estate, and brought them to his office. While they were held there appellant and his attorneys and agents had unrestricted access to such records. Appellant's averment that the deputy district attorney suborned perjury and concealed evidence was found to be untrue. His claim that the "Loan Agreement and Receipt" given Mrs. Russ was suppressed was rejected and she deposed that she had never seen or heard of it and had never signed it. It was proved without contradiction by a celebrated handwriting expert that her signature on the paper was a carbon impression and not a genuine signature written with the writing instrument in direct contact with the paper, but was made with a carbon paper on the purported agreement hidden below another piece of paper.

[11] But whatever complaint appellant might make with respect to the documents taken from his office, he made no showing before the case was submitted or on his motion for a new trial that he had sought any process to compel their presence before the jury. There was, therefore, no abuse of discretion shown in the denial of such motion. Consequently, appellant suffered no prejudice by reason of the court's denial of a new trial. People v. Yankee, 79 Cal.App.2d 431, 437, 179 P.2d 582; People v. Weber, 149 Cal. 325, 350, 86 P. 671; People v. Negra, 208 Cal. 64, 73, 280 P. 354; People v. Poor, 52 Cal.App.2d 241, 243, 126 P.2d 146. For the same reason the court's ruling on the motion for a new trial disposes of the numerous argu-

ments to show that appellant was denied due process of law or that the deputy district attorney had perpetrated a fraud on the court; to show that the "court ignored affidavits and motion for suppressed evidence"; to show that it was the court's "duty to protect innocent"; to show "misconduct of Deputy Loucks." It disposes of all other assignments made with reference to any other fact impliedly found by the jury against appellant. The court's ruling on the motion for a new trial is far-reaching and all encompassing.

[12] From such portions of the prosecutor's arguments to the jury as are found in the transcript it does not appear that the rules of propriety were transgressed. It is not error for the advocate to state his conclusion from specified facts in evidence which is merely a form of suggesting the finding they should make on such facts. They were instructed to find from evidence only, and not from arguments. (See 8 Cal.Jur., pp. 266, 267.) Under the rule that the reviewing court must consider in the strongest light all evidence that gives support to the verdict and all inferences reasonably deducible and to disregard such as are inconsistent therewith, no discretion is left for this court to interfere with the judgment. People v. Newland, supra; People v. Barber, 112 Cal.App.2d 333, 246 P.2d 99.

The Trial Judge.

[13] It is asserted that the acts of the trial judge constituted prejudicial misconduct; that he took over the role as prosecutor; by insidious behavior deprived appellant of a fair trial, hinted to the prosecutor how to induce Mrs. Russ to say that she had signed Exhibit N, intimidated counsel into stipulating away appellant's rights, in all some 22 acts. Such charges are without substantial support. The judge was constantly alert and carried on with expedition and caution to effect with wisdom and charity the termination of the proceeding.

Acts Described in Counts VII and VIII, Not One Offense.

[14, 15] Appellant suffers the misconception that the crimes alleged in counts VII and VIII constitute a single transaction "split into two counts." Not so. Two separate crimes are alleged. He took Mrs. Russ' $3,000 on November 19th and on the fifteenth day thereafter he relieved her of a note, secured by trust deed for the sum of $4,200. He says by splitting his transaction he was fatally prejudiced before the jurors in that "it tended to increase the number and enormity of the alleged crimes." But the law is that by obtaining property by fraudulent pretense the crime is complete and when at a subsequent time the thief takes other property while the victim is under the influence of the same fraudulent representations, a second crime is committed. People v. Ellison, 26 Cal. App.2d 496, 498, 79 P.2d 732. "* * * the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representation, which was still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person." People v. Rabe, 202 Cal. 409, 413, 261 P. 303, 305. On the authority of the Rabe decision, appellant's motion to require an election at the close of the prosecution's evidence was properly denied.

Instructions Not Prejudicial.

[16] Appellant charges that by telling the jury the district attorney was under no obligation to produce evidence, the court deprived him of the right of due process of law. Now, the instruction merely informed the jury that neither side of the controversy is obliged to call all witnesses shown to have been present at or had knowledge of any event involved in the evidence. The instruction (Caljic 23) worked both ways. Appellant called neither himself nor Mrs. Wingrave.

[17–19] Also, appellant assigns as prejudicial the instruction that a writing last known to be in possession of the defendant is, in legal effect, a lost document and its contents may be proved by parol. That

such instruction was correct is supported by People v. Jackson, 24 Cal.App.2d 182, 198, 74 P.2d 1085. Neither was there error in the instruction defining primary and secondary evidence.[3] It is taken from the Code of Civil Procedure, sections 1829 and 1830. Nor was it error to give the instruction on expert testimony.[4] Appellant had an expert to testify and the instruction is in traditional form.

[20, 21] The instruction[5] taken from Caljic 228 is in no sense erroneous. People v. Jones, 36 Cal.2d 373, 379, 224 P.2d 353. Instructions 220, 229a and 229b are correct statements of the law. They define "theft," "false token," and "evidence of similar representations" and set forth Hornbook principles.

[22, 23] It was not error to instruct the jury that "the corroboration required upon a charge of obtaining money by false pretense must be a similar alleged false pretense." It was logically called for by the instruction requested by appellant and given by the court.[6] Neither was it error to give Caljic instruction No. 8.[7] It is a classical, cautionary warning to a jury not to apply such instructions as are not applicable to the facts they find.

Appellant's Proposed Instructions Rejected: Not Prejudicial.

[24] Appellant requested the court to instruct the jury that "if you find from the evidence that each deal in this case bore the color and was that of a normal civil contract, you must acquit the defendant" and that "defendant is not to be convicted solely because of dissatisfaction of a person making a loan or because of his business difficulties"; also, he requested an instruction defining a loan; that a borrower must pay the amount due in such money as is current when the loan becomes due, etc. None of them was pertinent to the issue of theft. All were calculated to confuse the jury by commanding an ac-

3. You are instructed that in addition to the classification of evidence as direct evidence and circumstantial evidence there is another classification of evidence, to wit, primary evidence and secondary evidence.

Primary evidence is defined as follows. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

Secondary evidence is defined as follows. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and its contents.

4. Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

5. In a prosecution for theft by false pretenses, if it is shown that the defendant practiced a fraud of a kind regarded by law as being a false pretense, and with the intent to deprive another of property, it is immaterial whether he did so to obtain property for himself or his own possession, or to accomplish its delivery to another person or organization either for the benefit of that other person or organization or for the benefit of himself.

6. You are instructed that the corroboration required in order to establish the crime of theft by false pretense is corroboration of the making of the pretense. Therefore if, in this case, you find that there was no corroboration of any alleged pretense, or representation, you must acquit the accused of theft by false pretense or fraudulent representation.

7. The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

quittal if they found each deal bore some specified aspect.

[25] Complaint is made of the court's refusing to give defendant's instruction No. 6.[8] It was covered by Caljic 231, given.

[26] Appellant requested the court to give two instructions relating to novation and the release of appellant by one of the complainants. They were not proper. The thefts were committed at the times appellant received the money or the trust deed or there was no theft. Acts of the accusers pretending to effect a release or acquittal of the accused were not relevant to his guilt.

Exhibits Attacked.

[27] Exhibit 43 was a copy of the receipt given to Mrs. Russ on November 19, 1948, made by her from memory. Appellant asserts he was prejudiced thereby and by the court's refusal to strike the parol testimony with respect thereto even though the exhibit was stricken. The original writing was taken from the lady by appellant, and in less than 15 minutes she made the copy. After the witness had testified that the copy was a correct reproduction of the original receipt and contract of appellant, it was properly admitted as proof of a "memorandum of the agreement subscribed by the defendant." Penal Code, § 1110. Appellant then complains that he was prejudiced by the order striking the exhibit and denying his motion to strike the testimony with reference to it. If the court struck the exhibit, appellant cannot complain; he requested it. If the court refused to strike the testimony with regard to the exhibit, appellant cannot complain for he elicited it.

[28, 29] It was not error to receive in evidence the Lee trust deed and chattel mortgage. They were proofs of the very crime alleged in count VIII and for which appellant was on trial. There was no error in admitting exhibit 48 in order to show the encumbrances of record against the property described in the trust deed to Mrs. Russ which recited merely "subject to encumbrances of record." It proved the inferiority of her security.

[30] The testimony of Mr. Butts with reference to the investigations by the Retail Credit Association of prospective members was properly excluded as hearsay and immaterial.

[31] Appellant asserts that he was prejudiced by the court's denial of a "full cross-examination" of Mrs. Russ. The voluminous record of her testimony belies such claim. Appellant was not unduly restricted as to such examination.

The Prior Felony.

[32] Appellant was not improperly charged with the prior felony. He had committed it and the law authorizes the inclusion in any information or indictment of the charge of former crimes. People v Dunlop, 102 Cal.App.2d 314, 316, 227 P.2d 281. He admitted having served a term in a federal prison in Colorado.

Motion for New Trial.

[33, 34] Appellant contends that he was denied the right to argue his affidavits; that the court shielded the district attorney in tampering with the evidence, derided appellant's efforts to be heard, "poked light at defendant's affidavits"; that the judge tried "to trick defendant into the loss of his procedural rights" and "cut the defendant short." The record discloses a continued series of patient continuances of the hearing of the motion from the date of its first setting on May 31, 1951, to August 15, when the motion was denied. Such continuances were for the accommodation of appellant. On August 15 oral testimony was heard. At all times his counsel was pres-

8. While the charge of grand theft may be proved by evidence which shows the obtaining of money by false pretences, or may be shown by evidence of larceny by trick and device, it cannot be proved by a combination of the elements of both of said offences. Before the defendant can be proved guilty, the commission of the crimes must be proved beyond a reasonable doubt by evidence either of the obtaining of money by false pretence or of larceny by trick and device; but it cannot be proved by a combination of the elements of both offences.

ent. Many affidavits were filed. The judge is presumed to have read all affidavits. There is no proof that he did not do so.

The Case of Mrs. Neal.

Appellant asserts with renewed emphasis that he was denied his constitutional rights in respect to the trial of the accusation of Mrs. Neal. His assignments as to the trial of her charges are substantially a repetition of those made concerning the Russ trial. For that reason a discussion involving the same principles and similar situations will be eschewed. However, it will not be amiss to advert to some features of her affidavit in reply to affidavits submitted by defendant in support of his motion for a new trial. After the information had been filed, Mrs. Wingrave and the Butts couple found their way to the North Carolina home of Mrs. Neal. She deposed that she was confined to her bed with a bad heart and refused to take a ride with her visitors. She had read their affidavits and denied she had discussed any matters mentioned by them except the portion "devoted to affiant's changing her testimony to the effect that she granted her consent for the use of her money"; that most of their conversation was a play for her sympathy by telling her how they and appellant had been subjected to criminal charges; that they brought forth a seven page affidavit for her to sign and when she scorned their request, one of them threatened her with "means either fair or foul"; that they drove an expensive car, but pleaded for her to keep them over night because they had only $14.

[35] Appellant's "newly discovered evidence" is asserted to be a letter written by Mrs. Wingrave and signed by Mrs. Neal whereby the latter authorized a cancellation of the El Patio theater transaction and a use of her money for general purposes. Inasmuch as such letter was not presented to the trial court, it has no bearing on appeal.

[36] It was not error for the court to admit the testimony of Mrs. Neal given in the preliminary examination. Appellant was there, attended by his counsel who was privileged to and did cross-examine Mrs. Neal. Section 686 of the Penal Code authorizes the use of testimony given by a witness before the committing magistrate in the presence of the accused. Therefore, appellant was not denied the right to be confronted by the witnesses.

Appellant's contention that the deputy district attorney committed a fraud on the court by reading the testimony of Mrs. Neal, knowing it to be false, is likewise without merit. No section of the state or federal constitution forbids such reading. Mrs. Neal never said it was false; it was presumptively true until the jury might determine its merit. They decided it was true.

All other legal problems presented on counts V and VI have been covered by the discussion of counts VII and VIII.

The appeals from the verdicts are dismissed as nonappealable. The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.



115 Cal.App.2d 176

RICORD et al. v. ARAGON et al.

Civ. No. 19152.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1952.

Rehearing Denied Jan. 19, 1953.

Hearing Denied Feb. 26, 1953.

Action for declaratory relief and to enjoin sale of real property under a trust deed. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that written agreement for the loan which was secured by the trust deed met the requirement of clearly stating that interest was being charged at a rate in excess of seven per cent.

Judgment affirmed.

1. Usury ⇐53

Where written agreement for loan of $27,000 at six per cent interest, with trust deed as security, clearly expressed bor-

rowers' agreement to pay a $4,000 bonus which was an additional charge for use of the money, it met requirement that it must clearly state that interest was being charged at a rate in excess of seven per cent. Gen. Laws, Act 3757, §§ 1, 2.

2. Usury ⇨42

The charging of interest on a bonus which borrowers agreed to pay as an additional charge for use of the money which was being lent at six per cent did not amount to a usurious charging of interest upon interest. Gen.Laws, Act 3757, §§ 1, 2.

3. Mortgages ⇨338

In proceeding to enjoin sale of real property under trust deed, brought by grantors who made only one monthly payment on the loan secured by the deed, evidence sustained finding that a bonus which grantors agreed to pay to obtain the loan had not been credited by the lenders to the monthly payments but had only been waived.

4. Mortgages ⇨335

Where lenders waived bonus which borrowers had agreed to pay, such act was only a remission by them of part of the debt and was not an act of performance by borrowers under Civil Code Section governing in the matter of the application of performance by a debtor under several obligations to another, and, thus, lenders did not violate statute by declaring debt immediately due for non-payment of installments. Civ.Code, § 1479.

Lauren M. Handley, Los Angeles, for appellants.

Wendell W. Schooling, Wallace F. Mills, Kenneth M. Liskum, Huntington Park, for respondents.

SHINN, Presiding Justice.

Action for declaratory relief and to enjoin sale of real property under a trust deed. Judgment was for defendants and plaintiffs appeal.

In September, 1950, plaintiffs inserted an advertisement in the Los Angeles Examiner reading as follows: $3,000 Bonus—Want $27,000.00 1st T.D. on De Lux 10 units. 6% Interest." Defendants Aragon, husband and wife, answered the advertisement and on September 28, 1950 an agreement was reached whereby the Aragons would lend plaintiffs $27,000 and would receive a note for $31,000 to be paid in 58 monthly instalments of interest and principal, the entire balance then to be due. The transaction was consummated, plaintiffs giving the Aragons a trust deed on the land and apartment building thereon. Only the first payment of $300, due December 1, 1950, was made. In July, 1951, notice of trustee's sale was given and plaintiffs filed this action. By their complaint plaintiffs asked for (1) an injunction against foreclosure because the loan was usurious, (2) recovery of interest wrongfully collected and (3) declaratory relief. It was alleged that defendants had credited the amount of the bonus on the note, that this operated as a prepayment of monthly instalments equal to $4,000 and therefore plaintiffs were not in default.

Computations of interest were made at the trial which included as interest the agreed bonus. The court found, and plaintiffs concede, that it was slightly less than ten per cent per annum and that it was not usurious.

Plaintiffs contend that the note provided for interest at a rate exceeding 7 per cent without a writing clearly expressing an agreement of the parties for such charge. From this premise they argue there was usury and that the debt could not be declared due until the last payment fell due. Article XX, § 22 of the Constitution, which relates to the rate of interest, provides as set out below.[1]

The usury law, Deering's General Laws,

1. "The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 per cent per annum.

"No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more

Act 3757, § 1, reads in part as set out below.[2]

[1] As previously stated, the rate here in question was not over ten per cent and we conclude that the agreement to pay interest was clearly expressed in writing. It has been plaintiffs' contention throughout, and correctly, that the bonus was charged as additional interest. Notwithstanding the stipulation that the rate would be six per cent plaintiffs offered to pay the bonus and there was a clearly expressed agreement to pay it. The parties understood it to be, and it was in fact, an additional charge for the use of money. Otis v. I. Eisner Co., 7 Cal.App.2d 496, 46 P.2d 235. The writing met the requirement that it must clearly state that interest was being charged at a rate in excess of seven per cent. Brown v. Cardoza, 67 Cal.App.2d 187, 194, 153 P.2d 767.

[2] Plaintiffs further contend that there was a charge of interest upon interest in violation of sections 1 and 2 of Act 3757 in that they agreed to pay interest upon the bonus of $4,000, or interest upon interest, without any agreement therefor in writing and that the penalty provisions of section 2 apply. The claim is not sustainable. There was a clearly expressed agreement to pay interest on the $4,000. Moreover, the agreement to pay interest on the bonus, whether expressed clearly or in ambiguous terms would not render the loan usurious nor subject the lenders to penalties. In Lewis v. Pacific States Sav. & Loan Co., 1 Cal.2d 691, 695, 37 P.2d 439, 440, the court stated: "We have already seen that giving full effect to the contentions of appellants, the limit of 12 per cent per annum for the period of forbearance is not overreached. Besides, the promissory note itself provides for the payment of interest at the rate of 10 per cent per annum upon all installments or portions thereof remaining unpaid at any maturity date. This would seem to be the compound interest or interest upon interest referred to by the act. The fact that the condemned items remain a part of the principal as shown by the face of the obligation, and draw interest, does not bring the transaction under the penalties prescribed by sections 2 and 3 of said act" and in Brown v. Cardoza, supra, 67 Cal.App.2d 187, 194, 153 P.2d 767, 770, it was said: "We have grave doubts that, if a transaction is not usurious, so far as the interest charge is concerned, the portions of §§ 1 and 2 above quoted were ever intended to render void all interest provisions if perchance the agreement to pay more than 7% is not clearly expressed, or if interest is charged on interest without a clear agreement to that effect. The two portions of the sections quoted seem to embody a rule of construing ambiguous documents, rather than compelling a court to void all interest simply because the contract may be ambiguous."

[3, 4] Plaintiffs also contend that defendants credited $4,000 on the note and that it should have been applied to the payments on the note first falling due, hence they were not in default. The court found there was no credit but only a waiver of the bonus. The evidence supports this finding. In certain situations section 1479 Civil Code, upon which plaintiffs rely, governs in the matter of the application of

than 10 per cent per annum upon any loan or forbearance of any money, goods or things in action."

2. Sec. 1. "The rate of interest * * * shall be seven dollars upon the one hundred dollars for one year * * * but it shall be competent for parties to contract for the payment and receipt of a rate of interest not exceeding twelve dollars [now ten dollars] on the one hundred dollars for one year * * * in which case such rate exceeding seven dollars on one hundred dollars shall be clearly expressed in writing."

Sec. 2. "* * * interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

performance to obligations "Where a debtor under several obligations to another, does an act, by way of performance, in whole or in part" etc. There was, here, no act of performance by plaintiffs—only a remission by the defendants of a part of the debt. Section 1479 does not apply.

There was no violation of the statute. Defendants had a right to declare the debt immediately due for nonpayment of the instalments.

We find no merit in plaintiffs' claim that the court failed to find on material issues.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



AETNA CASUALTY & SURETY CO. v. BECHTEL CORP.*

Civ. 15087.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1953.

Hearing Granted Feb. 26, 1953.

Action by compensation insurance carrier, under statute, against third party for alleged negligent injuries to an employee of plaintiff's insured. The Superior Court for the State of California in and for the City and County of San Francisco, Theresa Meikle, J., sustained a demurrer on the ground that the action was not brought within the one year allowed for the bringing of personal injury actions, and insurance carrier appealed. The District Court of Appeal, Nourse, P. J., held that the three year statute of limitations as to liabilities created by statute was applicable to this action.

Judgment reversed with direction.

1. Workmen's Compensation ⇐2188

An employer who brings an action against a third party tort-feasor for injuries to his employee does not act only as trustee for the employee but acts in the first place for the protection of his statutory interest in the entire indemnity due from the wrongdoer. Labor Code, §§ 3850–3862.

2. Workmen's Compensation ⇐2188

An employer who brings an action against a third party tort-feasor for injuries to his employee is entitled to bring it not only for the amount of compensation he paid or became obligated to pay, but also for the damages suffered by the employee. Labor Code, §§ 3850–3862.

3. Limitation of Actions ⇐34(1)

In determining doubtful question of whether liability of third party tort-feasor to employer for injuries to employee, which for other purposes had been determined to be statutory, was statutory for purpose of applicability of three-year statute of limitation, the purpose and policy of the workmen's compensation statute would have great weight. Code Civ.Proc. § 338, subd. 1; Labor Code, §§ 3850–3862.

4. Limitation of Actions ⇐34(1)

Three year statute of limitations as to liabilities created by statute, rather than one year statute of limitations as to personal injury actions, was applicable to statutory action by employer against third party tort-feasor for injuries to employee. Code Civ.Proc. §§ 338, subd. 1, 340, subd. 3; Labor Code, §§ 3850–3862.

5. Constitutional Law ⇐249

The equal protection clause does not prevent reasonable classification in matters of the statute of limitations.

6. Constitutional Law ⇐249

Application of three year statute of limitations to statutory action by employer against third party tort-feasor for injuries to employee, rather than one year statute of limitations as to personal injury actions which was applicable to similar action by the employee, did not violate equal protection clauses of federal and state Constitutions. Code Civ.Proc. §§ 338, subd. 1, 340, subd. 3; Labor Code, §§ 3850–3862.

Belli, Ashe & Pinney, San Francisco, for appellant.

* Subsequent opinion 264 P.2d 5.

Partridge & O'Connell, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action by a compensation insurance carrier. The third and fourth cause of action of its amended complaint are directed against the third party whose negligence allegedly caused compensable injury to an employee of plaintiff's insured. The third cause of action claims compensation benefits and expenses for medical and hospital care paid by plaintiff for the injured employee, the fourth, general damages suffered by said employee. The action was brought more than one and less than three years after the accident which caused the injury occurred. To the fourth cause of action a demurrer was sustained without leave to amend and plaintiff appeals from the judgment entered accordingly.

The only question presented is whether to said fourth cause of action the one year statute of limitations as to personal injury actions, § 340, sub. 3, Code Civ.Proc., or the three year statute as to liabilities created by statute, § 338, sub. 1, Code Civ. Proc., is applicable. Respondent, although conceding that the three year statute applies to the third cause of action, Limited Mutual, Etc., Ins. Co. v. Billings, 74 Cal. App.2d 881, 169 P.2d 673; Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605 and that appellant, apart from the statute of limitations, was entitled to sue for the injured employee's general damages, State Comp. Ins. Fund v. Matulich, 55 Cal.App.2d 528, 131 P.2d 21; State Compensation Ins. Fund v. Allen, 104 Cal.App. 400, 285 P. 1053, maintains that in so far as plaintiff sues for the employee's general damages it is pursuing the tort action of the general law in behalf of the employee as his statutory trustee and not a new statutory action of its own, whereas appellant urges that the fourth cause of action and the third are equally statutory in origin as created by sections 3850–3862, Labor Code, so that the three year statute equally applies. We have concluded that the position of appellant must be sustained

[1] Sections 3850–3862, Labor Code, form an integrated system of coordination of the tort liability of the wrongdoer and the compensation liability of the employer or his insurance carrier so as to avoid double recovery by the injured employee and have the indemnification due from the tort-feasor serve in the first place to relieve the duty of the employer or insurance carrier. According to section 3850(b) "Employer" when used in the chapter in question includes insurance carrier and we also shall further use employer in this extended meaning. The action against the third party can be brought either by the employer who has to pay compensation, §§ 3852, 3854, or by the employee alone or jointly with the employer, § 3855. The one who brings the action must give notice to the other; the other may then join as party plaintiff or if he has brought action independently the actions shall be consolidated, § 3853. If the employer brings the action he shall reimburse himself for the amounts he has paid or has become obligated to pay (plus attorney's fees) and pay any excess to the injured employee. § 3854. If the employee has brought the action the court shall, if the employer has become a party to the action, reimburse him for his expenditures for compensation out of the entire recovery or if the employer has applied for a lien said expenditures shall be allowed as a first lien against the entire recovery. § 3856. Also to the amount of the balance of the judgment, received by the employee, the employer shall be relieved from the obligation to pay further compensation, § 3858. The entire amount of any settlement is subject to the employer's full claim for reimbursement for his compensation expenditures and liability, § 3860. Finally the employer is entitled to be allowed by the commission as a credit against his compensation liability any recovery by the employee for his injury not applied to reimbursement under the preceding provisions, § 3861. The above excerpt from the statutory provisions shows clearly that in bringing action against the third party tort-feasor the employer does not act only as a trustee for the employee but in the

first place for the protection of his own interest in the entire indemnity due from the wrongdoer which interest the statute gives him to reimburse his compensation expenditures and to relieve him from further liability.

[2] The legal history leaves no doubt that when the employer brings action he is entitled to bring it not only for the amount of compensation he paid or became obligated to pay but also for the damages suffered by the employee. Such was stated in so many words in section 26 of the "Workmen's compensation, insurance and safety act of 1917" as amended by statutes 1931, Chap. 1119, pp. 2370–2371. When this provision was transferred to section 3852, Labor Code, its formulation became somewhat confused but this court held that no change was intended and that the employer's action was still as wide as under the prior statute, State Comp. Ins. Fund v. Matulich, supra, 55 Cal.App.2d 528, 530, 131 P.2d 21, a decision which seems in line with the system and purpose of sections 3850–3862 as stated hereinbefore. However, we can not find in the legal history a solution for the question now before us, the statute of limitations applicable when the employer brings action for the general damages suffered by the employee.

When the District Court of Appeal for the Fourth District in Limited Mutual, Etc., Ins. Co. v. Billings, 74 Cal.App.2d 881, at pages 884–885, 169 P.2d 673, at page 676, supra, decided that to the action of the employer against the tort-feasor for reimbursement of compensation paid the three year statute was applicable it gave the following reasoning:

> "The new and separate cause of action thus created is based upon a liability expressly created by statute. While a third party was formerly liable to the employee he was not liable to the employer prior to the adoption of these statutory provisions. Although the new liability covers elements which were included in the old it runs in favor of a different party who, by operation of law, has been put in a position where he has also been injured, and it includes elements which the employee is no longer entitled to retain if he recovers them. A new and different liability has therefore been created in favor of another interested party, with provisions designed to prevent a double recovery. The statutes creating the new cause of action and the new liability make no provision limiting the time within which the new action must be commenced, and the general statutes in that regard must prevail.
>
> "There are sound reasons for providing a different time limitation for the bringing of such an action by an employer than that governing an action by an employee against the same third party. The employee knows at once that he has been injured but, as a practical matter, the employer does not know whether or not he has been injured by the act of the third party until his liability for compensation to the employee has been determined. He has a right to contest that matter and, in contested cases, more than a year will usually elapse before it is finally settled by the commission and the courts. In the meantime, the employer should not be compelled to file an action claiming he has become liable for compensation while at the same time, in other forums, he is earnestly maintaining that he has not become so liable." The Supreme Court cited this case in Dodds v. Stellar, 30 Cal.2d 496, 503, 183 P.2d 658, 663, for the proposition "that the rights of the parties are wholly governed by statute."

[3] Although the position that the liability to the employer is one created by statute had already been indicated by the Supreme Court in Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605, and has since been considered the principle accepted in California, California Casualty Indemnity Exchange v. United States, D.C., 74 F.Supp. 401, 404; City of Los Angeles v. Howard, 80 Cal.App.2d 728, 729, 182 P.2d 278, it cannot be supported by absolutely compelling reasoning and does not seem to

be in accord with the weight of authority. 58 Am.Jur. 823; Annotation, 95 A.L.R. 1431, 1432. The duty of the third party responsible for the injury is in origin still the ordinary tort liability, whereas the right of the employer is purely a part of the statutory compensation law. The relation between these two parties is therefore not clearly either wholly statutory or wholly based on tort. Compare Finnegan v. Royal Realty Co., 35 Cal.2d 409, 435, 218 P.2d 17. The inclusion in the one or the other category must necessarily be somewhat arbitrary. In deciding the same doubtful question with respect to a related but different part of the relation of the parties, the purpose and policy of the statute must have great weight. It is our opinion, as stated before, that the statute aims at offering the employer the means of having the whole indemnification due from the wrongdoer serve to relieve him from compensation liability present and future. As explained in the quoted part of the Billings case, supra, a one year statute may force him to bring action to enforce reimbursement of possible compensation liability before the existence of any compensation liability would have been finally decided. A three year statute as to the action for reimbursement of compensation alone would not effectively solve this difficulty, because, if the employer wishes to avail himself of the right to have the whole liability of the tort-feasor allowed on his compensation liability he would still have to bring the action for general damages to the employee within one year, even if he had denied compensation liability and that liability had not finally been adjudicated.

[4] This policy argument together with the position taken by the Supreme Court on a closely related point and the unity we find in the whole statutory regulation of the subject convinces us that on the whole action of the employer in both its aspects the three year statute as to liability created by statute must be applicable. Contrary arguments of respondent based on a different choice made in other fields of the law or other states can carry no weight where the choice must be governed not by general logical or systematic rules but by the special aspects of the specific question before the court.

[5, 6] Respondent's contention that the application of the three year statute to the liability of the tort-feasor if the injury happens to be compensable and therefore to involve the employer violates the equal protection clauses of the federal and state Constitutions is without merit. The equal protection clause does not prevent reasonable classification in matters of the statute of limitations. 16 C.J.S., Constitutional Law, § 560, p. 1124. What is said above shows that there is a good reason for granting the employer a longer limitation period than the one year period otherwise barring personal injury actions so that the classification is not arbitrary or unreasonable.

The judgment is reversed with direction to the trial court to overrule the demurrer to the fourth count of the amended complaint.

DOOLING, J., concurs.



115 Cal.App.2d 21

OWEN v. NATIONAL CONTAINER CORP. OF CALIFORNIA et al.

Civ. 19099.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1952.

Rehearing Denied Jan. 6, 1953.
Hearing Denied Feb. 19, 1953.

Action by real estate broker against domestic and foreign corporations, to recover compensation for services. The Superior Court, Los Angeles County, Julius V. Patrosso, J., dismissed action as to foreign corporation after service of summons was quashed, sustained domestic corporation's demurrer to complaint on ground that action was on contract, not in writing, employing plaintiff for purchase of real estate, and entered judgment of dismissal as to domestic corporation, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the

agreement alleged in complaint, whereby plaintiff was to locate a suitable industrial site, without any duty on his part to bring parties together or to negotiate or assist in purchase, and whereby plaintiff was to render special services, such as making surveys, furnishing plans, specifications and estimates, and negotiating for construction of building, was not an employment to purchase real property, and was not within statute of frauds.

Judgment reversed as to domestic corporation and affirmed as to foreign corporation.

1. Brokers ⇐43(2)

Employment of real estate broker to negotiate and assist in effecting a purchase of real property for compensation or a commission would be invalid unless in writing. Code Civ.Proc. § 1973; Civ. Code, § 1624.

2. Brokers ⇐43(2)

In action by real estate broker to recover compensation for services, alleged agreement whereby broker was to locate a suitable industrial site, without any duty on his part to bring parties together or to negotiate or assist in a purchase, and whereby broker was also to provide certain special services, such as making surveys, furnishing plans, specifications and estimates, and negotiating for construction of building, was not an employment to purchase real property, and was not required to be in writing. Code Civ.Proc. § 1973; Civ.Code, § 1624.

Guthrie, Darling & Shattuck, Los Angeles, for appellant.

Bronson, Bronson & McKinnon, Edgar H. Rowe, San Francisco, for respondent.

SHINN, Presiding Justice.

Plaintiff LeRoy D. Owen appeals from a judgment of dismissal after the demurrer of defendant National Container Corporation of California, a corporation, was sustained to the third amended complaint without leave to amend. Plaintiff, a real estate broker, sued for the sum of $15,000 on an express contract to pay for his services, and in a second cause of action for the same amount alleged to be the value of the services. National Container Corporation, a foreign corporation, parent of appellant, also was named as a defendant, but the action was dismissed as to it after an order quashing service of summons.

It appears from the briefs that the demurrer was sustained upon the ground that the action was upon a contract employing plaintiff for the purchase by the California corporation of real estate and was not in writing. Code Civ.Proc., § 1973; Civ.Code, § 1624. We are of the opinion that the demurrer should not have been sustained.

The complaint alleged in part as set out below.[1] Attached to the complaint were copies of 37 written communications

1. "On or about August 15, 1946 defendants employed plaintiff to locate a suitable industrial site in the Los Angeles metropolitan area for defendants, to be used by defendants for a Los Angeles factory. As part of the agreement then made by plaintiff with defendants plaintiff was to develop surveys for defendants on labor conditions, transportation matters, financial arrangements and further plaintiff was to negotiate and assist defendants in the preparation of engineering drawings on various proposed factory layouts and further plaintiff was to negotiate on behalf of defendants with the Central Manufacturing District, Inc., of Los Angeles, respecting the proposed plant to be constructed by defendants in that district. For such services defendants agreed to compensate plaintiff therefor by paying to plaintiff the usual commission for such services, that is, 5% of the cost of the improvements and installations at the factory to be constructed by defendants on the site located by plaintiff. Defendants confirmed this agreement in writing as shown by the written documents attached hereto marked Exhibits A to LL inclusive and by such reference made a part hereof as though fully alleged. Dan D. Froehle, whose name appears on several of the exhibits attached hereto, was the agent and employee of plaintiff at all times herein mentioned."

"During the period from August 15, 1946 to February 17, 1950 plaintiff performed all of the services required of plaintiff by his agreement with defendants. The nature and extent of such services are more fully described in the

that passed between plaintiff and one or the other of defendant corporations, as well as a communication from George J. Schneider to Samuel Kipnis, who were respectively the vice president and the president of both corporations, a copy of which was sent to plaintiff. These communications were under various dates between October 15, 1946 and November 11, 1949. The complaint alleged that plaintiff had performed all the agreed services. The writings show that for a period of about three years plaintiff was endeavoring to locate for defendants a suitable site for a factory; he sent information to defendants concerning a number of improved properties which were considered by defendants and found unsuitable; in 1949 he submitted a 5.5 acre parcel belonging to the Central Manufacturing District, Inc., together with plans and specifications and estimates of cost of a factory building prepared by the owner of the property and he also arranged numerous alterations in the plans and specifications in accordance with the wishes of defendants. It also appears from the correspondence that plaintiff furnished defendant with the surveys described in the complaint. Appellant eventually purchased the 5.5 acre site and constructed thereon a building alleged on information and belief to have cost $300,000. It was alleged that in constructing the building defendants used and adapted many of the suggestions, plans and ideas developed by plaintiff and that the plaintiff's 5% commission is due because the purchase of the real estate and construction of the building were consummated. Plaintiff limited his claim to a percentage of the cost of the building and made no demand for compensation for negotiating and effecting a sale of the real property.

The contentions of the parties which require decision are the following: Plaintiff claims that the agreement pleaded was one that was not required to be in writing, and that proof of the agreement and full compliance on his part would entitle him to the agreed compensation; respondent, the California corporation, hereafter referred to as defendant, maintains that the services of plaintiff were only those of a broker endeavoring to make a sale of real property, the special services alleged being only incidental to the main purpose of assisting defendant in acquiring a suitable location, either improved or unimproved, and that a contract therefor was required to be in writing; that the writings do not constitute an employment of plaintiff for any purpose, nor an agreement to compensate him. Plaintiff replies that the writings are sufficient as a written employment of plaintiff to render the special services if a writing was required.

It is obvious that the letters were incorporated in the complaint upon the theory that they constituted a written agreement of employment and that this theory was pressed upon the trial court. As we shall presently see the correspondence which related to the question of performance, rather than to the matter of employment, tended to confuse the issue, namely, whether the

exhibits attached hereto and particularly Exhibits B, E, N, R, W, X, Y, Z, BB, DD, FF, II, KK.

"As a direct result of plaintiff's efforts and services defendants on or about February 8, 1950 purchased from the Central Manufacturing District, Inc., a 5.5 acre parcel of property for defendants' Los Angeles factory. Defendants thereafter and prior to the commencement of this action constructed a factory building and made improvements on said site, and plaintiff is informed and believes and therefore alleges that the cost of said building and improvements was $300,000. In erecting said factory building defendants used and adapted many of the suggestions, plans and ideas that had been developed by plaintiff for defendants in accordance with the agreement made between plaintiff and defendants. Directly in accordance with the provisions of Exhibit A and in accordance with the agreement made between plaintiff and defendants plaintiff is entitled to 5% of the cost of such improvements, that is, 5% of $300,000, to wit, $15,000. Said 5% commission is now due as contemplated by the agreement plaintiff had with defendants and as shown by Exhibit A because the purchase of the real estate and construction of the building and improvements thereon were consummated."

agreement pleaded was within the statute of frauds. We agree with the trial court that the writings do not constitute an employment of plaintiff or an agreement to pay him for his services. They merely show the nature of plaintiff's services, and defendants' requests for further information. If the writings alone were to be considered, we would not hesitate to regard them as insufficient to entitle plaintiff to recover any compensation for his services, but they must be considered with the allegations of the complaint. The agreement pleaded may fairly be construed as one under which plaintiff was to be compensated if he performed his services as agreed and a building was constructed upon a site "located" by him and purchased by defendant. The allegation that "defendants confirmed this agreement in writing as shown by the written documents attached hereto" etc., is a mere conclusion and not an allegation that the writings constituted the contract.

[1, 2] An employment of plaintiff to negotiate and assist defendants in effecting a purchase of real property for compensation or a commission would, of course, be invalid unless in writing. Code Civ.Proc., § 1973; Civ.Code, § 1624; Shanklin v. Hall, 100 Cal. 26, 34 P. 636; Dolan v. O'Toole, 129 Cal. 488, 62 P. 92; Duckworth v. Schumacher, 135 Cal.App. 661, 27 P.2d 919. A valid oral agreement could be made for the special services alleged, consisting of the surveys made, the furnishing of plans, specifications and estimates, and the negotiations carried on for the construction of a building by Central Manufacturing District.

An employment of plaintiff merely to give defendants information as to available factory sites would not have to be in writing. Wilson v. Morton, 85 Cal. 598, 24 P. 784. An employment of plaintiff "to locate a suitable industrial site," without any duty on his part to bring the parties together or to negotiate or assist in a purchase would not be an employment to purchase real property. See Blanchard v. Pauley, 92 Cal.App.2d 244, 206 P.2d 864. The complaint, exclusive of the exhibits, did not allege an agreement that was required to be in writing and we do not believe the attached correspondence constituted an employment different from the one alleged. So far as factory sites were concerned the letters from plaintiff conveyed information as to various sites but none of the letters from either side disclosed any negotiations or authority to negotiate with any of the owners until the Central Manufacturing District site was proposed. With reference to this site there were extensive negotiations carried on by plaintiff, but these were concerned with the proposed construction of a building on the site, which was the subject of numerous letters between plaintiff and the two corporations. Since it was not alleged in the complaint that plaintiff represented defendant as its agent in acquiring the real property, it was to be inferred that he represented only the seller. The allegation that the site was purchased and the building constructed "as a direct result of plaintiff's efforts and services" etc. would be true if plaintiff only "located" the site and rendered the agreed services in negotiating for and assisting in the construction of the building. It is not an allegation that plaintiff acted as defendants' agent in negotiating for the purchase of the real property.

It is clear that in the absence of an allegation of an express agreement, no obligation would be implied from the correspondence to compensate plaintiff for his alleged services, all of which would appear to have been merely incidental to his efforts to earn a commission from an owner for negotiating a sale of real property to defendant. Plaintiff has pleaded a most unusual agreement under which he was to locate a site but not negotiate for or otherwise assist in its purchase. Defendant says it would be strange indeed if a broker could earn a commission by merely pointing out a property which met the requirements of a customer. Perhaps what is meant is that it would be strange that one should agree to pay for so slight a service.

But the agreement which was pleaded called for considerable more than locating a site for defendant. It was alleged to have been entered into on or about August

15, 1946, and required plaintiff to render services in connection with the construction of a building, which subject, incidentally, did not arise for consideration until nearly three years later, when the 5.5 acre site was submitted together with plans, etc., for a building.

Although we hold that the agreement alleged was not within the statute of frauds, if we assume, as defendant does, that the correspondence shows that plaintiff, in his efforts to aid defendant in the acquisition of real property went beyond mere efforts to "locate" a site and that a contract for such additional services would have to be in writing, our conclusion would remain the same.

A trial court may find from the evidence that an agreement was made for the limited services alleged in the paragraph we have quoted from the complaint; it may find there was an oral agreement of employment to purchase real estate or that there was no employer-employee relationship whatever between the parties. We have only to determine whether the complaint pleads an agreement that was required to be in writing. The correspondence did not constitute the agreement which was pleaded. It did not purport to create an employer-employee relationship, and if there was an antecedent employment for any purpose it was not superseded by the correspondence which came later. What plaintiff did in the way of performance was not inconsistent with the existence of the agreement he alleged. The evidence of plaintiff's activities, as shown by the letters, will be of considerable importance upon a trial in determining what, if any, agreement the parties had, but if plaintiff has alleged an agreement not required to be in writing the terms of it would not be enlarged or the nature of the agreement changed by his putting forth more effort than the agreement called for.

If it should be determined that a written employment was required as to some of the agreed services, but not as to the remainder, the questions would arise whether the services were severable, and whether just compensation for those for which defendant had given valid authorization was readily ascertainable. Facts might be found which would render applicable the doctrine stated in Marks v. Walter G. McCarty Corp., 33 Cal.2d 814, 205 P.2d 1025. In that case a broker was orally employed to effect the sale of a furnished hotel; the sale was made through his efforts, the sale price of the furniture being $600,000. In a suit for a commission upon the price paid for the entire property the broker was allowed to recover a commission based on the selling price of the furniture, but was denied a commission on the sale of the real property. We are of the opinion that the principle declared in the cited case furnishes an alternative reason for our conclusion that the demurrer should not have been sustained.

We may say, however, in conclusion, that if the court should find that the services alleged were merely incidental to plaintiff's efforts to bring about a sale of real property to defendant, and that there was no express agreement of defendant to pay for the same, plaintiff cannot prevail in this action, either upon contract or in quantum meruit.

Other points argued in the briefs do not require special mention.

The notice of appeal is directed against several orders sustaining demurrers and an order quashing service against National Container Corporation. The orders being nonappealable, the purported appeals are dismissed. Appellant does not claim error in the order quashing service of process and will be deemed to have waived his right to a review of that order.

The judgment is reversed as to National Container Corporation of California and affirmed as to National Container Corporation.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

115 Cal.App.2d 87

MARON et al. v. SWIG et al.

Civ. 19196, 19207.

District Court of Appeal, Second District, Division 2, California.

Dec. 26, 1952.

Action by lessee of space in building for jewelry store, to recover from lessors for thefts from premises by lessors' building superintendent who had master key to lessees' premises. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, Fox, J., held that where lessees, who had been directed by lessors to contact lessors' building superintendent with respect to matters concerning the rented space, had informed superintendent that merchandise was being taken, and had requested a change in locks with retention of keys by lessees only, such notice of thefts was notice to the lessors, even though not conveyed to them by the superintendent who was in fact guilty of the thefts.

Judgment reversed.

1. Principal and Agent ⇐180

Where lease to space in building for jewelry store prohibited lessees from changing locks on doors or procuring duplicate keys without consent of lessors, when lessees, who had been directed by lessors to contact lessors' building superintendent with respect to any matters arising with reference to rented space, informed superintendent that merchandise was being taken and requested change in hours of cleaning personnel and in locks so that only lessees would have keys, such notice of the thefts was notice to the lessors, even though not conveyed to them by the superintendent who was in fact guilty of the thefts.

2. Principal and Agent ⇐177(1)

Knowledge acquired by an agent during the agency and within its scope is imputed to the principal even though the knowledge so acquired by the agent is not actually conveyed to the principal.

3. Principal and Agent ⇐124(1)

In action by lessees of space in building for jewelry store to recover from lessors for merchandise lost by thefts perpetrated by building superintendent of lessors, wherein it appeared that lessees had been directed to contact building superintendent with respect to matters concerning the rented space, and that they had informed superintendent of the thefts and had requested change in locks so that only lessees would have keys, and of hours of cleaning personnel, question whether it was within the scope of the building superintendent's agency to receive such complaints and to take reasonable means to correct the condition causing same, were factual and for jury.

4. Principal and Agent ⇐69(1), 180

Where an agent is in fact acting for his principal in a particular transaction, it is his duty, even though he may have an opposing personal interest, to communicate to his principal any facts in his possession material to the transaction, and the law will presume, in favor of third persons, that the agent made such communication.

5. Landlord and Tenant ⇐169(11)

In action by lessees of space in building for jewelry store to recover from lessors for loss of merchandise by thefts committed by building superintendent of lessors, wherein it appeared that lessees were prohibited from changing locks on doors and that master keys were retained by lessors and building superintendent, question of reasonableness and practicability of lessees' request for change of locks and that lessees have sole possession of keys, was for jury.

6. Landlord and Tenant ⇐169(7)

Where lease to space in building for jewelry store prohibited lessees from changing locks on doors or procuring duplicate keys without consent of lessors, and master keys were retained by lessors and certain of their employees, and thefts resulted, if it was within the scope of lessors' building superintendent to receive notice of thefts from lessees, and if request of lessees to change locks and retain all keys was reaonable, it was duty of lessor to protect their lessees' interest by complying with such request, and failure in such respect would constitute prima facie showing of liability.

7. Principal and Agent ⇐159(1)

A principal is responsible to third parties for wrongful acts committed by his agent in and as a part of the transaction of the business of the agency, and for the agent's willful omission to fulfill the obligations of the principal. Civ.Code 2338.

Amos Friedman, Fred Horowitz, Los Angeles, for appellants.

Pat A. McCormick, Frank P. Doherty, Milton A. Krug, Theodore Weisman, Los Angeles, for respondent.

FOX, Justice.

Plaintiffs leased certain space in the Spreckels Building, located in the city of Los Angeles, for the purpose of carrying on the jewelry business. Defendants are the owners and lessors. The doors to the demised premises were already equipped with locks, but the lease provided, among other things, that no additional locks would be placed on the doors and no duplicate keys were to be made without the consent of the owners. Three master keys were retained by the lessors, who seldom visited the building: one was kept by Mr. Genis, their agent and manager, one was in the possession of Mr. Lantz, as day superintendent, and the third was given to the night man. Genis operated a real estate business from his office in the building. He was absent from the city, however, about one-third of the time. He told Mr. Maron, who was in charge of plaintiffs' business, to contact Lantz with respect to "anything that might arise in the space." The latter testified that he looked after the building for Genis. Some months after plaintiffs took possession they discovered an unaccountable shortage in their inventory. Early in 1946 Maron requested Lantz to change the hours of the cleaning crew, which was furnished by defendants, from night to the daytime when plaintiffs would be there. Lantz refused to comply with this request. Some six months later, after having discovered further inventory losses, Maron again asked Lantz to change the hours of the cleaning crew to the daytime and also to change the locks, so that only the tenants or their employees would have keys to the premises. Lantz refused this request also. During 1947 and 1948 Maron advised Lantz several times of their continued inventory losses and renewed his request that the hours for cleaning be changed and that new locks be installed. Lantz still declined to accede to this request. There were four other tenants to whose premises neither the owners nor their representatives had keys. It was finally discovered that Lantz had been stealing plaintiffs' merchandise, gaining admission to the premises by the key which he had as superintendent. A judgment of nonsuit was entered, from which plaintiffs appeal.

Before the liability of the owners of the building for the thefts of Lantz can be determined three intermediate factual questions must be decided: (1) Was notice by plaintiffs to Lantz of the theft of their merchandise notice to defendants; (2) was plaintiffs' request for change of locks and elimination of outstanding keys reasonable; and (3) if their request was reasonable, was it within the scope of Lantz's authority to make the change? If these questions are answered in the affirmative then a prima facie showing of defendants' liability would be made as to merchandise stolen after such notice and request.

[1–3] In their complaint plaintiffs do not claim compensation for losses prior to August 1, 1946, and in their reply brief they direct attention to the fact that they do not seek recovery for any theft which occurred prior to the first notification to defendants through Lantz. Was notice to Lantz by plaintiffs of the thefts notice to defendants? The answer is Yes, if such was within the scope of his agency, for "Knowledge acquired by an agent during the agency and within its scope is imputed to the principal." Faires v. Title Ins. & Trust Co., 15 Cal.App.2d 350, 354, 59 P.2d 428, 430; Dressel v. Parr Cement Co., 80 Cal. App.2d 536, 540, 181 P.2d 962; Hellar v. Bianco, 111 Cal.App.2d 424, 427, 244 P.2d 757; Civ.Code, sec. 2332. The fact that the knowledge acquired by the agent was not actually conveyed to the principal does not prevent the operation of the rule. The

agent may have been thus guilty of a breach of duty to his principal, yet the knowledge of the agent has the same effect as to third persons as though his duty had been faithfully performed. Columbia Pictures Corp. v. De Toth, 87 Cal.App.2d 620, 630, 197 P. 2d 580. Was it within the scope of Lantz's agency to receive such complaints from the tenants and to take reasonable means to correct the conditions causing the same? These were questions of fact for the jury. See McChristian v. Popkin, 75 Cal.App.2d 249, 255, 171 P.2d 85; Hiroshima v. Pacific G. & E. Co., 18 Cal.App.2d 24, 29, 63 P.2d 340. Genis was the agent of the owners and the manager of the building. He had an office in it from which he carried on his real estate business. Maron testified to a conversation with Genis soon after plaintiffs moved in in which "Mr. Genis stated that Dan Lantz was the superintendent of the building, the man to see for any of the facilities that may need adjusting or anything that might arise in the space, that I should contact Mr. Lantz to look after it." Genis was out of the city four months out of the year during the period here involved. In response to a question as to his duties, Lantz testified: "Well, I managed the building in a way, looked after it for Mr. Genis." Respondent admits Lantz "was vested with considerable authority with respect to the management and operation of the building. He hired and dismissed, bought supplies, took care of tenants' needs, and generally looked after the building." The foregoing demonstrates that the extent and character of Lantz's authority and agency was not clear cut and was therefore a matter for the jury's determination.

[4] It may be claimed that, since Lantz had an interest contrary to his employers, notice to him of the thefts was not notice to them regardless of the scope of his agency and that notice to him could serve no purpose because, as the thief, he already knew too well the source of plaintiffs' trouble. The rule, however, is that if the agent is in fact acting for his principal in the transaction, even though he may have an opposing personal interest, it is his duty, notwithstanding his interest, to communicate to his principal any facts in his possession material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication. West American Finance Co. v. Pacific Indemnity Co., 17 Cal.App.2d 225, 236, 61 P.2d 963; Nat'l Bank of San Mateo v. Whitney, 40 Cal.App. 276, 283–284, 180 P. 845; McKenney v. Ellsworth, 165 Cal. 326, 329, 132 P. 75; Williams v. Hasshagen, 166 Cal. 386, 393, 137 P. 9; 6A Cal. Jur., pp. 1169–70, sec. 665.

[5] On the question of the reasonableness and practicability of Maron's request for change of locks and that plaintiffs have possession of all keys, the evidence shows that there were four tenants in the building to whose premises the employees of defendants did not have keys.

[6, 7] If the jury found that it was within the scope of Lantz's employment to receive notice of thefts from tenants' premises, and that the request of plaintiffs to change the locks and retain all keys was reasonable, then it would become the duty of the owners to protect their tenants by complying with their request. If the jury should find this duty was within the scope of Lantz's authority a prima facie showing of liability would be made, because under Civil Code section 2338 a principal is responsible to third parties for wrongful acts committed by his agent in and as a part of the transaction of the business of the agency and for the agent's willful omission to fulfill the obligations of the principal. Grigsby v. Hagler, 25 Cal.App.2d 714, 715, 78 P.2d 444; Transcontinental & W. Air v. Bank of America, 46 Cal.App.2d 708, 713, 116 P.2d 791; Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 655, 171 P.2d 5.

Since there were questions of fact as to the scope of Lantz's authority, and the reasonableness of plaintiffs' request, and since the evidence would have sustained findings on these issues adverse to defendants and established a prima facie showing of liability, the order granting respondent's motion for a nonsuit was clearly prejudicial.

The order of Judge Herndon granting plaintiffs' motion to retax costs becomes

moot by virtue of our conclusion as to the judgment. The appeal (Civil No. 19207) therefrom is dismissed.

The judgment is reversed.

MOORE, P. J., concurs.

McCOMB, J., dissents.



115 Cal.App.2d 192

MENDEZ et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 15154.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1953.

Action against electric company for injuries received by minor who grasped wires on roof of house in a federal housing project. The Superior Court, Contra Costa County, Hugh H. Donovan, J., entered judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, First Appellate District, Division Two, Jones, J. pro tem., held that where neither the complaint nor plaintiffs' opening statement contained any charge that the wires and appliances furnished and installed by the United States were to be maintained in a safe condition by the electric company, the complaint and opening statement were fatally defective and granting defendants' motion for nonsuit was proper.

Affirmed.

1. Evidence ⇐48

Trial court was bound to take judicial notice of the provisions of a contract between the federal government and utility company sued for personal injuries allegedly due to company's negligence in maintaining electric wires in housing project operated by federal government. Code Civ.Proc. § 1875.

2. Trial ⇐109

A motion for nonsuit may be granted on an opening statement when it clearly appears from all the facts alleged in the complaint and stated by counsel and all favorable inferences to be deduced therefrom that no cause of action exists. Code Civ. Proc. § 581c.

3. Electricity ⇐19(2)
Trial ⇐109

In action against electric company for injuries received when minor grasped allegedly frayed and poorly insulated wires on roof of house in a federal housing project, in which action neither the complaint nor plaintiffs' opening statement contained a charge that the wires and appliances furnished and installed by the United States were to be maintained in a safe condition by the electric company, the complaint and opening statement were fatally defective, and trial court properly granted motion for nonsuit. Code Civ.Proc. § 581c.

Edward E. Craig, Berkeley and H. J. Rodriguez, Oakland, for appellants.

Carlson, Collins, Gordon & Bold and Frederick Bold, Jr., Richmond, for respondents.

JONES, Justice pro tem.

This appeal is from a judgment of nonsuit entered upon the opening statement of plaintiffs' counsel to the jury.

The action is for damages for personal injuries which plaintiff alleges he sustained because the Pacific Gas and Electric Company "carelessly and negligently managed, maintained and controlled" electric wires from their pole to 4720 Mead Street in the City of Richmond, California. It is alleged by the plaintiff that the insulation on said electric wires was allowed to become deteriorated and put in such a state of disrepair so that when he grasped them the electricity was permitted to course through his body.

At the commencement of the trial plaintiffs' counsel made the following opening statement to the jury:

"Ladies and Gentlemen of the Jury, you heard what the Judge said about the nature and purpose of an opening statement. My evidence will show to

you what happened in this case. It's a very simple tale of a boy and a ball and some bare wires and a fall and some injuries; that's what it amounts to.

"My evidence will show that on September 9th, 1949, someone, I don't know whether it was the plaintiff in this case or someone else, knocked a ball on the roof of the house where the plaintiff was living, which is in the Seaport Housing Facilities; that the Pacific Gas and Electric Company delivers electricity to that housing place; that on this particular occasion the plaintiff, this young boy, went up on the roof to retrieve his ball, or the ball that was knocked up there. When he got up there, he grabbed onto some wires, apparently for support. These wires were electric wires, which delivered electricity into this housing unit. The wires had been allowed to become bare; I mean the ordinary insulation which surrounds the wires had become frayed and the wires bare, and as the boy grabbed the wires they came together, and there was a flash, an electric arc, which, if you don't know it, the electric arc produces ultraviolet rays, the same as the sun. And the burn from an electric arc, whether you're a welder or whether you're a small boy retrieving a ball, or whatever you are, has the same effect upon the system as the sunlight does—prolonged sunlight. It's a momentary flash of rather severe intensity, and it exposes the parts of the person that are exposed to this ultraviolet light which affects the face, the skin, the hands and the eyes. And when this boy got this flash, naturally he let go and he fell to the ground.

"He sustained a few injuries on account of the fall. As a result of the flash he sustained some eye injuries. He was taken to the Permanente Hospital for treatment. He was treated there by a Doctor Smithburn. Doctor Smithburn has about a month ago, we discovered, left the Permanente Hospital and has gone south. We haven't been able to locate him, so there will be no testimony from Doctor Smithburn. We'll have to rely on the testimony of the boy himself and on the testimony of people who have seen him, and his parents, to prove the injuries.

"Later on, some months later, the boy was taken to an eye specialist, in Oakland, for an examination. The examination revealed that the boy had completely recovered from whatever eye injuries he received, so it would be senseless and useless for us to bring in a doctor to tell you that when he examined the boy there were no injuries.

"And we will then show, by the evidence, that after this flash, the Pacific Gas and Electric Company, with their own equipment, came in and repaired the wires; not only on this one occasion, but on a later occasion they came in with their own equipment and repaired the same wires only a few feet away, where another fire had broken out. With that we will submit the case to you."

At the conclusion of the statement counsel for the defendant company objected to its sufficiency to make out a case against the company, and requested that plaintiffs' counsel make it sufficient by stating that the defendant was under a duty to manage, maintain or control the wires involved which are within the Seaport Housing Project operated by the Federal Government. This, counsel for plaintiffs declined to do and the defendant then asked the court to take judicial notice of a contract for supplying electricity to the Seaport Housing Project between the United States and the Pacific Gas and Electric Company. By the terms of this contract it is provided that, "The Government shall furnish, construct, own and operate the complete and entire electric distribution system of the development from the points of delivery." It is further provided by the contract that the company shall deliver a 12,000 volt current to "the first pole of the Government's distribution system located approximately 80 feet east of the east line of 47th Street which is also the westerly

boundary of the development and approximately 160 feet south of the south line of Mead Street." The contract also states that "All electricity supplied" is to "be measured at said point of delivery or at another mutually satisfactory point adjacent thereto", and "No portion of the electricity supplied * * * shall be resold, except that the Government may sell or otherwise distribute electricity to the tenants of the Development." The effect of the contract is to prohibit the company from distributing or selling any of the delivered electricity within the project.

After the contract was called to the attention of the court considerable discussion with counsel ensued as to its effect upon the pleadings and the opening statement. Plaintiffs' counsel was then given an opportunity to modify or add to the statement and to amend his complaint. He declined to do either, and with respect to this opportunity the court said: "Now, the Court has given counsel an opportunity to supplement his opening statement. The Court has also given counsel an opportunity to amend his pleadings. The counsel has declared that he will stand on matters as they now are, on the opening statement and also the pleadings." After this statement the motion for the judgment of nonsuit was granted.

Under the provisions of section 1875 of the Code of Civil Procedure "Courts take judicial notice of the following facts: * *

[1] "3. Public and private official acts of the legislative, executive and judicial departments * * * of the United States * * *." The trial court was bound to notice judicially the provisions of the contract, People v. Tulare Packing Co., 25 Cal. App.2d 717, 78 P.2d 763; Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175, and in considering the complaint to read the pleading as if the contract were set out in full therein. Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666; Livermore v. Beal, supra, 18 Cal.App.2d 535, 64 P.2d 987; Sheehan v. Vedder, supra, 108 Cal.App. 419, 292 P. 175. When so considered the complaint in effect pleaded that the Federal Government constructed, owned and operated the complete and entire electric distribution system of the development project beyond the designated delivery point, and that the Government was supplying electricity to the house at 4720 Mead Street at the time of the accident.

[2, 3] No attempt is made in the opening statement to charge the Pacific Gas and Electric Company with the ownership, or duty to maintain the distributing system, or with any right or obligation to distribute the power within the project. The most that the statement charges is that the company delivers electricity "to that housing place", and "the Pacific Gas and Electric Company, with their own equipment came in and repaired the wires". Nor is there any charge in the pleading or in the statement that the company was obligated by subsequent agreement, or otherwise to see that the wires and appliances furnished and installed by the United States were to be maintained in a safe condition by the Pacific Gas and Electric Company. The failure to charge a duty to maintain the line in a safe condition renders both the pleading and the statement fatally defective.

The rule is not disputed that the Court may grant a motion for nonsuit on the opening statement where it clearly appears from all the facts alleged in the complaint and stated by counsel and all the favorable inferences to be deduced therefrom that no cause of action exists. Code of Civil Procedure, section 581c; Bias v. Reed, 169 Cal. 33, 145 P. 516; Wrightson v. Dougherty, 5 Cal.2d 257, 54 P.2d 13; Paul v. Layne & Bowler Corp., 9 Cal.2d 561, 71 P. 2d 817; Davis v. West Shore Co., 55 Cal. App.2d 220, 130 P.2d 459; Porter v. Fiske, 74 Cal.App.2d 332, 171 P.2d 971.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

115 Cal.App.2d 157

PEOPLE v. ONE 1949 FORD TUDOR SEDAN et al.

Civ. 15210.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1952.
Rehearing Denied Jan. 29, 1953.
Hearing Denied Feb. 26, 1953.

Proceeding by state to forfeit interests of individual, as registered owner, and bank, as legal owner, in a motor vehicle on ground that it had been used to transport narcotics. The Superior Court, City and County of San Francisco, Warren Steel, J., entered judgment forfeiting registered owner's interest, but refused to forfeit the interest of the bank, and the state appealed. The District Court of Appeals, Peters, P. J., held that evidence established that interest of the bank in the automobile, as assignee of conditional sales contract, was created after a reasonable investigation by the conditional vendor of the moral responsibility, character and reputation of the registered owner.

Judgment affirmed.

1. Forfeitures ⇐5

On appeal by state from adverse portion of judgment forfeiting registered owner's interest in automobile on ground that he had used it to transport narcotics, but denying forfeiture of bank's interest as legal owner of automobile, transportation of narcotics by registered owner so as to warrant forfeiture of his interest would be accepted as a fact, in absence of cross-appeal by registered owner. Health and Safety Code, §§ 11500, 11610–11629, 11620.

2. Evidence ⇐568(1)

Where witness says that an event "probably" occurred, he is, in effect, stating that according to his best recollection it did occur, and word "probably" does not prevent the testimony that follows from being substantial evidence.

3. Evidence ⇐568(1)

In proceeding to forfeit automobile used to transport narcotics, involving issue as to whether automobile dealer had communicated the result of its investigation of moral responsibility, character and reputation of automobile buyer to bank to which conditional sales contract for purchase of automobile was assigned, testimony of manager of automobile dealer's insurance and contract division that information was "probably" given bank was not a mere guess or conjecture, but constituted substantial evidence that would support finding of communication. Health and Safety Code, §§ 11500, 11610–11629, 11620.

4. Forfeitures ⇐5

On state's appeal from adverse portion of judgment forfeiting buyer's interest in automobile used to transport narcotics, but denying forfeiture of conditional sales contract assignee's interest, the District Court of Appeal, in exercise of its power to make additional findings based on evidence in the record, would add finding that information gained by conditional seller's investigation of buyer had been communicated to assignee, where testimony that information was "probably" communicated was taken without objection and stood uncontradicted. Code Civ.Proc. § 956a; Health and Safety Code, §§ 11500, 11610–11629, 11620.

5. Forfeitures ⇐5

Statute providing that claimant in proceeding to forfeit a motor vehicle may prove conditional sales contract to be bona fide and his interest to have been created after reasonable investigation of moral responsibility, character and reputation of purchaser, does not require assignee of conditional sales contract to make independent investigation, if investigation made by seller was sufficient, and assignee could rely on seller's investigation whether or not the results thereof were communicated to assignee. Health and Safety Code, § 11620.

6. Forfeitures ⇐5

Under statute providing that claimant in a proceeding to forfeit a motor vehicle may prove conditional sales contract to be bona fide and his interest to have been created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, whether a sufficient inquiry has been made is a question of fact. Health and Safety Code, § 11620.

7. Forfeitures ⇐5

In proceeding to forfeit automobile used to transport narcotics, finding that interest of bank in automobile, as assignee of

conditional sales contract, was created after a reasonable investigation, made by conditional vendor, of the moral responsibility, character and reputation of the purchaser, was sustained by evidence. Health and Safety Code, §§ 11500, 11610–11629, 11620.

Edmund G. Brown, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for appellant.

Samuel B. Stewart, Jr., Christopher M. Jenks, Richard Saveri, San Francisco, for respondent.

PETERS, Presiding Justice.

By this proceeding the State seeks to forfeit the interests of James Cole, as registered, and the Bank of America as legal owners in a motor vehicle on the ground that it had been used to transport narcotics in violation of section 11500 of the Health and Safety Code. Cole was served and answered but made no appearance at the trial. The lower court forfeited Cole's interest but refused to forfeit the interest of the Bank. The State appeals from that portion of the judgment favorable to the Bank.

[1] Although Cole was convicted in a criminal proceeding of transportation and possession of narcotics, such conviction, insofar as the transportation count is concerned, was subsequently reversed. People v. Cole, 113 Cal.App.2d 253, 248 P.2d 141. But in the instant case, since Cole has not appealed, it must be and is accepted as a fact, as found by the trial court, that Cole transported narcotics so as to warrant the forfeiture of his interest in the automobile.

The vehicle was sold to Cole on November 10, 1949, by the S & C Motors under a conditional sales contract, Cole turning in an old car as part of the purchase price, and the balance due of $2,126.70 being payable over a 30-month period. This contract, for a valuable consideration, and in the regular course of business, was assigned by S & C Motors on November 25, 1949, to the Bank of America. When the car was seized by the law enforcement officials on March 9, 1951, the contract had been paid down so that but $1,063.35 was due on it.

The law provides for the forfeiture of a vehicle used to transport narcotics unlawfully. §§ 11610–11629 of the Health and Safety Code. Under proper circumstances the interests of both the legal and registered owners may be forfeited, but section 11620 of the Health and Safety Code provides: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

It was stipulated, and the trial court found, that two of the three conditions required by this section existed, i. e., that the bank's conditional sales contract had been assigned to it in the normal and regular course of business and was bona fide, and that at the time of the assignment the bank had no actual knowledge that the car was to be used to transport narcotics. On the third element set forth in the section the trial court found that when Cole purchased the car from S & C Motors he submitted to that company a purchaser's statement containing information and references "to be used for the purpose of investigating the responsibility, character and reputation of James C. Cole"; that prior to entering into that contract "S & C Motors did conduct a reasonable investigation of the moral responsibility, character and reputation of the purchaser, James C. Cole"; that the contract was assigned to the Bank, and that "the right, title, lien or interest of the Bank * * * in and to the defendant vehicle above named was created after a reasonable investigation of the moral responsibility, character and reputation of James C. Cole had been conducted." Based on these findings, the court refused to forfeit the interest of the Bank, fixed the *quantum* of that interest, and entered its judgment accordingly.

It is the theory of the State on this appeal that the finding that S & C Motors conducted a proper investigation is unsupported by any substantial evidence; that even if a proper investigation had been conducted by S & C Motors there is no evidence that the results of that investigation were communicated to the Bank; and that the Bank cannot bring itself within the protection of section 11620 of the Health and Safety Code unless it makes its own investigation or has the results of a proper prior investigation communicated to it. Therefore, urges the State, under the evidence, as a matter of law, it is entitled to forfeit the interest of the Bank.

The evidence on these basic questions is as follows: As part of the purchase transaction S & C Motors required Cole to fill out a "purchaser's statement." That document represented that Cole was living at 1053 Fell Street, San Francisco, and had lived there for one year; that he formerly had resided for seven years at 1364 Grove Street, San Francisco; that he was thirty years of age, married, and had two dependents; that he was employed by Bob Hawk at the Hamilton Field barber shop as a barber at a salary of $80 per week, and had worked there for ten months; that he had a bank account in a designated branch of a San Francisco bank. As a business reference he listed the Mercantile Acceptance Corporation and the Anglo-California Bank, who had carried a prior credit contract for him. He listed as a relative his mother-in-law, giving her name and address.

The S & C Motors, by the use of the facilities of the Retail Credit Association, proceeded to verify some of this information. The credit association informed S & C Motors that Cole was a barber employed at Hamilton Field, an Army Air Base, at a salary of $75 per week; that he previously had worked for Army Transport Service; that he resided at 1053 Fell Street, and that he was "well regarded" and had "steady employment." The credit association also told S & C Motors that Cole had had a previous contract with Mercantile Acceptance which had been paid up regularly.

A representative of the credit association testified that when S & C Motors telephoned for a report on Cole in November, 1949, they already, for another client, had a report on Cole, which report had been compiled in June of 1949. This report had been prepared by a correspondent of Retail Credit located in San Rafael, who reported Cole as "dependable." The manager of the reporting department of Retail Credit pointed out that his company carefully peruses the legal and other newspapers in the area, clipping and filing any derogatory or complimentary information there contained, and that such information dealing with a man's moral character is passed on to subscribers. The report on Cole had no derogatory information, which meant that nothing derogatory was known by the Retail Credit Association concerning Cole.

The employee of the Marin County Credit Association, who had made the actual investigation of Cole at the request of the Retail Credit Association of San Francisco, testified that she telephoned the Hamilton Field barber shop, asked to talk to the manager, and secured the information already described.

The bank made no independent investigation of Cole at the time it accepted the assignment. No bank representative testified that the results of the S & C Motors' investigation were communicated to it, but the manager of the insurance and contract division of S & C Motors, when asked if he had passed on the information to the Bank, without objection, testified: "Well now, that I couldn't state, whether it was passed on to the Bank of America. Offhand I would say it probably was." There is no contradiction of this evidence.

[2] The State contends that the evidence last quoted is insufficient to show communication to the Bank, and that had a finding been made to the effect that S & C Motors had communicated the information it had secured about Cole to the Bank, such finding would be unsupported by the evidence. It is urged that the testimony that "I would say it probably was," is a mere guess or conjecture and does not

constitute substantial evidence that would support a finding of communication had such a finding been made. Such contentions are not sound. The word "probably" does not prevent the testimony that follows from being substantial evidence. When a witness says that an event "probably" occurred or that it is "probable" that it occurred, he is, in effect, stating that, according to his best recollection, it did occur. In Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77, the court stated: "The term 'probable' has been defined to mean 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.'" In Weingetz v. Cheverton, 102 Cal.App.2d 67, 226 P.2d 742, 743, testimony couched in phrases that the witness "thought so," "claimed," or "was of the opinion" was held to be substantial and sufficient to support a finding. In People v. Soap, 127 Cal. 408, 59 P. 771, it was held that the answer "I presume" was properly not stricken upon motion. The court stated, 127 Cal. at page 410, 59 P. at page 772: "* * * While a witness can testify only to facts which are within his knowledge, he is not required to testify with that certainty which excludes all doubt from his mind. The word 'presume,' as used by the witness, was nothing more than a statement of his best recollection." In People v. One 1940 Chrysler Coupe, 48 Cal.App.2d 546, 120 P. 2d 117, the investigator employed by the seller of a car testified that he "assumed" that a bank of whom he made inquiry had made an investigation of the purchaser. It was held that this testimony unobjected to and uncontradicted was evidence that such an investigation had been made. In Jacklin v. North Coast Transp. Co., 165 Wash. 236, 5 P.2d 325, the court held that the use of the word "probably" by a witness did not necessarily imply conjecture on his part, and that such testimony was admissible. None of the cases cited by appellant suggests or compels a contrary holding.

[3, 4] Although the trial court made no express finding that the information gained by S & C Motors had been communicated to the bank, this court, at least in support of an affirmance, has the power to make additional findings based on the evidence in the record. Code Civ.Proc. § 956a. In the instant case the testimony that the information was "probably" communicated came in without objection and stands uncontradicted. Exercising the power conferred by the section we hereby add to the findings a finding to the effect that the information gained by S & C Motors was communicated to the Bank of America.

[5] Such finding is, however, not indispensable to support the judgment. It is our opinion that, under the law, assuming the investigation by S & C Motors was sufficient, the Bank can rely on that investigation whether or not the results of the prior investigation were communicated to it. If a proper investigation is in fact made by the seller of the automobile it does not matter that a subsequent assignee made no independent investigation or did not know of the prior investigation by his assignor. The statute does not require that the claimant make the required investigation personally. Section 11620 of the Health and Safety Code merely requires the claimant to show that his interest "was created after a reasonable investigation", without specifying who must conduct that investigation. If the Legislature had intended that the claimant must make the investigation or must know of the results of a prior investigation, it would have been a simple matter to have so provided.

A rule that the assignee could not depend upon a prior proper investigation made by his assignor, even though unknown to the assignee, would lead to absurd results. The assignment to the Bank from S & C Motors, as is usual in such cases, contains an express guarantee that the purchaser, Cole, will make all payments due under the contract. If it be assumed that S & C Motors made a proper investigation, then, if it still held the conditional sales contract, its interest could not be forfeited. But if the Bank, even without knowledge, cannot rely on the assumed proper investigation made by S & C Motors, then the Bank's interest will be forfeited, and then it could recover its total loss, including attorney's

fees, from S & C Motors. Thus S & C Motors, a company that we have assumed fully complied with the statute, nevertheless would, in effect, have its validly created and forfeiture free interest in the car forfeited.

The policy of the statute is to prevent automobiles, as far as possible, from falling into the hands of persons who will use them to transport narcotics. Such policy is amply served by interpreting the statute so that all that is required is a prior proper investigation. No useful purpose would be served by requiring each successive assignee to make his own investigation or know of the prior one.

This point seems never to have been directly passed on in this state. It was discussed in People v. One 1938 Buick Sedan, 39 Cal.App.2d 42, 102 P.2d 447, 451, where the court expressed, by way of dicta, the opinion that an assignee could not rely on a prior investigation made by the seller and unknown to the assignee. That was a case affirming a judgment forfeiting an assignee bank's interest on the ground that no reasonable investigation had been made. Both the assignor and the assignee had made independent investigations. Neither communicated the results to the other. The two investigations were remarkably similar and disclosed substantially the same information. The appellate court upheld a finding that no sufficient investigation had been made. Thus, since the Bank's investigation was not legally sufficient, as a matter of law, to upset the finding, obviously the prior similar investigation by the seller was equally insufficient. In discussing the problem generally the court stated that it was "inclined to the opinion" that the Bank could not rely on the prior investigation by the seller. The precise language used was as follows, 39 Cal.App.2d at page 50, 102 P.2d at page 451: "Appellant claims that in the establishment of its claim of title or interest it is entitled to rely, not only upon the independent investigation made by it, but in addition, the investigation made by the original conditional vendor. We are inclined to the opinion that unless the assignee makes inquiry of the vendor as to the information obtained by him, or otherwise obtains such information from him, the assignee would not be entitled to use such evidence in support of its claim. If the interpretation be otherwise, any original vendor might discover, after an incomplete investigation, that he had sold a car to a person who was not morally responsible and not possessed of a good character and reputation and was a reputed narcotic violator, and might thus avoid the liability of forfeiture by assigning his contract to a third party. Could it be claimed that the third party, the assignee, might then omit the necessity of an independent investigation of its own, and rely upon the original investigation of the vendor as the basis of its claim? We think not. For if it be otherwise, the purpose of this provision of the act pertaining to forfeitures could be easily defeated. We do not intend to convey the impression, however, that such evidence as was obtained by the vendor could not be used by the assignee in support of its claim, if it were properly communicated to the assignee as a part of its investigation prior to or at the time of the purchase of the contract by the assignee. The evidence in the instant case does not show any inquiry of the vendor by the assignee as to his investigation. Therefore, the results of his investigation would not be available to appellants."

We think this dicta is unsound and should not be followed. The compelling arguments already mentioned that support a contrary conclusion were not discussed. The reason given for reaching the conclusion that an assignee cannot rely on an investigation made by his assignor uncommunicated to the assignee, i. e., that an irresponsible assignor could shirk his duty of investigation by making an "incomplete" investigation and then assigning, thus freeing the car from the danger of forfeiture, is unsound. Such danger does not exist. The court apparently completely overlooked the fact that neither the seller nor his assignee is freed from the danger of forfeiture unless one or the other, or both, has or have made a "reasonable investigation." Under the facts assumed in the quotation since the assumed investigation was "incomplete," it would not be "reasonable"

and neither the seller nor the assignee could rely upon it.

We conclude that, assuming the investigation by S & C Motors was sufficient to protect it, such investigation likewise would protect the Bank, either because the results of such investigation were in fact communicated to it by S & C Motors, or, if not so communicated, then such communication was not necessary.

That brings us to the basic question involved, namely, was the investigation by S & C Motors sufficient to support the finding that prior to the sale "S & C Motors did conduct a reasonable investigation of the moral responsibility, character and reputation of the purchaser"?

There have been many cases discussing the sufficiency of the investigation required by the statute, and laying down certain general principles. These principles were summarized as follows by this court in People v. One 1940 Buick 8 Sedan, 70 Cal. App.2d 542, 548, 161 P.2d 264, 268:

"1. The defense that the investigation required by the statute has been made is an affirmative defense, and the burden of proof on the issue rests with the claimant.

"2. The question as to whether a proper investigation has been made is one of fact and is to be tested by the legal standards ordinarily applied to such fact questions.

"3. The statute does not prescribe the maximum or minimum of the investigation that must be made. It requires a 'reasonable' investigation of the factors involved. What is reasonable must be governed by the facts of each case.

"4. An investigation into the financial standing or the credit rating of the car purchaser is not sufficient—the law requires an investigation of the 'moral responsibility, character, and reputation of the purchaser.'" This last rule has frequently been announced by the courts. See, for example, People v. One Packard 6 Touring Sedan, 26 Cal.App.2d 150, 79 P.2d 130; People v. One Lincoln Eight, etc., 12 Cal. App.2d 622, 55 P.2d 925; People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013.

[6] Aside from these general rules, the courts have seldom attempted to formulate a specific test of a sufficient inquiry. See, however, 43 Cal.App.2d 411, 416, 110 P.2d 1013, supra, hereafter discussed, where the court did suggest certain minimum requirements. This reluctance is understandable because, as already pointed out, whether a sufficient or insufficient inquiry has been made is a question of fact, and generally must be governed by the facts of each case. Subject to the general rules already mentioned, a precise test is impracticable. The best that can be done is to look at the facts and holdings of the decided cases and compare them with the facts of the case involved, so as to ascertain, if possible, by this inductive process, on which side of the line the case involved falls.

An examination of the cases discloses some apparent conflicts. Most, but not all of these conflicts, have arisen because the language used must be read in connection with the precise holding of the particular case, that is, whether it is an affirmance of a finding of sufficient investigation or of insufficient investigation, or is a reversal of such a finding.

The cases upholding a finding of insufficient investigation are not very helpful because, although some of them contain general language as to what constitutes a sufficient investigation, such language must be read in view of the fact that the trial court had found that the particular investigation was insufficient, and all the appellate court held was that this finding was supported. In several of the cases contrary inferences were possible, and undoubtedly a contrary finding would also have been upheld.

In People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, 161 P.2d 264, heavily relied upon by the State, the investigation was substantially less than the one here involved. In that case the current employer of the purchaser was not interviewed, although his name had been given as a reference, and the credit investigation that was made disclosed a falsehood about a former occupation. The seller of the car was not

even informed as to the current address of the purchaser. In the instant case the present employer was interviewed and the current address of the purchaser verified, and other facts discovered or verified.

People v. One 1938 Buick Sedan, 39 Cal. App.2d 42, 102 P.2d 447, is another case affirming a forfeiture. There both the auto dealer and the assignee bank made investigations. The agent of the dealer had visited the purchaser's home, obtained a purchaser's statement, talked to a reference who gave no derogatory information, and checked the credit rating of the purchaser. The bank made a similar investigation, checking the purchaser's statement, obtaining a credit rating and talked to a reference, who knew nothing unfavorable. The purchaser had a long prior criminal record and there was conflicting evidence as to whether this was shown by the credit reports. The court held that, as a matter of law, this evidence did not compel a finding of sufficient investigation. The basic thesis of the case is that, because the purchaser was a lewd and dissolute person with a long criminal record, any reasonable investigation would have disclosed these facts.

In People v. One 1941 Buick Club Coupe, 72 Cal.App.2d 593, 165 P.2d 44, the facts faintly resemble those of the instant case—the claimant telephoned the employer and was told the purchaser was "fairly steady," and a reference told the claimant that the purchaser was not in the habit of getting into difficulties except for minor gambling. The finding of insufficient investigation was upheld.

In People v. One Pontiac 8 Sedan, 22 Cal.App.2d 503, 71 P.2d 302, there was no investigation at all.

None of the above cases is very helpful. Cases much more important are those which reversed judgments upholding the lien claimant on a finding of sufficient investigation.

People v. One Lincoln Eight, etc., 12 Cal. App.2d 622, 55 P.2d 925, is strongly and properly relied on by the State. In that case there was only a credit investigation and inquiry made of two references who gave conflicting recommendations, one stating that the purchaser was "a very fine gentleman," the other that he was "a good old soak." The court, in holding that this investigation was insufficient as a matter of law, pointed out that where conflicting information as to character is received the lien claimant is under a duty of further inquiry.

People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013, which is not cited by the State, is one of the more extreme cases holding an investigation insufficient as a matter of law. The seller there interviewed two acquaintances of the prospective purchaser. One, the operator of a restaurant where the purchaser customarily ate, but whose acquaintanceship was otherwise meager, told the seller that Fong, the purchaser, "is a good character, his moral is good, and good reputation too." The other person interviewed was one Gamble about whom the seller knew "practically nothing" and whose relationship, if any, to Fong, was not developed. He told the seller that Fong "has a good reputation and morals is all right." A credit investigation was also made. The address given by the prospective purchaser was a tong headquarters, but no investigation was made there. The court pointed out that the seller did not ascertain the purchaser's "business nor his residence address, nor make inquiry of any of his countrymen, except Mrs. Tom [the restaurant operator], nor learn where he had previously lived, or the nature of his work, or the names of any employers." 43 Cal.App.2d at page 414, 110 P.2d at page 1015. It was also held that a bona fide investigation should, at least, "reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community." 43 Cal.App. 2d at page 416, 110 P.2d at page 1016. The investigation was held insufficient as a matter of law.

In People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 970, the only investigation made, and quite properly held insufficient as a matter of law, was to ascertain the fact of employment. In People

v. One 1940 Ford V-8 Coupe, 36 Cal.2d 471, 224 P.2d 677; People v. One 1938 Ford Sedan, 98 Cal.App.2d 333, 219 P.2d 839; People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 55 P.2d 908, there was no character investigation at all. In People v. One 1937 Packard, 50 Cal.App.2d 761, 123 P.2d 900, there was merely knowledge of the reputation of the parents of the purchaser, and a credit rating.

The cases directly in point on the problems here involved are those affirming judgments in favor of claimants based on findings that the investigations there involved were sufficient. One of the leading cases is People v. One 1940 Chrysler Coupe, 48 Cal.App.2d 546, 120 P.2d 117. There a credit man checked the purchaser with a bank, learning that satisfactory payments had been made on a prior account, and that the bank, via its own credit investigation, had learned nothing derogatory about the purchaser's reputation. The purchaser's statement showing the purchaser's address, his occupation, the names of relatives and some facts regarding his assets was verified. The court held that the finding of sufficient investigation was supported, and that People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013, supra, was not controlling. The facts of the case closely resemble those of the instant case.

People v. One Plymouth Sedan, 21 Cal.App.2d 715, 69 P.2d 1011, strongly supports respondent, and is probably inconsistent with the rationale of the 43 Cal.App.2d 411, 110 P.2d 1013 case cited above. The court curtly dismissed the contention that the finding of sufficient investigation was unsupported as being "totally without merit." The court held that the following facts learned by the seller supported the finding: That the purchaser "was a butcher by trade and had been employed in a market in San Jose for several years; that his employer was visited by an agent of the finance company who made inquiry concerning his character and reputation and was assured that he was all right. A certain credit association had also assured the finance company that the purchaser was responsible. The evidence concerning the inquiry satisfies the requirement of the act that a reasonable investigation be made, and fully supports the finding upon the subject." 21 Cal.App.2d at page 717, 69 P.2d at page 1012.

People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 147 P.2d 49, is a case upholding a finding of sufficient investigation on very slim evidence indeed—there the seller interviewed only the landlord of the purchaser, and learned the purchaser promptly paid his rent and that the landlord knew nothing against him. Much said in the case might be relevant to the present problem were it not for the fact that the opinion discloses that these statements were predicated upon a marked hostility towards the forfeiture statute by the majority of the court, which feeling it not in accord with the majority and best reasoned cases on the subject. One justice dissented and three Supreme Court justices voted for a hearing.

In People v. One 1939 Plymouth 6 Coupe, 41 Cal.App.2d 559, 107 P.2d 266, the financing was conducted by a bank manager with a long time personal knowledge of the applicant, who also checked the references given. The evidence was ample to support the finding of sufficient investigation.

People v. One 1939 Buick Coupe, 56 Cal.App.2d 163, 132 P.2d 308, 310, is an interesting case because it upheld a finding of sufficient investigation where inquiry was made of but one reference who was well known to the bank, the employer of the applicant, who vouched for the "good moral character" of the applicant, and offered to endorse his note. It was held that the test was whether the information gained by the seller was sufficient to "satisfy a reasonably prudent person" of the purchaser's good moral character.

[7] These cases support the conclusion that the investigation made by the seller and by the Retail Credit Association on behalf of the seller was sufficient to warrant the trial court in finding as a fact that a proper investigation had been made. Here an inquiry was made of the present employer. The fact of the employment of the applicant was verified, as well as the

amount of his salary, and that such employment was steady, and it was learned that the applicant had previously worked for the Army Transport Service. The employer verified the residence of the applicant, and asserted that the applicant was "well regarded." The credit association also ascertained that the applicant had paid up regularly in a prior credit transaction, and that he was "dependable." The evidence shows that had there been any derogatory information generally known about the applicant, this fact would have been known to the credit association and reported to the subscriber, the car dealer, but that no such information was contained in the purchaser's file. While this investigation was not exhaustive, the trial court was justified in finding that it was sufficient to satisfy a reasonably prudent man of the "moral responsibility, character and reputation" of the purchaser.

The findings are amended as hereinbefore indicated, and the portion of the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

KESTERSON LUMBER CORP. v. FRIESLEBEN ESTATE CO.

Sac. 6307.

Supreme Court of California, in Bank.

Jan. 13, 1953.

Rehearing Denied Feb. 11, 1953.

Purchaser's action against vendor to recover down payment, wherein the vendor, by way of affirmative defenses and cross-complaint, invoked the equitable principle that the purchaser was not entitled to restitution without the restoration of the benefits received by it under the contract. The Superior Court, Butte County, Harry Deirup, J., rendered judgment for defendant on its cross-complaint, and plaintiff appealed. The Supreme Court, Shenk, J., held that the trial court had correctly construed the ambiguous contract.

Affirmed.

Prior opinion 241 P.2d 672.

1. Sales ⇐54

Vendor and Purchaser ⇐46

In action involving rights of parties under contract for purchase and sale of real and personal property owned by defendant, court correctly proceeded to interpret contract based on a construction of language in the light of the surrounding circumstances. Code Civ.Proc. § 1860; Civ. Code, § 1647.

2. Evidence ⇐461(1)

Where contract for sale of ranch contemplated contingency that third party might prevail in his claim to property by providing that in such event purchaser should be entitled to restitution of initial payment, but contract failed to provide for surrender of possession of realty or restoration otherwise on part of purchaser, contract was ambiguous, and resort could properly be had to extrinsic evidence for purpose of determining what parties had contemplated should be required of purchaser in event of third party's success.

3. Vendor and Purchaser ⇐80

In action involving construction of ambiguous contract, under which purchaser was to have immediate possession of ranch and right to sell livestock and crops without liability to account to vendor and which entitled purchaser to refund of down payment in event specific performance action by third party against vendor, involving another contract for sale of same ranch, were not determined favorably to vendor within 18 months, evidence sustained determination that parties had intended that a purchaser should be required to restore benefits received under the contract before becoming entitled to refund of down payment. Civ.Code, § 1691.

Rogers & Clark, Webster V. Clark, San Francisco, Raymond A. Leonard, Oroville, Ware & Ware and A. B. Ware, Chico, for appellant.

Rich, Weis, Carlin & Fuidge, W. P. Rich, Marysville, Winston Churchill Black, San Francisco, Clewe, Martin & Blade, Ernest Clewe, Oroville, Manwell & Manwell and Ray Manwell, Marysville, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff, Kesterson Lumber Corporation, from a judgment for the defendant on its cross-complaint. The plaintiff sued on, and the defendant cross-complained under, a contract for the purchase and sale of real and personal property owned by the defendant. The controversy grew out of the following circumstances:

The plaintiff owns and operates several ranches. The defendant, also a corporation, owned a single asset, a ranch of 1700 acres in Butte county which was devoted to the raising of livestock and agricultural crops. Ella M. Friesleben, an elderly woman, owned five-sevenths of the corporate stock and was president of the company. She depended on the operation of that ranch as her source of income.

The Friesleben ranch had been operating at a loss and was encumbered to the extent of $80,000 under a deed of trust and a chattel and crop mortgage. A sale was deemed the solution. Prior to May 23, 1944, Arnold Christensen made an offer to purchase for a total price of $215,000—$150,000 for the land, $21,000 for the livestock and equipment, and $44,000 for the current crops. On that day agents acting for Christensen and Friesleben signed a "de-

posit receipt" calling for a deposit of $5,000, payment of $20,000 on acceptance by Friesleben, $25,000 on August 1, $25,000 on November 1, and the balance of $140,000 on January 14, 1945, with interest to commence from August 1, 1944. Kesterson also wanted to purchase the ranch for a total of $225,000 for the real and personal property. Advisers informed Mrs. Friesleben that there was no existing agreement with Christensen and that she was free to accept the Kesterson offer which provided for a $50,000 deposit. On the assumption that there was no agreement with Christensen, the Friesleben Estate Company on May 29, 1944, executed and delivered to the Kesterson corporation a deposit receipt agreement. Thereunder the latter was given forty-five days for examination of title, and if it proved defective a further ninety days after notice within which to exercise an option to accept title in its defective condition or recall the deposit.

Shortly thereafter Christensen claimed that there had been an acceptance of his offer and that a contract of sale to him was in existence. On June 17, 1944, he commenced an action for specific performance against the Friesleben Estate Company. The parties here believed that the Christensen claim could be defeated and on July 24, 1944, they executed a new contract dated June 16th, 1944, which is involved in the present action and cross-action.

By the agreement dated June 16th the previous contract of May 29th was kept in force except as modified in the following particulars: The agreement recited the title defect, that Christensen had commenced the action for specific performance, and that title could not be perfected within the time specified in the May 29th contract. The Friesleben company agreed to defend the Christensen action and to save the Kesterson corporation harmless from any claims or demands that might be made by Christensen. The Friesleben company agreed to deliver to the Kesterson corporation a bill of sale covering the personal property, and the Kesterson corporation agreed "contemporaneously" to make a $50,000 part payment on the sale price of $225,000, which was to be applied in reduction of the lien indebtedness and for release of the crop and chattel mortgage. The Kesterson corporation was to have immediate possession of the real and personal property with the "same force and effect as though said agreement dated May 29, 1944, had been consummated", and to be entitled to the exclusive use and benefit of the property, and the rents, issues and profits thereof free of charge, "as though all of said property had been actually conveyed to the Purchaser free and clear of all liens and encumbrances whatsoever, except current taxes not delinquent." It was agreed that if Christensen won in the litigation against the Friesleben company, the latter should cause the Christensen purchase fund to be deposited in escrow and to authorize therefrom payment to the Kesterson corporation of all sums owed including "reimbursement for said sum of $50,000", plus any sums not exceeding $10,000 expended for capital improvements, and any sums expended in settlement of any claims or demands by Christensen as to which the indemnification applied, balance to be paid to the Friesleben company. If within eighteen months from June 16th, 1944, the Christensen action should not be finally determined, the Friesleben company agreed "on demand to repay" the $50,000 and the other expenditures unless that period was extended. The Friesleben company was permitted to increase the realty encumbrance to the extent of $10,000 for corporate uses. Pending the outcome of the Christensen action the Kesterson corporation was not to resell any ranch equipment but could "resell all livestock and crops located thereon, as Purchaser's own property, without any liability to account to Seller for any proceeds of such resale." As the contract and the record discloses, "personalty" referred to and included both harvested and planted crops, the livestock, and the farm equipment.

The Kesterson corporation took immediate possession of the ranch, received a bill of sale of the personalty, and made the $50,000 initial payment to the Friesleben company.

In July 1945, a decree for specific performance was granted to Christensen in his action against the Friesleben company. By

that judgment $65,000 was allowed to Christensen as a set-off against the total purchase price of $215,000 for undelivered crops, livestock and equipment. The sum of $25,000 additional was allowed for the rental value which subsequently was reduced by $23,000 when in 1946 the parties in that action agreed to dismiss the appeal taken by the Friesleben company.

In the meantime the harvesting of the 1944 crops on the Friesleben ranch was completed by the plaintiff. Crops for the 1945 season were planted and harvested. No crops were planted in 1945 for the 1946 harvest. All of the crops, all of the livestock and poultry, and part of the farm equipment were sold by the plaintiff. It also removed a portion of the equipment. On December 17, 1945, it surrendered possession of the real property and demanded the return of the $50,000 payment without offering any further restoration.

On December 26, 1945, the plaintiff filed the complaint in the present action for repayment of the $50,000 with interest from December 17, 1945, alleging full performance of the obligations and terms of the contract to be performed by it. The defendant denied the indebtedness and performance by the plaintiff; and by way of affirmative defenses and cross-complaint invoked the equitable principle that the plaintiff was not entitled to restitution of the $50,000 without the restoration of the benefits received.

The plaintiff placed in issue the allegations of the cross-complaint. It contended that the contract was complete and unambiguous and expressed the true intent of the parties that on failure of the defense in the Christensen action and termination of the contract, the plaintiff was entitled to the return of the $50,000 initial payment without an accounting or the restoration of any of the personal property title to which was transferred under the bill of sale; that the contract of June 16th became one for the sale of the real property only, for a total price of $225,000; and that the use of the realty and the transfer of the personalty under the bill of sale, without obligation for an accounting, were received as consideration for the extension of time, the use of the $50,000 in reduction of the indebtedness to clear the title to the personalty, and the permission to the defendant to borrow an additional $10,000 under the deed of trust.

The trial court rejected the plaintiff's contentions. It found and determined that the contract included both the real and the personal property. It concluded that the contract was ambiguous because it did not clearly express the plaintiff's obligation in the event Christensen won his suit or the contract was sooner terminated by the plaintiff, even omitting a requirement to redeliver possession of the realty; that the contract expressly provided the remedy of restitution by the defendant, and that the language as interpreted by the surrounding circumstances implied the corresponding obligation of restoration on the part of the plaintiff. The court took evidence to determine benefits received by the plaintiff from its operation of the ranch. It further found a net operational excess over expenses of $52,327.12 and the reasonable value of sold and removed equipment as $3500, or a total obligation of $55,827.12 which, with the credit of the $50,000 initial payment received by the defendant, left a net sum due from the plaintiff to the defendant of $5,827.12. Judgment was entered accordingly with interest from December 17, 1945.

The principal burden of the appeal is that the trial court gave no effect to the parties' agreement that in the operation of the ranch the plaintiff was to have free use and occupancy of the property and was not obligated to account for sales of crops and livestock. The plaintiff contends that giving meaning to the express provisions of the contract entitles it to a reversal of the judgment and entry of judgment in its favor on the complaint.

[1] The court correctly proceeded to interpret the contract based on a construction of the language in the light of the surrounding circumstances. § 1860, Code Civ. Proc.; § 1647, Civ.Code; Fraters Glass & Paint Co. v. Southwestern C. Co., 200 Cal. 688, 695, 254 P. 1097; Crandall v. Schnouser, 207 Cal. 772, 777, 279 P. 778; Univer-

sal Sales Corp. v. Cal., etc., Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665.

The court correctly rejected other offered theories in arriving at a conclusion that the contract gave to the plaintiff the right to terminate the contract when it did, and in the event of such termination that the parties agreed on restitution of the $50,000 received by the defendant. But the contract language also has meaning to discover what the parties, in the light of all the circumstances, intended should be restored by the plaintiff when it exercised the right to terminate. The contract expresses the defendant's obligation of restitution. But ambiguity appears in the respects in which the parties failed to deal fully with the plaintiff's duty of restoration.

It is clear from the contract that the parties contemplated alternative eventualities, namely: that the title would be cleared of the Christensen claim and that the sale to the plaintiff would be completed; or that the defendant would not prevail in the Christensen action, and that the defendant would be required to deliver the property to him. Pending final determination of the Christensen action, or in the event of termination of the contract by the plaintiff at the expiration of the eighteen month period, the plaintiff was to take possession of the real property, and title and possession of the personal property, in order to be able to operate the ranch without interference due to the Christensen claim. To this end title to the personalty was cleared by the use of the $50,000 initial payment to reduce the indebtedness and obtain a release of the chattel and crop mortgage, and enable the defendant to deliver a clear title bill of sale to the plaintiff. The latter had declined to operate the ranch if on termination without sale it should be required to account for the farming operations. Substituted for such a provision was the permission to sell crops and livestock without accounting, restricting sales of equipment, and giving possession rent free. These provisions would be unnecessary in the event the sale to the plaintiff should be completed. They had bearing only on the plaintiff's obligation of restoration in the event of termination of the contract.

But it does not follow that in the event of the termination which occurred the plaintiff was absolved from all obligation except to restore possession of the realty. As stated the parties also contemplated the eventuality of losing the defense in the Christensen action and the consequent necessity of delivering the property under the Christensen agreement. They were fully aware that Christensen was buying a ranch equipped and in operation with planted crops. The defendant was willing to risk some loss by inability to deliver the current crops and rental value for the time Christensen was out of possession. The plaintiff risked the interim operation of the ranch at a loss. But unquestionably, as the court's conclusions imply, the language of the contract and the surrounding circumstances manifest the intention of the parties to keep the property as an equipped and going ranch in the event it must be delivered to Christensen. It thereby becomes clear that the parties did not intend restoration of possession of the realty without more. No such express provision appears and the contract language and the circumstances readily suggest that if the plaintiff had asked express release from all obligation except the redelivery of the possession of the realty as the condition for the restitution of the $50,000 payment under the contract, the request would have been rejected. Cf. Foley v. Euless, 214 Cal. 506, 511–512, 6 P.2d 956; Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 824, 129 P.2d 383; Stockton Dry Goods Co. v. Girsh, 36 Cal.2d 677, 681, 227 P.2d 1, 22 A.L.R.2d 1460. On the other hand, as the cited cases also indicate, the provisions which were included and which bear on the plaintiff's obligations in the event of termination must be given meaning and application.

The court properly determined that the contract is not divisible—one portion relating only to the realty and the other to the personal property—as urged by the plaintiff. It is a single contract for the purchase and sale of the ranch as a going concern, covering both real and personal property. Nor is it a plain and unambiguous contract to that end alone. By its terms it contemplates the contingency that Christensen

may prevail in his claim to the property, but it fails to provide what the plaintiff might be required to do in the event that restoration be required on its part. Its provisions are plain to the effect that upon failure of the defendant to convey the plaintiff should be entitled to the restitution of the initial payment, but it fails to provide for surrender of possession of realty or restoration otherwise on the part of the plaintiff. Apparently it is the position of the plaintiff that under the contract it could take immediate possession of the ranch, sell the personal property, except the farming equipment, as its own, retain the proceeds, farm the land at a net profit in excess of the initial payment and surrender possession of the naked realty, stripped of crops, either planted, growing or harvested, and still be entitled to the retention of the original payment. Such a construction would be entirely unreasonable.

[2, 3] The trial court correctly declared the contract to be ambiguous and proceeded to take evidence as to the circumstances surrounding the parties at the time of its execution and the conduct of the parties under it. After an extended trial on that issue the court rightly concluded that the obligation of restitution by the defendant of the initial payment was plain and that the plaintiff had the right to terminate the contract when it did. And it also properly concluded that the plaintiff was under obligation to restore to the defendant the benefits received as a condition to such restitution. The court applied the principle akin to the doctrine of rescission to the effect that a party affirmatively seeking restitution, is under the correlative obligation to restore benefits received in order that the status quo ante, so far as is practicable, may be established. This rule is recognized and approved in the Restatement of the Law of Contracts, Vol. 3, § 349, p. 595, § 354, p. 610. Its salutary purpose is reflected in § 1691 of the Civil Code. See also Williston on Contracts, Rev.Ed. § 1460A, p. 4082 et seq.; Alder v. Drudis, 30 Cal.2d 372, 182 P.2d 195.

The court then proceeded to ascertain the amount of the benefits received. The evidence shows and the court found as above indicated that the plaintiff received benefits in an amount in excess of the initial payment by it and to the extent of the amount ordered paid. The record supports the findings and conclusions.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



40 Cal.2d 81

FRANCK et al v. J. J. SUGARMAN–RUDOLPH CO. et al.

L. A. 22369.

Supreme Court of California, in Bank.

Dec. 19, 1952.

Action by sellers against buyers of corporate stock for money had and received. The buyers asserted a counterclaim. The Superior Court, Los Angeles County, Henry M. Willis, J., gave judgment for the plaintiffs; defendants appealed. The Supreme Court, Carter, J., held that where buyers made no claim of breach of guarantee respecting value of corporate assets for more than three years after discovery of alleged breach, such delay was so unreasonable that buyers had lost right to claim damages for alleged breach.

Affirmed.

For prior opinion, see 241 P.2d 1045.

1. Sales ⇐285(2), 288(2)

Purpose of statute providing that acceptance of goods does not discharge seller for breach of warranty, unless so agreed, and that buyer must give notice of breach within a reasonable time is to ameliorate common law rule that acceptance of goods by buyer or passage of title to him constituted a waiver of remedies for breach of warranty, and to give seller protection against stale claims by requiring notice. Civ.Code, § 1769.

2. Corporations ⇐121(3)

Buyers of all corporate stock under contract by which sellers guaranteed rep-

resented financial condition of corporation and by which buyers were to pay balance of purchase price on receipt of audit verifying the financial condition, lost right to claim damages for alleged breach of guarantee by permitting three years to elapse after discovery of claimed deficiency of corporate assets before asserting such claim, either on theory of waiver, or on theory of failure to comply with statute requiring buyer accepting goods to give notice to seller of claimed breach within a reasonable time to preserve seller's rights. Civ.Code, §§ 1769, 1796.

3. Set-Off and Counterclaim ⇐24

Where sellers of all corporate stock sued buyers for money had and received and buyers' right to have damages offset for alleged breach of sellers' guarantee that financial condition of property of corporation was as represented was waived for failure to give notice of claim of breach within reasonable time, the right to have the cross-demands compensate each other was lost. Code Civ.Proc. § 440.

4. Limitation of Actions ⇐46(9), 49(1)

Where contract for sale of all corporate stock provided that balance of purchase price was not to be paid to sellers until refund of federal taxes was obtained, sellers' cause of action against buyers in respect to purchase price did not accrue until the refund, and hence action commenced within one year after refund was timely, whether action be considered as for money had and received governed by two year limitation statute or as action for breach of contract governed by four year limitation statute. Code Civ.Proc. §§ 337, subd. 1, 339, subd. 1.

Knight, Gitelson, Ashton & Hagenbaugh, Alfred Gitelson and Leon Savitch, Los Angeles, for appellants.

John W. Preston and John W. Preston, Jr., Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs commenced an action for money had and received in the sum of over $65,000. Defendants, a partnership, hereafter referred to as defendant, and the partners, answered raising general issues and also counterclaimed and asserted affirmative defenses for over $98,000, and raised the defense of the statute of limitations. Code Civ.Proc., §§ 339(1), 337(1), 338(4), 343.

The judgment from which defendant appeals awarded plaintiffs $64,054.61, with interest, and that defendant take nothing by the counterclaim. The court excluded evidence on the affirmative defenses and counterclaim on the ground that defendant had waived them.

According to the findings, on August 7, 1943, plaintiffs entered into a written agreement with defendant, agreeing to sell all of the issued shares (3,267) of Hercules Foundries, Inc., a corporation, (hereafter called Hercules) for $110,000. The contract provided that plaintiffs "represent and guarantee" that the financial condition and property of Hercules was (as of July 31, 1943) as set forth in the contract, and in reliance on that "guarantee" defendant promised to buy the stock and to pay for it as follows: $10,000 on execution of the contract, $90,000 on delivery of the stock and the balance of $10,000 when they received (paragraph 2[c]) "a certificate signed jointly by" plaintiffs' auditor and defendant's auditor "verifying the truth of the representations" and guarantees above mentioned.

Plaintiffs delivered to defendant the stock and all the assets and records of Hercules on August 16, 1943. On August 18, 1943, the United States Collector of Internal Revenue filed a lien for taxes against Hercules for $103,112.67. To meet that situation and pay the taxes under protest the parties entered into a new contract on August 21, 1943, modifying the first one to the effect that from the money payable by defendant to plaintiffs for the stock there would be paid under protest sufficient to discharge the tax lien; and that defendant would cause Hercules to prosecute a claim for refund of the $103,112.67 for the use of plaintiffs. Mention was again made of the guarantee and audit and it was provided that if the tax refund is received, defendant will cause Hercules to assign to plaintiffs all right to the refund

subject to such existing offsets, if any, arising out of the "guarantee." Pursuant to the agreements, escrows were provided and other supplemental agreements were made which are discussed later herein.

In accordance with the last contract the tax lien was paid and a refund claim made, resulting in refunds in August and December, 1948, amounting to $82,546.45.

In compliance with paragraph 2(c) of the first contract (above mentioned) shortly after the delivery of the stock, etc., defendant had its auditors make an audit of Hercules' books. The auditors submitted to defendant a preliminary report in the latter part of September, 1943, and a final report in September, 1944, and at all times thereafter defendant had actual knowledge of all matters pertaining to the property, assets and financial condition of Hercules as of July 31, August 7 and August 21, 1943. The audit showed according to defendant's counterclaim and affirmative defenses, that the value of Hercules' assets was $98,448.74, less than represented by the guarantee and balance sheet in the first agreement. Plaintiffs had no such knowledge and did not know that defendant claimed or asserted the assets were less than represented in the first agreement or that a violation of that contract had occurred until they were notified by and received from defendant a copy of the audit on July 31, 1947. Defendant accepted the stocks, assets and records of Hercules and at all times has retained exclusive possession thereof. Finding that an unreasonable time elapsed between the audit and notification to plaintiffs, the court concluded defendant had waived the purported breach of promise as to the assets of Hercules upon which its affirmative defenses and counterclaim are based and the claim of breach was barred by laches and section 1769 of the Civil Code.

Finally, the court concluded that defendant held for and was indebted to plaintiffs in the sum of $64,054.61, which was the amount of the tax refund recovered less expense of recovery.

In addition to defendant having obtained and retained at all times after August 16, 1943, and after they knew the claimed breach of the "guarantee", all the stock and assets of Hercules, it appears from the record that after the contracts were made, correspondence passed between Mr. Gazlay, a representative who was handling the matter for plaintiffs, and Mr. Katz, the representative of defendant. On September 13, 1943, Gazlay wrote to Katz stating that defendant's auditors had said the audit was practically completed; that it should be completed as soon as possible and that plaintiffs should receive a statement from defendant as to whether it claimed the assets and financial condition of Hercules was not as represented in the contract; that the time to settle the matter was "now when the facts are fresh and records available." Katz replied on September 14, 1943, agreeing with the thoughts expressed by Gazlay and stating that he had asked the auditors for a report and would advise Gazlay as soon as he had it. On September 30, 1943, Gazlay wrote to Katz calling his attention to the previous correspondence and again requesting the report. On October 4, 1943, Katz sent to Gazlay a copy of a letter from defendant's auditors which was in response to a letter from Katz to the auditors. The auditors stated they expected to have a final report ready on October 11, 1943, a draft of which had been made. On October 11, 1943, Gazlay wrote to Katz. He referred to the copy of the auditors' letter and stated that under the contract the report should be finished in a reasonable time and such time had elapsed and the matter should be settled now while the facts were fresh in the parties' minds. Receiving no reply from Katz, Gazlay wrote to Katz on November 2, 1943, demanding the report and stating that the failure to furnish it was a breach of the contracts. Again receiving no reply Gazlay wrote on January 6, 1944. He referred to the former correspondence and of Katz' refusal to speak to him on the telephone and stated: "* * * it would appear that I am entitled to at least professional courtesy. If your clients do not desire to give the statement, you could at least have written an evasive letter, at which I am advised you excell. I resent the

treatment received from you. I again request a copy of the statement hereinbefore referred to." In a letter from Katz to the auditors on September 14, 1943, Katz stated he agreed with Gazlay that then was the time to determine whether the balance sheet in the contracts was correct. Gazlay died in 1944 and several of plaintiffs' predecessors in interest died. As before seen from the findings, defendant had a preliminary report in the latter part of September, 1943, and the final in September, 1944, but did not give a copy to plaintiffs or advise that they made any claim of a breach of the "guarantee" until July 31, 1947.

As seen from the findings it was the theory of the trial court that defendant lost its claim for damages for the alleged breach of the guarantee because of the unreasonable length of time elapsing after their discovery of the claimed deficiency of Hercules' assets (at least 3 years) and by reason of the conduct of defendants during that time. As we construe the findings they may be based on either laches, waiver, or a failure to comply with section 1769 of the Civil Code.[1]

Defendant's main contention is that it did not lose its rights under any of those theories; that section 1769 cannot apply because it is a part of the Uniform Sales Act as adopted in this state and does not include sales of stocks in a corporation; that, as the action is legal in nature the equitable doctrine of laches cannot apply; that there was no assent to the alleged breach of the guarantee; and that there could be no bar by laches, waiver or otherwise because the contracts contemplated and the law is that any claimed deficiency in the assets would be offset against the purchase price; that in effect the purchase price was not to be paid until the correctness of the "guarantee" and the amount of recovery for refund of taxes had been ascertained.

Section 1796 of our Civil Code reads the same as, and is a part of, the Uniform Sales Act, adopted in this state. The act, with the exception of the statute of frauds provision, Civ.Code, § 1724, refers to the sales of goods and that term is defined to "include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." Civ.Code, § 1796. And, by reason thereof, it has been held inapplicable to the sale of corporate shares. Porter v. Gibson, 25 Cal.2d 506, 154 P.2d 703; Eckart v. Brown, 34 Cal.App.2d 182, 93 P.2d 212; Williston on Sales (Rev.Ed.), § 619 (a). It was also stated in the Porter case that the court would not apply the sales act to sales of stock by analogy and for sake of uniformity as was done in Agar v. Orda, 264 N.Y. 248, 190 N.E. 479, 99 A.L.R. 269. It may be noted that this state has also adopted the Uniform Stock Transfer Act, Corporations Code, § 2450 et seq., but no provision thereof has been indicated as supplying a solution to the instant case. That being the case it is of no assistance in determining what rule should be applied here. The court went on in the Porter case, however, and applied the law of sales of personal property (other than as stated in the sales act), particularly as enunciated in Cuthill v. Peabody, 19 Cal.App. 304, 125 P. 926, which, in dealing with sales of stock, relied upon the provisions of the Civil Code and rules of law in cases dealing with the sales of personal property as they existed before the Uniform Sales Act was adopted.

[1] The first sentence of section 1769 of the Civil Code, supra, states that in the

1. Civil Code, § 1769: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

absence of agreement the acceptance of the goods does not discharge the seller for breach of promise or warranty, but the second sentence requires notice by the buyer of a claimed breach in a reasonable time to preserve his rights. The purpose of the two sentences was to "ameliorate the harshness of the common law rule in some states that the mere acceptance by or passage of title to the buyer of the goods constituted a waiver of any and all remedies for breach of warranty, and at the same time to give the seller some protection against stale claims by requiring notice. (See, discussion Williston on Contracts [Rev.Ed.], sec. 714.)" Whitfield v. Jessup, 31 Cal.2d 826, 828, 193 P.2d 1, 2. Apparently the rule was, before the uniform act, as to the sale of personal property generally that an acceptance of the goods by the buyer, knowing of the breach of warranty, constituted a waiver by him of a claim for damages for the breach, at least unless he gave notice of his complaint within a reasonable time. See Streff v. Gold Medal Creamery Co., 96 Cal.App. 18, 273 P. 831; Gladium Co., Inc. v. Thatcher, 95 Cal.App. 85, 272 P. 340; Stockton Lumber Co. v. Mulcahy, 86 Cal.App. 505, 260 P. 897; American Steel Pipe etc. Co. v. Hubbard, 42 Cal.App. 520, 183 P. 830; Burrell v. Southern California Canning Co., 35 Cal. App. 162, 169 P. 405; Doak Gas Engine Co. v. Fraser, 168 Cal. 624, 143 P. 1024; Bryon Jackson Machine Works v. Duff, 158 Cal. 47, 109 P. 616; Pigott v. Clark, 133 Cal. App. 53, 23 P.2d 800; 22 Cal.Jur. 983–988. The same rule is stated in the Restatement. Rest., Contracts, § 412. And it has been held either tacitly or directly that the general rules on sales of goods applied to sales of corporate stock. See Cuthill v. Peabody, supra, 19 Cal.App. 304, 125 P. 926; Kirkland v. Levin, 63 Cal.App. 589, 219 P. 455; Porter v. Gibson, supra, 25 Cal.2d 506, 154 P.2d 703.

[2] There appears to be no valid reason why the rule applicable to the question here involved and stated in the sales act and probably the law before the sales act, should not apply to sales of stock in a corporation, especially when it is remembered that the sale included all of the stock, and in effect, all of the records and assets, tangible and intangible, of the corporation. Although defendant did not know of the financial condition of Hercules when the stock was transferred, it found out later and for over three years made no claim of the breach of the guarantee, and in the meantime some of the parties concerned with the transaction died. From the correspondence between Gazlay and Katz, the latter, as above seen, agreed that defendant's auditors should make their report within a reasonable time and it should be ascertained whether there was any claim of a breach of the guarantee by plaintiffs while the facts were fresh in the minds of the parties. The reason, to protect the seller from stale claims, Whitfield v. Jessup, supra, 31 Cal.2d 826, 193 P.2d 1, is present. Hence, we conclude that the trial court was correct in its conclusion, although it did specifically mention section 1769 of the Civil Code as one of the grounds for its ruling, and that section may not be technically controlling. It is true that there are indications in the record that the court was basing its conclusion on section 1769, but as we have seen, the findings are broad enough to include waiver, and it makes no difference whether that was based upon the law of sales of personal property apart from the sales act or the sales act itself, as the rule is substantially the same.

Defendant argues, however, that even assuming section 1769 to be applicable, there are other supplemental agreements as well as the agreements of August 7 and 21, 1943, which show that any deficiency in the assets as compared with the "guarantee" was to be ascertained when the tax refund was obtained (it was received in 1948, one year after defendant gave notice to plaintiffs of the claimed breach of "guarantee") and then any offsets by reason of the deficiency were to be made against the refund. Escrow instructions were entered into pursuant to the August 7th contract whereby $90,000 was to be deposited with a bank by defendant and paid out by the bank when it received a certificate signed by the auditors of the parties as prescribed by paragraph 2(c) of the August 7th contract, and if the certificate shows a deficiency in

the assets the latter should be deducted and the balance paid to plaintiffs. On August 19, 1943, after the tax lien was filed the parties in an agreement referred to the tax lien and the $90,000 which was deposited with the bank and provided that that sum plus $15,000 (including the $10,000 down payment) be deposited with the federal court wherein the tax refund action was pending and the balance (after a certain deduction) shall be applied to pay defendant the amount of any deficiency under the guarantee as determined by the auditors of the parties. Then followed the contract of August 21, 1943, heretofore mentioned, in which it was provided that the balance of the purchase price (after mentioning the method for payment of a small portion of it) shall be payable out of the tax refund when received, subject as above mentioned to the offsets, if any, by reason of any deficiency in the assets which shall be deducted from the refund.

Implicit in the court's finding that an unreasonable time had elapsed after defendant discovered the asserted deficiency, is the conclusion that the audit and claim of deficiency must be made in a reasonable time after the contracts were made, and the correspondence heretofore discussed shows that Katz, defendant's representative, so construed the agreements. It also shows that the parties considered that the audit should (at least initially) be made by defendant's auditors, which, of course, is reasonable because the audit was primarily for defendant's benefit, inasmuch as it was the party who would be benefited if there was a deficiency in the assets. Defendant had the possession and control of the records and assets of Hercules. Plaintiffs had no real opportunity to have their auditors make an audit as Katz kept stalling on the report of defendant's auditors, never even mentioning an audit by plaintiffs' auditor. While the agreements speak of payment in terms of offsets, the trial court was justified in finding impliedly at least (it found waiver and that an unreasonable time had elapsed) that defendant should give a reasonable time notice of any claimed deficiency disclosed by the audit after it discovered the same. Merely because the amount of payment for the stock was to be reduced by offsets arising out of a deficiency, does not necessarily mean that a notice of the asserted deficiency should not be given in a reasonable time after discovery, that is, that the rule of law above held applicable to this case does not apply.

[3] In this same connection defendant cites Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893, where we held that under certain circumstances cross demands between parties under section 440 of the Code of Civil Procedure will be deemed compensated and thus paid to the extent they equal each other and hence the statute of limitation does not run on the paid portion. That has no application in the instant case where the rule of law declared is applied, because here the right to have damages or offset for the alleged breach of the "guarantee" is waived for failure to give notice of the claim of breach within a reasonable time. Hence it necessarily follows that the right to have the cross demands compensate each other is lost.

By reason of the result reached herein it is unnecessary to consider the contentions with reference to laches.

[4] Defendant contends that the court erred in failing to make a finding on its plea of the statute of limitation. However, it is a mere matter of law and mathematical computation, for whether we assume the two year period applies, as for money had and received, Code Civ.Proc., § 339(1), or the four year period, as for an action for breach of contract, Code Civ.Proc., § 337 (1), it is admitted that on August 24 and December 21, 1948, the federal government refunded the taxes. The action was commenced on June 8, 1949, less than one year thereafter and the balance of the purchase price was not to be paid to plaintiffs until the refund was obtained and hence the action did not accrue at least until then.

Finally, it is asserted by defendants that a recovery could not be had for money had and received because the tax refund was received by Hercules, which was removed as a party to the action, rather than defendant. Without going into the question of whether the action was for money had

and received or on the contracts, it is clear that the tax refund received by Hercules was for the use and benefit of plaintiffs under the agreements which provided that if the refund was received by Hercules, defendant would cause Hercules to assign it to plaintiffs since all the stock and assets of Hercules had been delivered to defendant at that time pursuant to the agreements.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.



40 Cal.2d 102

MERCER-FRASER CO. v. INDUSTRIAL ACC. COMMISSION (four cases).

Sac. 6238-6241.

Supreme Court of California, in Bank.

Jan. 6, 1953.

Rehearing Denied Feb. 2, 1953.

Proceedings on employer's application for review of Industrial Accident Commission awards of increased benefits under the Workmen's Compensation Act provisions for additional allowances where employer has been guilty of serious and wilful misconduct. The Supreme Court, Schauer, J., held that the findings made by the Commission did not support the awards.

Awards annulled.

Carter, J., dissented.

1. Workmen's Compensation ⇐939

The compensation act section dealing with serious and wilful misconduct of employer does not make the employer an insurer of safety and does not authorize additional award upon a showing of mere negligence, or even of gross negligence, but permits award of increased benefits only if employee was injured by reason of the serious and wilful misconduct of the employer. Labor Code, § 4553.

2. Workmen's Compensation ⇐940

The words "serious and wilful misconduct" must be given the same meaning in the Workmen's Compensation Act section providing for additional allowance for wilful misconduct of employer as they have in section authorizing reduction of compensation when employee has been guilty of such misconduct, and therefore, in determining whether corporation's managing superintendent had been guilty of "serious and wilful misconduct" which would justify increase in award for other injured employees, court would have to consider whether such misconduct, if it had resulted in injury to superintendent, would require reducing the normal award to him. Labor Code, §§ 4551, 4553; Insurance Code, § 11561.

3. Workmen's Compensation ⇐1704, 1939

Where evidence is in substantial conflict or is susceptible of conflicting inferences, finding of Industrial Accident Commission, whether for or against applicant, is final, and it is duty of reviewing court to uphold such finding, it being the commission's province to weigh the evidence and credibility of the witnesses.

4. Workmen's Compensation ⇐1723

Whether in any given case "serious and wilful misconduct", within the purview of Workmen's Compensation Act provision for additional allowance to injured employee, is shown inherently presents questions of both fact and law; and insofar as issues relate to credibility of witnesses, persuasiveness or weight of evidence and resolving of conflicting inferences, questions are of fact; but what minimum factual elements must be proven in order to constitute "serious and wilful misconduct", and the sufficiency of the evidence to that end, are questions of law. Labor Code, § 4553.

5. Workmen's Compensation ⇐939

The "serious and wilful misconduct" referred to in the Workmen's Compensation Act provision for additional allowance to injured employee is basically the antithesis of negligence, and the two types of behavior are mutually exclusive, and an

act which is merely negligent, and consequently devoid of either an intention to do harm or of knowledge or appreciation of fact that danger is likely to result therefrom, cannot at the same time constitute wilful misconduct. Labor Code, § 4553.

See publication Words and Phrases, for other judicial constructions and definitions of "Serious and Wilful Misconduct".

6. Workmen's Compensation ⇐1935

Findings of the Industrial Accident Commission must be interpreted liberally in favor of sustaining an award, and even if a finding, by itself, is inadequate for uncertainty, it will still be upheld if it can be made certain by reference to the record.

7. Workmen's Compensation ⇐45

Basic justice and common honesty require that Industrial Accident Commission and reviewing court be fair to both the employee and employer in the workmen's compensation cases.

8. Workmen's Compensation ⇐1752

Industrial Accident Commission's findings would not support awards of additional compensation under Workmen's Compensation Act section relating to additional allowances for serious and wilful misconduct of employer. Labor Code, § 4553.

9. Workmen's Compensation ⇐1743

It is not required that Industrial Accident Commission's findings be specific and detailed, but it is essential that they be sufficient, in form and substance, so that by reading them and referring to record parties can tell, and reviewing court can tell, with reasonable certainty, not only theory upon which Commission has arrived at its ultimate findings and conclusions but that Commission has in truth found those facts which as a matter of law are essential to sustain its award.

10. Workmen's Compensation ⇐1885

Employer's failure to serve, upon individual claimant, petition for writ of review challenging awards made by Industrial Accident Commission either prior to filing such petition or within thirty-day period during which petition could be filed, did not preclude judicial consideration of petition where individual claimant had been given notice by receipt of copy of answer filed by Industrial Accident Commission to employer's petition for writ as well as by subsequent receipt of copy of petition for writ. Labor Code, §§ 5903–5905, 5954; Rules on Appeal, rule 57.

11. Workmen's Compensation ⇐1885

Requirements as to service, when petition for writ of review is filed in workmen's compensation case, are more directory than mandatory, and service may be made after petition is filed if court declines to proceed in matter without service. Labor Code, §§ 5950, 5954; Rules on Appeal, rule 57.

Gardiner Johnson, Roy D. Reese and Samuel C. Shenk, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger, P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson and Alfred C. Skaife, San Francisco, for respondents.

SCHAUER, Justice.

In these four consolidated matters petitioner corporation seeks review of awards, made by the Industrial Accident Commission, of increased benefits assessed against it under the provisions of section 4553 of the Labor Code,[1] upon the theory that it was guilty of serious and wilful misconduct.[2] We have concluded that although we assume the sufficiency of the evidence to support findings which would sustain awards upon the issue of serious and wilful misconduct, petitioner is correct in its contention that the findings made by the commission do not support the awards, in that they disclose that such awards are based upon an erroneous and untenable concept of the law. We conclude further that the individual respondents' objections

1. Unless otherwise stated, all section citations refer to sections of the Labor Code.

2. Awards for normal compensation were made in other and prior proceedings before the commission, and are not here involved or before us.

to the jurisdiction of this court to entertain these proceedings on their merits cannot be sustained, and that the awards should be annulled.

In June, 1948, four employes of petitioner were injured, two of them (Soden and Epping) fatally, when the prefabricated parts of a building being constructed by the employer collapsed and fell while the employes were working thereon. The record shows that the commission made a conclusional finding that the employer was guilty of serious and wilful misconduct and that this conclusion is based on various primary findings, including a finding that the employer's general superintendent knowingly and wilfully failed and neglected to properly and adequately brace and guy the prefabricated parts of the building being erected, "so as to prevent" the fall or collapse thereof during the construction. The record also discloses, as will subsequently be shown in some detail, that the commission was of the view that the petitioner was bound under an absolute duty to preserve the safety of the employes, at least to the extent that it was humanly possible to foresee and guard against danger, and that any failure to maintain such standard of safety, whether negligent or otherwise, constituted serious and wilful misconduct.

Petitioner urges that the awards are unreasonable and arbitrary and are not supported by the findings, that the findings are not supported by the evidence, and more particularly that the commission has by the findings and awards unlawfully imposed upon petitioner a responsibility to insure (i. e., preserve absolutely) the safety of its employes or be subject to the increased assessment under section 4553.

[1] It must be recognized at the outset that the statute in question does not make the employer an insurer of safety and that it does not authorize the additional award upon a showing of mere negligence, or even of gross negligence. Under the provisions of section 4553, the awards of increased benefits can be sustained only if the employes were "injured by reason of the *serious and willful misconduct*" (italics added) of the employer, and where as here, the employer is a corporation, such misconduct must be "on the part of an executive, managing officer, or general superintendent" of the employer corporation. (See Cal. Shipbuilding Corp. v. Industrial Acc. Com. (1947), 31 Cal.2d 278, 279, 188 P.2d 32.) Imposition of the increased award upon evidence showing (or a finding of) conduct any less culpable than that specified by the statute would constitute an unlawful taking of the property of one person and an unwarranted giving of it to another. An award of the type here involved, although denominated and regarded for some purposes as "increased compensation," is actually of the nature of a penalty (Campbell, "Workmen's Compensation, § 423, p. 381; cf. E. Clemens Horst Co. v. Industrial Acc. Com. (1920), 184 Cal. 180, 192, 193 P. 105, 16 A.L.R. 611), and cannot be insured against (Ins.Code, § 11661 [3]). Such an award, therefore, can be sustained only if the evidence establishes and the commission finds, directly or impliedly, every fact essential to its imposition.

[2] Since in interpreting the law (specifically, the meaning of the words "serious and wilful misconduct") we must concern ourselves with its impact upon employes as well as upon employers, it should be noted that, with certain statutory exceptions, the Legislature has seen fit to penalize employes as well as employers for "serious and wilful misconduct." "Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half * * *" (§ 4551). It cannot be seriously disputed that the words "serious and wilful misconduct" must be given the same meaning in section 4551 as they have in section 4553. As has been heretofore declared, "There is no difference in principle between the degree of care required of an employer and that exacted from an employee" in deter-

3. Insurance Code, § 11661: "An insurer shall not insure against the liability of the employer for the additional compensation recoverable for serious and wilful misconduct of the employer or his agent."

mining whether serious and wilful misconduct occurred (see Campbell, "Workmen's Compensation," § 393, p. 363; E. Clemens Horst Co. v. Industrial Acc. Com. (1920), supra, 184 Cal. 180, 188, 193 P. 105, 16 A.L.R. 611; Parkhurst v. Industrial Acc. Com. (1942), 20 Cal.2d 826, 831, 129 P.2d 113). In other words, acts of the employer, to constitute serious and wilful misconduct which would warrant increased compensation must be of no less moment, in the relative circumstances, than the acts of an employe which would warrant reduction of his normal compensation. In determining, then, whether the managing superintendent of petitioner was guilty of serious and wilful misconduct which would justify *increasing* the award for other injured employes we must also consider that such misconduct, if the same accident injured the superintendent, would require *reducing the normal award* to him.

In order that the general principles of the law, which we hereinafter undertake to state with such comprehensiveness as appears practicable, may be clearly understood in their application to this case, it seems desirable to first relate the facts with considerable detail.

The prefabricated wooden structure here involved was one of three units, A, B, and C, being constructed by petitioner for the Hammond Lumber Company. Hammond supplied the materials and hardware and prefabricated the lumber, and petitioner supplied the construction "know-how" and the men for the job. Each unit, when completed, was to be approximately 500 feet long in a north-south direction and 192 feet wide. Units A and B, standing side by side, were up and all of the bracing, except for the roof panels, was in. The accident occurred during the construction of unit C, which was situated to the north of, and adjacent to, unit A, and was to be attached to the latter unit (i. e., the south end of C was to be attached by trusses to the north end of A) to form one continuous building 1,000 feet in length. C was not commenced as an extension of A; rather, petitioner began the erection of C at its most northerly end, raising and extending columns and trusses in a southerly direction until C reached the junction point with A.

Each unit was erected with 14-inch square timber columns standing vertically on concrete footings. The columns were spaced some 60 feet apart along the length of each unit and 63½ feet apart along the width, thus forming rectangular areas (termed bays) throughout the unit. Prefabricated wooden trusses, 60 feet long (designated as longitudinal or wall trusses), were mounted on top of each pair of columns along the length of the unit to span the space between columns, and similar trusses, some 63½ feet long (designated as transverse or roof trusses), were mounted on top of each pair of columns across the width of the unit.

According to the design of unit C, the framework when completed would have had longitudinal knee braces connecting the several columns with the longitudinal trusses each column supported. Also each column would have had transverse knee braces and transverse sway braces connecting each column to the transverse trusses which it supported. These braces were designed to give the structure support and stability against the pressure of external forces.

The method of erecting the three units appears to have been as follows: An initial bay or square (defined by the four columns on its four corners) was erected, with each of the four columns "guyed" to erection towers and also "[G]uy lines [were put] out, * * * cross lines * * * Inside and outside * * * So it was braced in a square * * * [I]t would be crossed inside, criss-crossed, and also externally outside"; longitudinal and transverse trusses were then set on top of the columns; the initial bay was made the "Anchor block for the rest of the building blocks [or bays]," which were not braced the same as the initial bay; in addition to the guying and bracing of the initial bay, guy lines attached to "deadmen" (objects serving as anchors buried in the ground) were secured to columns along the external sides of the structure.

On the day unit C collapsed all of its columns were up except for two bays to be constructed at the northwest corner, and

all trusses were in place except the longitudinal trusses which were to complete the connection between C and A. Installation of the bracing required by the plans and specifications had been commenced but only one set of four sway braces attached to one column and the two trusses it supported at the north end of C had been completely attached. A crew (including the injured employes Walsh and Epping) working under foreman Hoffman were installing a sway brace at the northern end of C and making roof panels, and another crew (including the employes Soden and McNabb) under foreman Hatten were installing the longitudinal trusses connecting A and C. C collapsed over its entire length and width.

R. B. McIntosh, superintendent of maintenance and construction and chief engineer for Hammond (the company for which petitioner, Mercer-Fraser, was constructing the building), testified that he is an engineer by profession; that the plans and specifications for the buildings were drawn by an architect and let out for bid by contractors, and that petitioner was awarded the contract to build; on the job site and on an unspecified date prior to collapse of C, the witness, in the presence of Ernest Johnson (construction supervisor for Hammond), told McFarlan (petitioner's construction superintendent) that "because of the type of construction I thought the building needed more guy lines at that stage of construction. * * * I believe it was in connection with building 'C', but the same would apply to all the buildings because the type of construction was the same * * * [T]he gist of [McFarlan's reply] * * * was that he considered the building stable enough to stand with the guy lines as they were placed * * * [H]is statement was to the effect that the construction was good heavy construction and that he thought it would stay up as it was being done, I don't think that he specifically mentioned we had enough guy wires, but he figured it was all right the way it was, that was the gist of it"; "guy lines in any construction are a form of temporary brace to hold the construction in place until the braces in the design or whatever might be designed into the building to hold it stable are in place"; on the day of the accident, just before the building collapsed at about 1 p. m., there "was a pretty stiff wind, but nothing to evoke any great comment as I remember, * * * from the northwest"; it is "good construction practice to follow along in back of the erection of columns and brace them as you're going along * * * [including] not only guy lines but sway and transverse braces * * * [P]articularly on this building I would say it was important * * * [T]he particular type of connection of the trusses and columns was somewhat unusual"; my "conclusion was that * * * the collapse of the building was caused by * * * a combination of the wind and the inadequacy of bracing"; at the time of the hearing at which he was testifying (some two years after the accident) the buildings had been completed "and in the same manner as they were being built, except * * there was some additional [steel] bracing added to the plans and incorporated in the buildings after the [accident] * * * that bracing was in the walls and was not included in the work that Mercer-Fraser was to do * * * [and] was not planned until after the collapse of the building."

Ernest Johnson, construction supervisor and "expediter of material" for Hammond, testified that he is not an engineer by profession and had had no prior experience "in heavy construction of this particular type * * * before the commencement of" unit A; his job in connection with the construction here involved was to look after Hammond's interests and "see that the building was constructed as per drawings and specifications"; he had no authority to instruct petitioner's employes "as to the method they should use to erect" the buildings, "I could just offer my suggestions"; the method of construction used was McFarlan's (petitioner's superintendent) "own idea of how it should be done"; the manner of erection and when the bracing was to be installed were left to petitioner's discretion and were not shown on the plans and specifications. About "a week or ten days before the accident" the witness and his supervisor, McIntosh, discussed the guy lines and the bracing on the

three units with McFarlan; "we figured there should be more guy lines * * * McFarlan * * * thought there was enough * * * [W]e didn't think there was enough bracing on it, that it may collapse"; following this discussion nothing was "done to change the guy line situation" although the witness did not know how many guy lines were on unit C on the day it collapsed (after the accident he saw some at the north end but recalled none in the center of the unit); petitioner's employes started to put more guy lines on units A and B "shortly after" C collapsed; the witness recalled no "objectionable features concerning the construction" other than the discussion as to the guy lines; units A and C were "almost identical" in construction and plan, the only difference was that C was "slightly higher" than A; A and B did not collapse and were still standing at the time of the hearing.

McNabb, one of the injured workmen, who was a carpenter and a member of the "erection crew" under foreman Hatten, testified that on the day of the accident, he and Soden (who died from injuries received in the accident) were "working on top of" unit C and were engaged in connecting units A and C; no one else was "on the top"; before noon they had installed one of the trusses connecting the two units; in so doing they had discovered that the gap between A and C "was two and a half inches longer than the truss" and "the whole building, the 500-foot from the north had to be pulled two and a half inches over to connect it"; the two workmen "had put a chain block at the top of the truss" on C, and "the post at the bottom" of C and "made this two and a half inches pull to allow us to get our truss in"; after lunch McNabb and Soden started to install another truss connecting the next succeeding columns of A and C, but found the gap this time was an inch and a half too short; again using a chain block the two workmen pulled unit C "back an inch and a half to allow this truss to go in"; "about five to ten minutes" later the building collapsed. McNabb further stated that on the evening before the collapse he and Soden had "come down off the roof [of C] that evening, and at that particular time, there was nothing to hold it except just a box in the air, this thing we could feel it move, and so we * * * told him [foreman Hatten] at that time, in fact I told Mr. Hatten the next day if something wasn't done I was going to stop, I wasn't going to work, and so he says, 'I think we can make her and get her hooked up' "; later the same evening McNabb told superintendent McFarlan that "If there ain't something done to this building, it won't be here much longer," and McFarlan said, "Oh I think it's very good, in very good condition, it's boxed up good and it's wide and the spans are long, I think it will stand."

Harold McFarlan, who had been petitioner's construction superintendent for ten years, was the "general superintendent" referred to in the commission's findings as being guilty of serious and wilful misconduct. His competence and good faith are unquestioned in the record unless we can infer that they are negatived by the commission's conclusional finding of serious and wilful misconduct. For reasons hereinafter developed we think that such an inference is not reasonable or tenable and that the commission does not, itself, draw it. Mr. McFarlan testified that he had been doing heavy construction work for some forty years; that in this construction of unit C the blueprints were followed, as well as good construction practice and Safety Orders issued by the State of California; that some ten days before the accident there was a "high wind" and "Mr. McIntosh got worried about the building, and so did I, and" the witness thereupon made "preparations to overcome the deficiency in the bracing"; "we certainly didn't knowingly erect anything hazardous, we didn't ask men to work in places if we thought it was dangerous, and I certainly wouldn't ask anybody to work under that building if I though it was going to fall down * * * I certainly wouldn't have had my own son and all the other men working underneath that building"; on the day before the accident he was told by the engineer and the oiler on a crane that some guy lines were removed from unit

C in order to permit moving the crane, and he didn't know whether they were replaced; following the collapse of C additional bracing was installed in units A and B; the "internal diagonal 'X' bracing" was not placed on unit C "identical to what it was on buildings" A and B for the reason that Hammond "requested that we keep the passageway open through that building so that the fire-fighting equipment could get in there in case of a fire," but other guy lines placed on C were "adequate to serve the purpose that the internal diagonal 'X' bracing would serve."

Harold B. Hamill, a consulting structural engineer, testified that in his opinion unit C collapsed "because it didn't have proper * * * braces to resist forces from the west" and that he was referring to any type of brace "the contractor might have wanted to put on which would have resisted forces from the west. They could have been guy lines from the outside * * or the inside * * * [T]here were none. It wouldn't have fallen if there had been any."

[3] In support of the award respondents rely upon the familiar rules (which petitioner does not challenge) that where the evidence is in substantial conflict or is susceptible of conflicting inferences the finding of the commission, whether for or against the applicant, is final and it is our duty to uphold such finding (Cal. Shipbuilding Corp. v. Industrial Acc. Com. (1946), 27 Cal.2d 536, 541–542, 165 P.2d 669), and that questions as to the weight of the evidence and the credibility of the witnesses are for the commission and if there is any evidence, whether direct or by reasonable inference, which will support the commission's finding, the reviewing court has no power to disturb it. (Nielsen v. Industrial Acc. Com. (1934), 220 Cal. 118, 122, 29 P.2d 852).

Respondents urge that the evidence is susceptible of the inference that superintendent McFarlan was guilty of serious and wilful misconduct as more particularly specified in the findings, hereinafter quoted or epitomized in some detail, and in this connection cite various general provisions of the Labor Code requiring the employer to maintain safe working conditions. (See §§ 6310, 6311, 6400–6406.) [4] Petitioner contends that the evidence would support a finding of nothing more culpable than a mistake in judgment or, at the most, of negligence, by McFarlan on the critical question of adequacy of the guy lines and the bracing in unit C, and that by a process of "hindsight" or "reverse reasoning" the commission has imposed upon petitioner the duty to absolutely preserve the safety of its employes. The evidence does, of course, support the conclusion that the collapse resulted from inadequate guying and bracing. To decide intelligently the controlling issues in these cases we must first understand clearly the essentials for an award.

[4] Whether in any given case serious and wilful misconduct is shown, inherently presents questions of both fact and law. Insofar as the issues may relate to the credibility of witnesses, the persuasiveness or weight of the evidence and the resolving of conflicting inferences, the questions are of fact. But as to what minimum factual elements must be proven in order to constitute serious and wilful misconduct, and the sufficiency of the evidence to that end, the questions are of law.

The courts of this state have frequently had occasion to discuss and to define the terms "negligence," "wilful misconduct," and "serious and wilful misconduct," and to emphasize the basic and substantial differences between negligence and wilful misconduct. For guidance in stating comprehensively the elements which must control the Industrial Accident Commission and the courts in applying the pertinent statutes to the facts of particular cases

4. Section 6310: "'Safe' and 'safety' as applied to an employment or a place of employment mean such freedom from danger to the life or safety of employees as the nature of the employment reasonably permits."

Section 6311: "'Safety device' and 'safeguard' shall be given a broad interpretation so as to include any practicable method of mitigating or preventing a specific danger."

we have reviewed the decisions in all related types of cases which have come to our attention. We bear in mind that the discussions and definitions in the respective cases ordinarily relate primarily to the term or terms as used in the particular statute with which the court was then concerned and that, for example, it is not necessarily true that "wilful misconduct" under the automobile guest statute (Veh. Code, § 403) has been unvaryingly regarded as being precisely the same as "serious and wilful misconduct" under the Labor Code (§ 4553). But the discussions and definitions evolved in cases considering these several statutes and related statutes or common law principles are helpful in determining what the Legislature must have meant in phrasing the statute in question. Thus, in Donnelly v. Southern Pacific Co. (1941), 18 Cal.2d 863, 118 P.2d 465, this court in defining what is meant by "willful and wanton negligence" as that phrase has been used by the federal courts, declared (18 Cal.2d at pp. 869–870, 118 P. 2d 465):

> "Negligence is an unintentional tort, a failure to exercise the degree of care in a given situation that a reasonable man under similar circumstances would exercise to protect others from harm. (Rest. Torts, secs. 282, 283, 284; Prosser, Torts, secs. 30 et seq.) A negligent person has no desire to cause the harm that results from his carelessness, (Rest. Torts, sec. 282 (c)), and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm. (Prosser, Torts, p. 261.) Willfulness and negligence are contradictory terms. * * * [Citations.] If conduct is negligent, it is not willful; if it is willful, it is not negligent. It is frequently difficult, however, to characterize conduct as willful or negligent. A tort having some of the characteristics of both negligence and willfulness occurs when a person with no intent to cause harm intentionally performs an act so unreasonable and dangerous that he knows, or should know, it is highly probable that harm will result. (Rest. Torts, sec. 500 et seq.; Prosser, Torts, pp. 260, 261.) Such a tort has been labeled 'willful negligence,' 'wanton and willful negligence,' 'wanton and willful misconduct,' and even 'gross negligence.' It is most accurately designated as wanton and reckless misconduct. It involves no intention, as does willful misconduct, to do harm, and it differs from negligence in that it does involve an intention to perform an act that the actor knows, or should know, will very probably cause harm. * * * [Citations.] Wanton and reckless misconduct is more closely akin to willful misconduct than to negligence, and it has most of the legal consequences of willful misconduct."

And as appears from Porter v. Hofman (1938), 12 Cal.2d 445, 447–448, 85 P.2d 447 (a case involving the term "wilful misconduct" as used in the so-called guest statute, Veh.Code, § 403), and cases there cited, this court has approved the following definitions: "Wilful misconduct * * necessarily involves deliberate, intentional, *or wanton* conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom.*"

"Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences."

"'Wilful misconduct' means something different from and more than negligence, however gross. The term 'serious and wilful misconduct' is described * * * as being something 'much more than mere negligence, or even gross or culpable negligence' and as involving 'conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences' * * * The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful misconduct' there must be actual knowledge, or that which in the law is es-

teemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. * * *" Substantially the same principles are stated in Helme v. Great Western Milling Co. (1919), 43 Cal.App. 416, 421, 185 P. 510; In James I. Barnes etc. Co. v. Industrial Acc. Com. (1944), 65 Cal.App.2d 249, 254, 150 P.2d 527; in Parsons v. Fuller (1937), 8 Cal.2d 463, 468, 66 P.2d 430; and in Cope v. Davison (1947), 30 Cal.2d 193, 198, 180 P.2d 873, 171 A.L.R. 667; see also North Pac. S. S. Co. v. Industrial Acc. Com. (1917), 174 Cal. 500, 502, 163 P. 910; Ethel D. Co. v. Industrial Acc. Com. (1934), 219 Cal. 699, 704, 28 P.2d 919; Hargrave v. Industrial Acc. Com. (1940), 5 Cal.Comp.Cases 129.

In Meek v. Fowler (1935), 3 Cal.2d 420, 425-426, 45 P.2d 194 (a case also involving the so-called guest statute, and quoting in part from Howard v. Howard (1933), 132 Cal.App. 124, 128, 22 P.2d 279 [guest statute]; see also Weber v. Pinyan (1937), 9 Cal.2d 226, 230-235, 70 P.2d 183, 112 A.L.R. 407 [guest statute]), the pertinent principles are discussed as follows: "While the line between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears * * * in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence and that this misconduct must be wilful. While the word 'wilful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.

"Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of wilful misconduct. As has been repeatedly declared, '"wilful misconduct" means something more than negligence—more, even, than gross negligence'. [Citations.]" Manifestly, "serious *and* wilful misconduct" cannot be established by showing acts any less culpable, any less deliberate, or any less knowing or intentional, than is required to prove wilful misconduct.

The situation here, which involved technical matters and skilled, expert judgment, is quite obviously distinguishable from the cases presented in Bethlehem Steel Co. v. Industrial Acc. Com. (1944), 23 Cal.2d 659, 145 P.2d 583, Parkhurst v. Industrial Acc. Com. (1942), supra, 20 Cal.2d 826, 129 P.2d 113, and Blue Diamond Co. v. Industrial Acc. Com. (1922), 188 Cal. 403, 205 P. 678, in each of which it was found that the employer had violated an express statute or safety order framed to protect the employes. (Cf. Simmons Co. v. Industrial Acc. Com. (1945), 70 Cal.App.2d 664, 670, 161 P.2d 702.) Thus, in the Bethlehem Steel case, the employer violated a specific safety order of the Industrial Accident Commission requiring that loads being transported by trucks "shall be secured against displacement"; in the Parkhurst case the violation was of statutes and of specific orders of health authorities relating to the purity of, and the methods of supplying, drinking water to the employes; and in the Blue Diamond case both "general safety orders of the commission and

* * * its express and repeated directions * * * with relation to the safeguarding of the belts and pulleys of the plant" were violated. By contrast, in the cases now before us no such specific statute or safety order is involved, but only expert judgment as to the extent of the guying and bracing needed in the course of the particular construction job here involved.

Some attempt has been made to isolate statements from some of the above cited cases which might appear to support the view that any negligent act or omission could be held to constitute serious and wilful misconduct. By way of examples, the following sentences from the indicated cases may be quoted: "The long continued maintenance of these [dangerous] conditions was properly found to constitute serious misconduct" (Cal. Shipbuilding Corp. v. Industrial Acc. Com. (1947), 31 Cal.2d 270, 273, 188 P.2d 27; "It has been held * * * that an employer's mistake in judgment does not relieve him from liability for serious and willful misconduct" (Parkhurst v. Industrial Acc. Com. (1942), supra, 20 Cal.2d 826, 829–830, 831, 129 P. 2d 113); "The mere fact the employer did not believe the condition was dangerous does not relieve him from liability" (Bethlehem Steel Co. v. Industrial Acc. Com. (1944), supra, 23 Cal.2d 659, 665, 145 P.2d 583).

[5] The above quoted statements as used in their contexts and applied respectively to the cases there under discussion correctly enunciate pertinent principles of law or propositions of fact. But those statements cannot fairly be isolated and understood to support the proposition that conduct which both courts and legislative bodies have traditionally defined and considered to be mere negligence, however gross, may be held by the Industrial Accident Commission to be serious and wilful misconduct under the terms of workmen's compensation statutes. Rather, the true rule is that serious and wilful misconduct is basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute wilful misconduct; conversely an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences, cannot properly be classed as the less culpable conduct which is termed negligence. It follows that a finding of serious and wilful misconduct cannot be sustained upon proof of mere negligence of any degree.

For the purposes of this opinion we assume without holding that the evidence as a matter of law is not insufficient to support a finding that the employer's superintendent, McFarlan, was guilty of serious and wilful misconduct in deliberately, knowingly, and intentionally failing to sufficiently brace and guy unit C so that it would not have collapsed during the course of construction. As shown above, there is testimony that he was warned on at least two or three different occasions that in the opinions of others[5] the building needed additional bracing and was unstable and "won't be here much longer * * * if something wasn't done"; that it is good construction practice to brace the columns as they are erected, including both permanent bracing (which had not yet been installed when C collapsed) and temporary guying, and that such bracing "particularly on this building * * * was important"; that some ten days prior to the collapse McFarlan himself became worried and made "preparations to overcome the deficiency in the bracing" (the nature of such preparations and whether they were actually carried to execution, or whether McFarlan deliberately and wantonly, refrained from carrying them into execution, does not directly appear although the very fact that he was worried would seem to nega-

5. We intend no implication as to the weight, if any, which should be accorded these opinions, or as to the qualification as experts of the persons expressing them.

tive, rather than affirm, either an intent to harm or a wanton, positive and absolute disregard of possible harm); that on the day before the collapse McFarlan was aware that guy lines had been removed to permit moving a crane, and he did not know whether they had been replaced; and that the wind, on the day of the collapse, was "pretty stiff." We particularly assume, for purposes of the opinion, but without so holding, that such testimony admits of the essential inference (we intend no implication that it is persuasive to that end or that as triers of fact we should so find) that McFarlan was further aware that unit C was so unstable as to constitute an imminent and probable threat to the safety of the men working on it, and that his failure to properly brace and guy the building went beyond mere negligence and constituted an intentional omission of a criminal or quasi-criminal nature done either with knowledge that serious or fatal injury was a probable result or with a positive, active, absolute, reckless and wanton disregard for the safety of the workmen.

An award based on such a finding would be within the law. Petitioner would not thereby be required to guarantee or preserve absolutely the safety of its employes, or even be free from negligence, as an alternative to suffering the additional assessment provided for by the terms of section 4553; it would merely have to refrain from such deliberate, knowing and intentional failure to take safety precautions, whereby its employes were intentionally subjected to known, serious, unnecessary and unreasonable hazards, as the Industrial Accident Commission, we are assuming, could have inferred as above suggested. But petitioner's contention that the commission did not make the subject awards on any such view of either the facts or the law and that the findings on the issue of serious and wilful misconduct do not in truth resolve the crucial issue and, hence, are inadequate and fail to support the awards, presents a quite different question.

In each of these cases the commission's findings on the issue of serious and wilful misconduct are that (italics added throughout) "The employee was injured, in said employment, by reason of the serious and wilful misconduct of the employer *in the manner more particularly as follows:* * * * That at, and immediately prior to, the time of injury * * * the employer through its general superintendent, did knowingly and wilfully fail and neglect":

(a) To "furnish employment, and a place of employment, which was safe for the work * * *" (As is shown subsequently, it appears that the commission in making this finding was of the view that the mere happening of the accident, coupled with a mistake in judgment on the part of petitioner's superintendent, supports the finding and warrants the conclusion of serious and wilful misconduct on the part of the superintendent.)

(b) To "furnish and use proper, sufficient and adequate safety devices and safeguards; to wit: the necessary and required securing, bracing, and guying of the pre-fabricated parts of a building, then being erected, *so as to prevent* the fall or collapse thereof during the construction *and thereby render* such employment, and construction, and place of employment, and construction, *safe for the work* * * *" (This finding seems to impute an absolute duty "to prevent the fall or collapse * * * during the construction," and it suggests the view that only by absolute prevention of collapse can the employer avoid being held guilty of serious and wilful misconduct for failing to provide a safe place of employment.)

(c) To "adopt and use those practices, means, methods, and operations, in securing, bracing and guying the pre-fabricated parts of a building then being erected, *so as to prevent* the fall or collapse during the construction thereof *and thereby render* such employment, and construction, and place of employment, and construction, *safe for the work* * * *" (Again, as in (b), this finding seems to impute an absolute duty "to prevent the fall or collapse during the construction," and a like absolute standard in respect to the safety of the work.)

(d) To "do those things which a prudent employer would have done, had it turned its mind to the fact, and which were re-

quired to secure, brace, and guy the pre-fabricated parts of a building, to protect the life, limb and safety of the employees * * *" (This finding obviously shows the view that negligence and serious and wilful misconduct are synonymous.)

(e) To "use and to exercise that degree of prudence, foresight and caution which, under the circumstances, a prudent employer would then and there have used and exercised, had it turned its mind to the fact, in requiring, permitting and directing its employee * * * to go, work, and be, in employment, and construction, and place of employment, and construction, that was then and there unsafe." (This finding like (d), imputes no more than negligence as a basis for the conclusion of serious and wilful misconduct.)

(f) To "use and to exercise that degree of prudence and caution which, under the circumstances, a prudent employer would then and there have used and exercised, had it turned its mind to the fact, in requiring and directing its employees, * * * to work upon, or in connection with, the erection of pre-fabricated parts of a building, without *first insuring* and securing proper, adequate, and *necessary* bracing and guying *so as to prevent the collapse* of said structure during, and in the course of, said erection and construction." (This finding not only defines negligence to constitute serious and wilful misconduct (as do (d) and (e)) but also appears to construe as serious and wilful misconduct any failure to *insure* absolute safety of the structure.)

(g) To "comply with the requirements of Labor Code, Sections 6400, 6401, 6402, and 6403, and each of them, neglecting, and omitting, to provide, secure, furnish and maintain, in place, and at the place of employment, necessary and adequate bracing and guying of the pre-fabricated parts of a building then being erected *so as to prevent* its fall or collapse during, and in the course of, said construction." [6] (This finding seems to presuppose that any failure for any reason to install and maintain such guying and bracing as would absolutely "prevent" the fall or collapse of the structure, would amount to a violation of the listed sections and would constitute serious and wilful misconduct.)

[6, 7] The primary rule of construing findings is to interpret them liberally in favor of sustaining the award, and even if a finding, by itself, is inadequate for uncertainty it will still be upheld if it can be made certain by reference to the record. This court consistently has been liberal in giving effect to such rule (see Vega Aircraft v. Industrial Acc. Com. (1946), 27 Cal.2d 529, 535–536, 165 P.2d 665; Cal. Shipbuilding Corp. v. Industrial Acc. Com. (1947), supra, 31 Cal.2d 278, 279, 188 P.2d 32; Ethel D. Co. v. Industrial Acc. Com. (1934), supra, 219 Cal. 699, 708, 28 P.2d 919) and it does not now recede from it. But here the problem is not answered by that rule. Basic justice and common honesty require that the commission and this court be fair to both the employe and the employer. The factual elements which, by the statutory requirement, must be found to exist before an award for serious and wilful misconduct can be sustained are hereinabove declared. The critical question here is: On the whole record can we fairly hold that the commission has found the essential facts to exist? Or, does it

6. In contrast to the commission's findings and conclusions, the report of the referee who conducted the hearings is as follows:

"If anybody would be charged with serious and wilful misconduct, it would be on account of Mr. McFarlan's actions in not seeing to it that better guy lines or more of them were put up. Having watched him carefully at the hearing and considered his testimony in connection with the entire record, I do not believe that anybody would question his good faith or that he acted with full intentions of looking out for the safety of his crew. The fact that he misjudged the stresses and strains on the adequacy of the guy lines, if admitted, is not sufficient to charge the employer with serious and wilful misconduct."

The referee then correctly states the law governing the conclusion which should be drawn from the facts as he viewed them and concludes with the statement that: "The evidence is insufficient to establish that the injury was caused by the serious and wilful misconduct of the employer."

appear, rather, that to facts not meeting the legal minimums the commission has applied a standard stricter than that authorized by the Legislature?

[8, 9] After most careful scrutiny of the entire record we conclude that the findings here lead to perplexity which cannot be cured by reference to the record and that on any reasonable construction such findings do not fairly support the awards. Although, as indicated above, it is not required that findings be specific and detailed it is essential that they be sufficient in form and substance so that by reading them and referring to the record the parties can tell and this court can tell with reasonable certainty not only the theory upon which the commission has arrived at its ultimate finding and conclusion but that the commission has in truth found those facts which as a matter of law are essential to sustain its award.

It is obvious, as indicated above, that certain of the specifications of "fact" contained in the findings are wholly insufficient, in that they include matters which on any view whatsoever are significant of nothing more culpable than negligence, as for example, in paragraph (e) of the quoted findings (see also paragraphs (f) and (d)), that the employer, through its general superintendent, failed and neglected to "exercise that degree of prudence, foresight and caution which, under the circumstances, a prudent employer would then and there have" exercised, and so was guilty of serious and wilful misconduct. Such statements concerning what a "prudent employer" would have done "had it turned its mind to the fact" obviously do not establish serious and wilful misconduct, which, as has been shown, requires an act or omission to which the employer *has* "turned its mind." Rather, as also above suggested, such statements indicate that the commission has held acts and omissions amounting to no more than negligence, to constitute serious and wilful misconduct. Yet, as previously shown, negligence and wilful misconduct are inherently incompatible. The quoted findings of fact, disregarding the ultimate conclusion of serious and wilful misconduct, do not in any respect determine that the employer here, through its general superintendent, was guilty of more than negligence. Such findings do not with any reasonable certainty determine any facts from which this court can conclude that the petitioner was guilty of serious and wilful misconduct or that, in truth, the commission itself has found facts which warrant such ultimate conclusion.

The findings made do not determine that the general superintendent had knowledge that if he failed to add further guying and bracing a probable result would be the collapse of the building, nor can this court determine that the commission found as a fact that such superintendent did in truth know or believe that the guying and bracing was insufficient and that a possible result would be the collapse and the serious injury of employes and with that knowledge proceeded with reckless, absolute, positive and wanton disregard of the consequences. Rather, the commission's findings, in paragraphs (d), (e), and (f), on the issue of serious and wilful misconduct demonstrate that the commission has regarded as such serious and wilful misconduct acts and omissions which as a matter of law do not constitute such misconduct, but merely evidence negligence, and as to findings (a), (b), (c), and (g) it appears that the commission has gone even farther than to hold that negligence is serious and wilful misconduct; it seems to have held petitioner to the standard of an insurer.

Even if it can be said that the findings, or any of them, are ambiguous, and that their language might admit of an interpretation which would sustain the awards upon the legal standards which we have enunciated, we are satisfied that the record here precludes interpretation to that end. Such an ambiguity cannot here fairly be resolved in favor of sustaining the awards because reference to the record and to the commission's formally declared position (its own language is hereinafter quoted) seems to demonstrate that the commission did not in truth find, and does not believe, that all the essentials of wilful and serious misconduct have been proven.

The commission argues that the findings establish serious and wilful misconduct

since they state the ultimate conclusion of such misconduct. However, such findings do not specify any facts from which this court can conclude that the basic and essential factual elements, which it is hereinbefore shown are necessary to support the ultimate conclusion of serious and wilful misconduct, were found to exist. Instead, such findings indicate that, as urged by petitioner, the commission was holding petitioner to the standard of an insurer or guarantor of the safety of its employes, rather than applying to the issue of serious and wilful misconduct the legally essential elements which we have specified in detail hereinabove. Thus, in the quoted paragraphs (as more specifically identified above), the words employed by the commission indicate the view that petitioner had an *absolute*, or substantially an absolute, duty and responsibility to make and keep the employment conditions safe against all hazards and to absolutely *prevent* (at least, as hereinafter noted from the argument of the commission, "In the absence of circumstances which *could* not be foreseen," as, for example, an act of God) the collapse of the building here involved, and that any failure to meet that standard, whether due to negligence or otherwise, constituted serious and wilful misconduct. Furthermore, the argument made by the commission itself in its answers to the petitions for the writ conclusively establishes that in fairness to the petitioner this court cannot interpret the conclusional findings as being an actual determination of the essential facts. For example, it is declared in such answers that "An employer's failure to comply with the requirements of Labor Code, Sections 6400 through 6403 [dealing with an employer's duty to maintain safe working conditions], constitutes serious and wilful misconduct * * * In the absence of extraordinary circumstances which *could* not [apparently meaning in the exercise of the highest degree of care and capability] be foreseen, petitioner was under a duty to employ methods and practices in the erection of the building to *insure* that it would not collapse from the pressure of forces to which it *might* be subjected during the construction period. Petitioner's *failure to take adequate precautions* against the dangers inherent in the erection of the structure *clearly constitutes serious and wilful misconduct* * * * McFarlan's failure to provide additional bracing was predicated *on his belief that his method of construction and the guying provided was adequate to sustain the structure.*" (Italics added.)

It is manifest from what has been said that if McFarlan in good faith believed (and the commission says he did believe) that the method of construction being employed was sound and sufficient for the safety of all concerned then he was guilty of no more than a mistake in judgment. His mistake in judgment on a technical matter of construction practice is his only "misconduct." In the light of these circumstances and the commission's statement, it seems unthinkable that the commission actually intended to hold, or has held, that McFarlan was guilty of serious and wilful misconduct within the true meaning of that term as defined hereinabove; a meaning, as already pointed out, which would require that if *he* had been injured in the building collapse, the normal award to him would have to be reduced. There is no suggestion that McFarlan was incompetent or inexperienced or that his employer (the petitioner) was itself guilty of misconduct in employing McFarlan for the job at hand. Under the circumstances here appearing, annulment of the awards is compelled.

[10, 11] As previously indicated, in each of the four cases the individual respondent has filed a "Special Appearance in Answer to" the petition for the writ and for hearing in this court, in which it is urged that the court is without jurisdiction to consider such petition by reason of the failure of the petitioner to serve a copy of the petition for the writ upon the individual respondent either prior to filing such petition or within the thirty-day period specified by section 5950[7] during which the

7. Section 5950, at the times here involved, provided: "Within thirty days after the petition for a rehearing is denied, or, if the petition is granted, within thirty days

petition may be filed. On the date (April 13, 1951) of filing of the petitions for review the Rules on Appeal provided, in Rule 57, that "(a) A petition to review an order or award of the Industrial Accident Commission shall be accompanied by proof of service of 2 copies thereof on the Industrial Accident Commission * * *," and petitioner complied with this rule. A copy of the petition was not, however, served upon the individual respondents or their attorneys until July 20, 1951, and the respondents contend that this failure to comply earlier with the provisions of section 5954[8] precludes our consideration of the petition.

Counsel for petitioner state that the delay in serving respondents' attorneys resulted from their complete reliance upon the Rules on Appeal, and that they inadvertently overlooked the service provisions of section 5954 until after the filing of the "Special Appearance" of each individual respondent.[9] We are not disposed, however, to accept the view that such service provisions can properly be interpreted as excluding jurisdiction under the circumstances shown here. It is to be noted that no time limitations appear in section 5954. In section 5905 the Legislature has directed that a copy of a petition to the commission for reconsideration ("rehearing" prior to 1951 amendment) of an award be served "forthwith" (apparently *after* filing, see §§ 5903, 5904) upon all adverse parties, and if a definite time limit was intended to apply to service of a copy of a petition for a writ of review it could easily have been included in section 5954.

Respondents rely upon statements that "The right to be present at any hearing necessarily includes the right to have notice of such hearing in time to attend" (Carstens v. Pillsbury (1916), 172 Cal. 572, 577, 158 P. 218), and that "The real adverse party in interest [in a certiorari proceeding] * * * is the one in whose favor the act complained of has been done" (Lee v. Small Claims Court (1939), 34 Cal. App.2d 1, 5, 92 P.2d 937), and also upon the holding in Lyydikainen v. Industrial Acc. Com. (1939), 36 Cal.App.2d 298, 97 P.2d 993, annulling an order of the commission where failure to comply with statutory provisions for service of a petition for an order terminating liability resulted in an award terminating compensation payments to an injured employe without an opportunity to the employe to be heard. In the present cases, however, the individual respondents have not been denied notice or opportunity to be heard and to file answers to the petitions for writs of review; on the contrary they admit being served on June 16, 1951, with copies of the answers (on the merits) filed by the commission to the petitions for the writ and on July 20, 1951, with copies of the petitions for the writ. Moreover, as observed by the court in Peter v. Board of Supervisors (1947), 78 Cal.App.2d 515, 521, 178 P.2d 73, "The requirements as to service when the petition [for the issuance of any prerogative writ, including certiorari] is filed, in section

after the rendition of the decision on the rehearing, any person affected thereby may apply to the supreme court or to the district court of appeal of the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award, or of the order, decision, or award on rehearing."

8. Section 5954 provides: "The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article [the article concerning judicial review of commission awards]. A copy of every pleading filed pursuant to the terms of this article shall be served on the commission and upon every party who entered an appearance in the action before the Industrial Accident Commission and whose interest therein is adverse to the party filing such pleading."

9. Rule 57, Rules on Original Proceedings in Reviewing Courts (as amended effective November 13, 1951) now provides "(a) A petition to review an order or award of the Industrial Accident Commission shall be accompanied by proof of service of two copies thereof on the Industrial Accident Commission and one copy upon each party who entered an appearance in the action before the Industrial Accident Commission and whose interest therein is adverse to the party filing the petition. * * *"

1107 of the Code of Civil Procedure, would seem to be more directory than mandatory as the court may act on the petition without any service if it decides to do so. Under these circumstances it would seem that service might be made after the petition is filed if the court should decline to proceed in the matter without service. The provisions as to service and points and authorities in opposition to the issuance of a writ under the prayer of a petition would seem to be more for the benefit of the court than for the advantage of the parties." (See also Code Civ.Proc. § 1069.) We believe the same observation is appropriate with reference to the service provisions of section 5954 of the Labor Code, and hold respondents' contentions on this point to be without merit.

For the reasons above stated, the subject awards are annulled.

GIBSON, C. J., EDMONDS, TRAYNOR and SPENCE, JJ., and WOOD, Justice pro tem., concur.

CARTER, Justice.

I dissent. The majority opinion in this case is a definite departure from what has been considered the settled law of this state in industrial accident cases, namely, that where specific findings of fact are supported by substantial evidence, an award based thereon will be affirmed. Here the Commission found, on evidence assumed by the majority to be sufficient to support such findings, that petitioner knowingly and wilfully failed:

(a) To furnish employment, and a place of employment, which was safe for the work.

(b) To furnish and use proper, sufficient and adequate safety devices and safeguards; to wit: the necessary and required securing, bracing, and guying of the prefabricated parts of a building, then being erected, so as to prevent the fall or collapse thereof during the construction and thereby render such employment, and construction, and place of employment safe for the work.

(c) To adopt and use those practices, means, methods, and operations, in securing, bracing and guying the pre-fabricated parts of a building then being erected, so as to prevent the fall or collapse during the construction thereof and thereby render such employment, and construction, and place of employment safe for the work.

(d) To do those things which a prudent employer would have done, had it turned its mind to the fact, and which were required to secure, brace, and guy the prefabricated parts of a building, to protect the life, limb and safety of the employees.

(e) To use and to exercise that degree of prudence, foresight and caution which, under the circumstances, a prudent employer would then and there have used and exercised, had it turned its mind to the fact, in requiring, permitting and directing its employees to go, work, and be, in employment, and construction, and place of employment, that was then and there unsafe.

(f) To use and to exercise that degree of prudence and caution which, under the circumstances, a prudent employer would then and there have used and exercised, had it turned its mind to the fact, in requiring and directing its employees, to work upon, or in connection with, the erection of prefabricated parts of a building, without first insuring and securing proper, adequate, and necessary bracing and guying so as to prevent the collapse of said structure during, and in the course of, said erection and construction.

(g) To comply with the requirements of Labor Code, §§ 6400, 6401, 6402, and 6403, and each of them, neglecting, and omitting, to provide, secure, furnish and maintain, in place, and at the place of employment, necessary and adequate bracing and guying of the pre-fabricated parts of a building then being erected so as to prevent its fall or collapse during, and in the course of, said construction.

The majority assumes that the evidence is sufficient to support such findings, but nevertheless annuls the award because it interprets these findings as supporting a conclusion that petitioner was guilty of negligence only. By what legerdemain may it be said that an employer who is found guilty of serious and wilful misconduct because he knowingly and wilfully

failed to provide a safe place for his employees to work, is guilty of negligence only? The answer to this question contained in the majority opinion is based upon a process of reasoning out of harmony with the social philosophy which postulated the statutory provisions here involved and renders them ineffective. This philosophy stems from the basic concept that industry should bear the burden of injuries suffered by working men and women in the course of their employment, and since the employer could insure against injuries resulting from negligence, it was necessary, in order to force employers to comply with safety regulations and provide safe places of employment, that they be subjected to increased awards to those injured as the result of their wilful failure to so comply. This philosophy is embodied in our statutes, and cases arising thereunder which have come to this Court for review indicate judicious consideration by the Industrial Accident Commission. The case at bar is no exception.

Brushing aside the sophistry with which the majority opinion is replete, what are the realities of the situation here presented? They clearly show the evidence was sufficient. A building collapsed in the course of construction and four men working thereon were seriously injured—two of them fatally. It is admitted that the cause of the collapse was insufficient bracing—that this condition was called to the attention of the employer's superintendent and he did nothing to correct it although he had ample time and the means to do so. In other words the building was unsafe because it was not sufficiently braced and the employer *knew* that it was therefore highly dangerous—a danger that would inevitably result in serious injuries and death. Yet with that knowledge he put the workmen on the job. Certainly if an employer knows a place of work is fraught with grave danger but still compels his employees to face that danger, he evinces a reckless disregard of the safety of his employees. Whatever may have been the motives for his conduct, to save money, or time or to satisfy a sadistic impulse is not important. The weak excuse of the superintendent that he thought the building had enough bracing cannot change the result. The Commission could disbelieve his testimony as to what he thought and conclude that he had full knowledge that the building was in an unsafe condition. On this evidence, the Commission found that the employer knowingly and wilfully failed to provide a safe place of employment for the men who were injured and that such failure constituted serious and wilful misconduct. I do not see how the Commission could have found otherwise. But the majority of the Court seems to be more concerned with technical terms and phraseology than the liberal application of the law enacted for the protection of working men and women who have suffered loss of life and serious injuries as the result of its violation. In fact, the whole tenor of the majority opinion is to emphasize the burden placed on the employer by this legislation and minimize its salutary objective. It is the age-old reactionary concept of property rights above human welfare: What does it matter that working men and women are killed and injured because industrial enterprises are unsafe so long as employers can escape liability? To guard against injury to employees may cost the employer money, so why should he do so without compulsion? The answer is that experience has shown that some employers will not provide safety devices unless forced to do so, hence the remedial legislation here involved—that life and limb of employees be protected against unnecessary risks even if it costs the employer money to do so. Not only has the legislature spoken by creating the liability of increased awards where serious and wilful misconduct is involved, but it has declared it to be the duty of the courts to liberally construe the provisions of the act "with the purpose of extending their benefits *for the protection of persons injured* in the course of their employment." (Emphasis added.) Labor Code, § 3202. This legislation has been generally accepted as extending to working men and women a measure of the economic and social justice to which people in industrial employment are entitled. Thinking people agree that social progress means, generally speaking, the gradual advancement of human

welfare toward greater physical, moral and cultural enjoyment of life. The legislation here involved tends toward this objective and should be liberally construed to achieve it. The present decision finds no parallel in the annals of the judicial history of this state in its antithesis of liberal construction with respect to both the act here involved and the proceedings before the Industrial Accident Commission and this Court.

The majority opinion assumes that there was sufficient evidence to support a finding of serious and wilful misconduct on the part of the employer and therefore increased benefits could be properly awarded against it under § 4553 of the Labor Code, but it annuls the award on the grounds that the findings are not sufficient to support the award; that they are based upon the theory that negligence constitutes wilful misconduct and that all that was found was negligence.

The *main* contention made by the petitioner here is that the evidence is insufficient to support a finding of serious and wilful misconduct, yet the majority refuses to pass upon that question. (It is a matter I will discuss later herein.) That refusal violates the policy expressed by statutes dealing with decisions on appeal that where a new trial is granted the court shall "pass upon and determine *all* the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." Code Civ.Proc. § 53. It is especially pertinent here for when the case goes back to the Commission all it needs to do is to amend its findings. Petitioner will again seek a review of the case urging its main point that the evidence is insufficient. If the court decides it is insufficient then the case can be retried with additional evidence and another review sought. Such delays are inexcusable and should not be countenanced.

The findings are clearly sufficient. They read that the employee was injured by reason of the "*serious and wilful misconduct*" of the employer "in the manner and more particularly as follows." Then follow various particular findings. We need go no further under the law than the findings of serious and wilful misconduct; the particular findings may be ignored. A finding of serious and wilful misconduct in those words—the words of the statute (Lab.Code, § 4553)—is sufficient. California Shipbuilding Corp. v. Industrial Acc. Commission, 31 Cal.2d 270, 188 P.2d 27; Kaiser Co. v. Industrial Acc. Commission, 81 Cal.App.2d 818, 185 P.2d 353; General Petroleum Corp. v. Industrial Acc. Commission, 90 Cal.App. 101, 265 P. 508; Clarke v. Industrial Acc. Commission, 87 Cal.App. 766, 262 P. 471; Dawson v. Industrial Acc. Commission, 54 Cal.App.2d 594, 129 P.2d 479; Vega Aircraft v. Industrial Acc. Commission, 27 Cal.2d 529, 165 P.2d 665; Lumbermen's Mut. Cas. Co. v. Industrial Acc. Commission, 29 Cal.2d 492, 175 P.2d 823; Ethel D. Co. v. Industrial Acc. Commission, 219 Cal. 699, 28 P.2d 919. It is equally clear that a court will not annul an award if the findings are inconsistent. If there are findings which will sustain the award other findings which would annul it are not available for that purpose. George L. Eastman Co. v. Industrial Acc. Commission, 186 Cal. 587, 200 P. 17; Southern Pac. Co. v. Industrial Acc. Commission, 177 Cal. 378, 170 P. 822; Coombs v. Industrial Acc. Commission, 76 Cal.App. 565, 245 P. 445; Hines v. Industrial Acc. Commission, 215 Cal. 177, 8 P.2d 1021. It necessarily follows that the majority holding which annuls the award by relying upon findings other than the ultimate one of serious and wilful misconduct is squarely contrary to the foregoing authorities. Yet none of them is even discussed. If it is the intention of the majority to overrule those cases it should be done openly and frankly. Moreover the statutory required liberal construction of the workmen's compensation laws, Labor Code, § 3202, demands that the findings be liberally construed to support the award.

In addition to the findings of the ultimate fact of wilful misconduct, the Commission *expressly* found the existence of wilful misconduct in detail. After making the ultimate finding, it is said that the misconduct occurred particularly as follows: That at and prior to the time of the collapse the employer "*did knowingly and wilfully fail*";

then follow seven separate paragraphs (a to g) specifying what the employer *wilfully and knowingly* failed to do or did, such as to furnish a safe place for the employee to work, to furnish and use proper safety devices, namely, bracing and guying for the structure so as to prevent its collapse. That such findings are adequate is beyond doubt. If an employer *knowingly and wilfully* fails to furnish a safe place for the employee to work (a safe place of employment is required by the safety laws of this state [1]) or to furnish supports to prevent a certain building from collapsing and injuring and killing workmen, we have the clearest case of serious and wilful misconduct that could be imagined.

The majority opinion cannot be reconciled with numerous cases. In Parkhurst v. Industrial Acc. Commission, 20 Cal.2d 826, 129 P.2d 113, 115, this Court annulled a Commission finding of no wilful misconduct stating: "It has been held repeatedly that the employment of workmen under *dangerous conditions that can be guarded against constitutes a reckless disregard for their safety.* (Emphasis added.) Hatheway v. Industrial Acc. Comm[ission]., supra, [13 Cal.2d 377, 90 P.2d 68]; Hoffman v. Dept. of Indus. Relations, supra, [209 Cal. 383, 287 P. 974, 68 A.L.R. 294]; Pacific Emp. Ins. Co. v. Industrial Acc. Comm[ission]., supra, [209 Cal. 412, 288 P. 66]; Gordon v. Industrial Acc. Com[mission]., supra, [199 Cal. 420, 249 P. 849, 58 A.L.R. 1374]; Blue Diamond Plaster Co. v. Industrial Acc. Comm[ission]., supra, [188 Cal. 403, 205 P. 678]; Johannsen v. Industrial Acc. Comm[ission]., 113 Cal.App. 162, 298 P. 99." In Hatheway v. Industrial Acc. Commission, 13 Cal.2d 377, 380, 90 P.2d 68, 70, the principles are stated and cases discussed: "'It has frequently been said that willful misconduct involves the *knowledge* of the person that the thing which he is doing is wrong. * * * Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."'

"The cases are quite uniform to the effect that permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of the employees that the commission's finding that such conduct is serious and wilful will not be disturbed. The mere fact the employer did not believe the condition was dangerous does not relieve him from liability. Thus in Blue Diamond Co. v. Industrial Acc. Comm[ission]., 188 Cal. 403, 409, 205 P. 678, 681, the employee was killed as a result of the failure of the employer to place guards on machinery. The managing agents of the employer testified that they knew of the condition, but stated that they did not consider the condition unsafe. 'Their mistake in judgment upon that subject cannot be held to relieve their employer from liability.' An award based on serious and wilful misconduct was affirmed. In Hoffman v. Department of Industrial Relations, 209 Cal. 383, 287 P. 974, 68 A.L.R. 294, it was held that where the employer violated the terms of a statute providing for a specified type of temporary flooring and its method of construction to be used when erecting a building, he was guilty of serious and wilful misconduct, even though the employer was ignorant of

1. "Every employer shall furnish employment and a place of employment which are safe for the employees therein." Labor Code, § 6400. "Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes, which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees." Labor Code, § 6401. "'Safe' and 'safety' as applied to an employment or a place of employment mean such freedom from danger to the life or safety of employees as the nature of the employment reasonably permits." Labor Code, § 6310.

the provisions of the statute. In Pacific Emp. Ins. Co. v. Industrial Acc. Comm[ission]., 209 Cal. 412, 288 P. 66, the employee was injured by an unguarded saw. The employer was held guilty of serious and wilful misconduct although the saw had been in operation but a week, and the employer testified that he intended to place a guard thereon. In Gordon v. Industrial Acc. Comm[ission]., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374, the employee was killed in a cave-in of a gravel pit. It was held that compelling an employee to work in a dangerous spot, without taking protective measures, where the employer knows or should have known of the danger is serious and wilful misconduct. In holding an employer guilty of serious and wilful misconduct under somewhat similar circumstances the appellate court in Johannsen v. Industrial Acc. Comm[ission]., 113 Cal. App. 162, 166, 298 P. 99, 100, stated: 'Had he (the employer) turned his mind to a consideration of the subject, he must have known that a person working in the trench was in jeopardy, which danger could readily have been obviated by the necessary bracing.' "

While the above cited cases differ factually from the case at bar the philosophy and legal concept of those cases is equally applicable here. The dangerous character of the place where the employees were required to work was obvious. If it was not known it was of such a character that it should have been known. Steps could easily have been taken to alleviate the danger but the employer did nothing whatsoever and sent the employees on that dangerous mission with reckless disregard of their safety.

To evade the specific provisions of the findings that the acts causing the collapse of the building were wilfully and knowingly done and hence wilful misconduct, the majority uses various devices. It ignores the express findings that the various things done or omitted and listed in paragraphs a to g are all qualified by the phrase preceding those paragraphs that the failure was wilful and knowing.

It discusses those paragraphs which appear to speak of negligence, failing, however, to stress the ones which do not point to negligence such as that the employer wilfully and knowingly failed to supply guy wires and braces for the structure. The findings pointing toward negligence should be disregarded under the authorities heretofore cited holding that such is the rule with regard to Commission findings and the rule which demands liberal construction of the findings. Even on appeal where findings of a court are reviewed, the rule is: "An appellate court will construe findings liberally in support of the judgment. Any uncertainties will be construed so as to uphold rather than defeat the judgment, that is, to give it effect rather than destroy it. All the findings are to be read together, and must be reconciled to prevent any conflict on material points, if possible. *Even if there is only one clear, sustained, and sufficient finding upon which a judgment may rest, it will be presumed that the court did rest the judgment on that finding.*

"In reviewing the sufficiency of findings to support a judgment, the appellate court will regard the ultimate facts found and not mere probative facts, unless the trial court's findings show that the probative facts are the only facts proved and that they alone are the basis for its finding of the ultimate facts. In the absence of such a showing, the mere circumstance that some of the probative facts are inconsistent with the ultimate facts will not prevent the ultimate facts from controlling. And whenever the facts found are such as might authorize different inferences, it will be presumed that the inference made by the trial court was one that will uphold rather than defeat the judgment. In such a case the appellate court will not draw any inference contrary to that which might have been drawn by the trial court for the purpose of rendering its judgment." (4 Cal.Jur.2d Appeal & Error, § 571.) (Emphasis added.)

The majority states that the theory of law adopted by the Commission in its findings and award was erroneous. That, however, ignores the rule that: "It is, of course, immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs

or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443, 448; 4 Cal.Jur.2d, Appeal & Error, § 536. There is ample here in the evidence and findings to support the theory that wilful misconduct is more than negligence and is what the majority opinion describes it to be.

Other things stated in the majority opinion, although dictum, require comment. It is said that the increased award for wilful misconduct is a penalty and hence such an award can be sustained only if the Commission finds every fact essential to its imposition. In the first place the additional compensation is *not* a penalty. That was held in E. Clemens Horst Co. v. Industrial Acc. Commission, 184 Cal. 180, 193 P. 105, 16 A.L.R. 611, where the Court held the provision for increased compensation was not even exemplary damages and hence was constitutional. That holding is based upon the obvious truth that ordinary compensation does not fully cover the loss suffered by the employee. E. Clemens Horst Co. v. Industrial Acc. Commission, supra, 184 Cal. 180, 193 P. 105, 16 A.L.R. 611; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398; West v. Industrial Acc. Commission, 79 Cal.App.2d 711, 180 P.2d 972. Secondly, that statement is contrary to the above discussed rules that only ultimate facts need be found and findings must be liberally construed. In this same connection the statement that conduct any less culpable then wilful misconduct would be an "unlawful taking of the property of one person and unwarranted giving it to another" is also incorrect for the same reasons.

The majority opinion brushes aside such cases as Bethlehem Steel Co. v. Industrial Acc. Commission, 23 Cal.2d 659, 145 P.2d 583 and Parkhurst v. Industrial Acc. Commission, 20 Cal.2d 826, 129 P.2d 113, holding wilful misconduct was present where a safety order was violated with the comment that in the case at bar expert judgment was involved in guying the structure and no safety order was involved. Just as much expert judgment was involved and the safety order was substantially the same in those cases. Here we have the safety statutes and in the Bethlehem case the safety requirement was that loads transported by trucks be secured against displacement. The safety statute here requires that the structure be safe, that is, secured against collapsing by sufficient guy wires or bracing. This the employer knew but wilfully disregarded. Such disregard constituted serious and wilful misconduct.

I would therefore affirm the awards here made.

Rehearing denied; CARTER, J., dissenting.



40 Cal.2d 139

SUTTER BUTTE CANAL CO. v. INDUSTRIAL ACC. COMMISSION et al.

Sac. 6308.

Supreme Court of California, in Bank.

Jan. 6, 1953.

Workmen's compensation proceedings wherein the Industrial Accident Commission awarded the claimant normal death benefits and also additional compensation on ground that death of employee was result of serious and wilful misconduct of the employer. On the employer's application for writ of review, the Supreme Court, Schauer, J., held that the evidence would not sustain the finding of serious and wilful misconduct.

Award annulled.

Carter, J., dissented.

Prior opinion, 241 P.2d 1008.

1. Workmen's Compensation ⇐1693

Industrial Accident Commission's view of dam, from which employee fell and drowned, did not constitute independent evidence which would have to be presumed to support finding of serious and wilful misconduct where it was made eleven months after employee's death and there was no showing that same conditions prevailed as at time of accident. Labor Code, § 4553.

2. Workmen's Compensation ⇐1674

Evidence would not sustain finding of Industrial Accident Commission that death of employee, who fell from dam and drowned while engaged in removing flash boards from top of dam, had been the result of "serious and wilful misconduct" on the part of the employer, within meaning of Labor Code section authorizing increased recovery under such circumstances. Labor Code, § 4553.

Millington & Millington and Seth Millington, Gridley, for petitioner.

Edmund J. Thomas, Jr., Robert Ball, T. Groezinger and Leonard M. Levy, San Francisco, for respondents.

SCHAUER, Justice.

Petitioner-employer, a corporation, seeks annulment of an award of increased benefits based upon a finding of respondent Industrial Accident Commission that the death of one of petitioner's employes was caused by the employer's serious and wilful misconduct. (See Labor Code, § 4553.) We have concluded that the award cannot be sustained, in that the evidence is insufficient to establish the minimum elements of serious and wilful misconduct as those elements are enunciated in Mercer-Fraser Company v. Industrial Accident Commission, 1952, Cal.Sup., 251 P.2d 955 and cases there cited, and that the award should, therefore, be annulled.

From the record it appears that the deceased employe, aged 36, was employed as a laborer by petitioner, and that he met his death by drowning when he fell from a concrete dam on top of which he was working. The dam, constructed by petitioner across the Feather River over 30 years ago, was some 8 feet high, 800 feet long, and four feet wide across the top. It was maintained for the purpose of raising the elevation of water in the river so as to discharge it into a diversion canal for distribution for irrigation purposes. Along the center line of the top of the dam, 2½" steel pipes were imbedded in cement post holes at about four-foot intervals for the dam's full length; the pipes extended 30 inches above the top of the dam.

Each year, during spring or early summer when the level of the river dropped to the point where water would not flow into the canal in sufficient volume, flash boards were placed along the top of the dam, attached to and resting against the steel uprights, and were left in place until the end of the irrigation season in the fall, at which time they were removed. The flash boards were 2 inches thick, 12 inches wide, and 16 feet long, and were installed two high (i. e., so as to make a 24-inch flash board rise over the concrete top of the dam). This practice had been followed for some 32 years.

In September, 1950, Baggett (the deceased employe), and two other workmen, Roseman and Heape, under instructions from petitioner's foreman were engaged in removing the flash boards. Roseman was prying the boards loose, and Baggett and Heape were lifting them out and carrying them to the side of the dam. It was about 2:30 o'clock in the afternoon. Water was flowing over the top of the flash boards to a depth of about 6 inches, giving approximately a 30-inch head over the top of the dam when the boards were removed. When Baggett and Heape had lifted off one of the top boards, they started to carry it shoulder high across the top of the dam and Baggett necessarily stepped into the water flowing through the place where the removed board had been. He slipped and fell over the side of the dam, which had a down slope of 45 degrees, into the pool below. Roseman and Heape testified that Baggett was smiling as he went down the slope, and started to swim downstream to shore, in no visible distress; after swimming about 100 feet he waved his arms several times and sank; Heape thought "he got a cramp"; Roseman then jumped in to assist Baggett but was unable to reach him before the latter drowned; the two workmen when they saw Baggett slip and fall "had no concern, didn't think anything was wrong," and if "there had been any difficulty * * * [could] have gone in right at the start"; the current below the dam was not still but there was "No

too much" rush of water; the witnesses had never "slipped or fallen or had any difficulty" on the dam, and had never heard of any one else doing so in the several years they had worked for petitioner company; although there was a "little moss" on top of the dam, it was not especially slippery where the three men were working, "We were walking back and forth on that without any trouble"; there is no great "rush of water" over the dam in the fall when the flash boards are removed; Baggett was wearing "ordinary working clothes," and was barefooted; none of the three workmen was wearing a life jacket; they had never been furnished such jackets; and there was no cable or life line across the dam, no boat downstream, and nobody "in attendance downstream for any purpose."

Whitinger, a laborer and sub-foreman for petitioner company since 1924, testified that the foreman told him not to go out on the dam to help remove the flash boards, but "to let the younger men go"; many times before he had helped with the removal; he never knew of any one else slipping off the dam in all his years with the company. Gifford, construction superintendent and general foreman for petitioner company for some 32 years, testified that no one had gone off the dam before while removing or putting in the flash boards; for many years the State Compensation Insurance Fund has been the Workmen's Compensation Insurance carrier for petitioner company, and has sent its safety engineers to go over petitioner's system to recommend safety measures, and petitioner has "done everything their safety engineers recommended"; such engineers had never "recommended any safety device on the dam other than those we have had there"; petitioner did not furnish the men with life lines, "they preferred to work without them," and Baggett himself had said "I don't want anything on * * * When I get out of this I don't want no obstructions. When I get in the water I want to swim"; the Feather River is "crystal clear."

Respondent commission, after issuing its award based on a finding of serious and wilful misconduct, granted the employer's petition for rehearing. The three commissioners constituting Panel One of the commission then personally "viewed the premises of the dam site," and thereafter the decision on rehearing or reconsideration was issued, again awarding increased benefits based upon a finding of serious and wilful misconduct of the employer "in that said employer wilfully and knowingly failed and neglected to provide a safe place of employment, and failed and neglected to use safety devices and safeguards to render said place of employment safe, and failed and neglected to use safety devices and safeguards to render the employment and said place of employment safe." This petition for review followed.

As grounds for annulling the award petitioner contends that the evidence does not support the findings and that the findings do not support the award. More particularly it is urged that since it is undisputed that for the more than 30 years that the dam had been maintained and the same method of installing and removing flash boards had been followed no one had gone off the dam before while working with the flash boards "there wasn't the slightest reason to believe that there was any danger out there at all," and that "had not Baggett got a cramp he would have swam ashore, regarded the whole thing as funny * * *." Petitioner also relies on the fact that the engineers of their insurance carrier apparently did not regard the working conditions on the dam as being dangerous, and argues further that the employe could have seized one of the steel posts spaced four feet apart along the top of the dam thereby further justifying the assumption by the employer that the work was safe.

[1, 2] Respondent commission's view of the premises, made some eleven months after the death of Baggett, does not constitute independent evidence "which must be presumed to support the finding of serious and wilful misconduct" (see Ethel D. Co. v. Industrial Accident Comm. (1934), 219 Cal. 699, 704, 28 P.2d 919; Simmons Co. v. Industrial Accident Comm. (1945), 70 Cal.App.2d 664, 669–670, 161 P.2d 702; In re Estate of Sullivan (1948),

86 Cal.App.2d 890, 895, 195 P.2d 894; Camicia v. Camicia (1944), 65 Cal.App.2d 487, 490–491, 150 P.2d 814) inasmuch as there was no showing that conditions were the same then as at the time of the accident. The commission argues, however, that the employer's suggestion that only the "younger men" do the work of removing the flash boards shows the employer recognized the "inherent danger" of the work. The commission also suggests that the employer might have furnished life lines but does not suggest how they could have been used, suggests a row boat at the foot of the dam, and suggests that life jackets might have been used although from the evidence it appears doubtful that Baggett would have used one. In other words, the commission appears to take the view that "something" should have been done, and to have based its conclusional finding of serious and wilful misconduct controllingly on the bare fact that an accident did occur. There is not the slightest evidence to support a finding that the petitioner deliberately sent its employes to work upon the dam either (1) knowing that the conditions thereon constituted an immediate hazard which would probably cause serious injury or death to one or more of them, or (2) that it so acted with positive, active, wanton, reckless and absolute disregard for possible consequences of that nature.

Inasmuch as the evidence is, therefore, as a matter of law insufficient, the award must be and it is annulled.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. The evidence supports the finding of the Commission that the employee lost his life by reason of the serious and wilful misconduct of his employer. Here we have an 8-foot dam upon which are two boards extending 2 feet above the top. Upstream (behind) from the boards is a 30-inch head of water. While the top of the dam is four feet wide the space left for a workman while removing the boards is only two feet because the boards are midway on the top. The top of the dam was covered with moss and mud as it naturally would be by reason of there being no flow of water over it and the seepage of water through the boards. When a board was removed by the deceased and another employee there was a rush of the 30-inch flow of water around the legs of the deceased. No life lines were fixed along the top of the dam. That could have been done easily and they would have afforded a saving handhold if an employee slipped.

The majority opinion lays stress on the evidence that the safety engineers for the employer's insurance carrier made inspection of its works and never made any recommendations with reference to the dam. That evidence does not show, however, whether the dam was ever inspected, that the inspectors knew of the practice of removing the boards, or that they had ever been present when that work was in progress. That evidence is therefore of little value.

Reliance is also had upon evidence that there had never before been an accident during the removal of the boards. However, two of the witnesses who testified to that effect had only been employed for a short time and had participated in the removal of the boards only once or twice. The employer's superintendent testified that over a long period of time no accidents had occurred, but because of his interest the Commission could view his testimony with suspicion.

The majority opinion concedes that the view of the dam by the Commission would be independent evidence supporting its decision but states that there was no showing that the conditions were the same at the time of the inspection. The time elapsing (11 months) is not sufficient upon which to base a conclusion of law that conditions were not the same. Where we have permanent things such as a dam and a stream the presumption is that conditions remain the same, see Wigmore on Evidence (3rd ed.) § 437; Code Civ.Proc. § 1963(32). It was incumbent upon the employer to show that conditions were different. That

it failed to do. Moreover, it did not object to the inspection and relies strongly, as does the majority opinion, on evidence that no prior accidents had happened which would be irrelevant unless the conditions were substantially the same at all times. Therefore, the view of the premises alone supports the award.

The conduct of the employer was in direct violation of the law requiring an employer to furnish a safe place to work and adopt all reasonable means necessary to achieve that end. (Labor Code, § 6400 et seq.)

The views expressed in my dissenting opinion in Mercer-Fraser Company v. Industrial Accident Commission, Cal.Sup., 251 P.2d 955, are equally applicable here, but I desire to point out particularly that the majority opinion here cannot be reconciled with the following cases. Parkhurst v. Industrial Accident Comm., 20 Cal.2d 826, 129 P.2d 113; Hatheway v. Industrial Accident Comm., 13 Cal.2d 377, 380, 90 P.2d 68; Hoffman v. Department of Industrial Relations, 209 Cal. 383, 287 P. 974, 68 A.L.R. 294; Pacific Employers Ins. Co. v. Industrial Accident Comm., 209 Cal. 412, 288 P. 66; Gordon v. Industrial Accident Comm., 199 Cal. 420, 249 P. 849, 58 A.L.R. 1374; Blue Diamond Plaster Co. v. Industrial Accident Comm., 188 Cal. 403, 409, 205 P. 678; Johannsen v. Industrial Accident Comm., 113 Cal.App. 162, 298 P. 99.

While the above cited cases differ factually from the case at bar the philosophy and legal concept of those cases is equally applicable here. The dangerous character of the place where the employees were required to work was obvious. If it was not known it was of such a character that it should have been known. Steps could easily have been taken to alleviate the danger but the employer did nothing whatsoever and sent the employee on that dangerous mission with reckless disregard of his safety.

The majority here is obviously opposed to the philosophy and legal concept of the above cited cases, or, more obviously, the majority is opposed to an award for serious and wilful misconduct in any case. The decision in this and kindred cases of recent vintage demonstrates the truth of this statement.

The record here is clearly sufficient to support the findings of the Commission and I would therefore affirm the award here made.



115 Cal.App.2d 144

PEOPLE v. HALL.

Cr. 4825.

District Court of Appeal, Second District, Division 3, California.

Dec. 29, 1952.

Hearing Denied Jan. 22, 1953.

Defendant entered a plea of guilty to a criminal offense and applied for probation. The Superior Court, Stanley N. Barnes, J., entered an order denying the state's motion to set aside an order placing defendant on probation and an order recalling the commitment of defendant to the state prison, and the state appealed. The District Court of Appeal, Vallée, J., held that where the Superior Court had jurisdiction of that part of the cause not affected by the appeal and of the defendant, it had jurisdiction to place defendant on probation.

Affirmed.

1. Bail ⇐42

The discretion to grant bail after conviction and appeal is in the trial court in the first instance. Pen.Code, § 1272.

2. Bail ⇐44

That defendant has been convicted of a felony, sentenced and has appealed does not deprive the trial court of jurisdiction to grant bail pending appeal. Pen.Code, §§ 1272, 1291.

3. Criminal Law ⇐1023(12)

An order denying defendant's motion to set aside the judgment and to set aside his plea of guilty is an order made after judgment affecting defendant's substantial rights from which an appeal may be taken. Pen.Code, § 1237, subd. 3.

4. Criminal Law ⇐1073

If the trial judge refuses or neglects to pass on whether there is probable cause for an appeal or improperly denies a certificate to that effect, the defendant may make an application to the justice of the court to which the appeal was taken even though he may have commenced to serve his sentence.

5. Criminal Law ⇐1083

An appeal from an order denying a motion to set aside a judgment does not operate to deprive the trial court of all jurisdiction over the cause pending the appeal, but only over so much of it as is affected by the appeal, and such an appeal does not divest the trial court of jurisdiction as to purely collateral or supplemental matters distinct from the question involved on the appeal. Pen.Code, §§ 1203, 1243, 1245, 1265.

6. Criminal Law ⇐1083, 1192

When there is an appeal from a judgment of conviction, the whole matter properly leaves the jurisdiction of the trial court and rests in the hands of the appellate court until it has seen fit to remit it once again to the trial court, and during such period the trial court has and should have no power to act with respect to such pending matters, but when the matter has once again been sent back to the jurisdiction of the trial court, then even if the appellate court affirms the judgment of conviction, the trial court has power to rehear the defendant's request for probation. Pen.Code, §§ 1203, 1243, 1245, 1265.

7. Criminal Law ⇐1073

If a defendant has noticed a motion to set aside a judgment of conviction, the Superior Court has jurisdiction to issue a certificate of probable cause and thus stay execution of the sentence after it has begun. Pen.Code, § 1243.

8. Bail ⇐42

The Superior Court has jurisdiction to admit a defendant to bail, except in cases punishable with death, after execution of sentence has begun. Pen.Code, § 1272.

9. Criminal Law ⇐1073, 1083

If a defendant has noticed a motion to set aside a judgment and a certificate of probable cause is issued or he has been admitted to bail, the Superior Court has jurisdiction of the defendant and of so much of the cause as is not affected by the appeal. Pen.Code, §§ 1243, 1245, 1265.

10. Criminal Law ⇐1001

As long as a Superior Court has jurisdiction of that part of a cause not affected by an appeal and of the defendant, it has jurisdiction to place him on probation. Pen.Code, § 1203.

11. Criminal Law ⇐1001, 1073, 1083

Where an appeal from an order denying defendant's motion to set aside a judgment of conviction was pending in a prosecution in which the crime was not punishable by death, and defendant was admitted to bail, and certificate of probable cause was issued, the Superior Court had jurisdiction of the defendant and of so much of the cause not affected by the appeal, and hence had jurisdiction to recall defendant's commitment to state prison and to place him on probation. Pen.Code, §§ 1203, 1243, 1245, 1265, 1272.

Edmund G. Brown, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

William Herbert Hall, Los Angeles, for respondent.

VALLÉE, Justice.

The People appeal from an order made after judgment denying their motion to vacate and set aside an order placing defendant on probation and an order recalling the commitment of defendant to state prison.

The chronology of events in the court below was as follows:

November 17, 1949—defendant pleaded guilty to a violation of Penal Code section 288 and applied for probation.

December 13, 1949—probation was denied, defendant was sentenced to the state prison, and remanded to the custody of the sheriff to be delivered to the custody of the director of corrections of San Quentin.

December 21, 1949—a stay of execution of the sentence was granted to and including January 12, 1950.

December 23, 1949—defendant filed a notice of appeal from the judgment.

January 6, 1950—defendant filed a motion to set aside the judgment and his plea of guilty.

January 11, 1950—defendant filed a dismissal of his appeal from the judgment.

January 12, 1950—defendant's motion to set aside the judgment and his plea of guilty was denied.

January 17, 1950—the sheriff delivered defendant to the custody of the director of corrections at San Quentin.

January 20, 1950—defendant filed a notice of appeal from the order denying his motion to set aside the judgment and his plea of guilty.

January 20, 1950—defendant filed a notice of motion to fix a bond pending the appeal.

January 27, 1950—bond on appeal was fixed, a certificate of probable cause was issued, and it was ordered that the sheriff return defendant from the state prison to the Los Angeles county jail pending the determination of the appeal.

February 4, 1950—pursuant to said order, defendant was delivered to the custody of the sheriff.

February 7, 1950—defendant was released on the bail theretofore fixed.

December 1, 1950—the order denying defendant's motion to set aside the judgment and his plea of guilty was affirmed on appeal. People v. Hall, 100 Cal.App.2d 763, 224 P.2d 812.

December 20, 1950—defendant filed a motion for reconsideration of the order denying his application for probation, and the hearing thereof was continued to December 27, 1950.

December 27, 1950—defendant's motion for reconsideration of his application for probation was granted; sentence was suspended and he was placed on probation for a period of ten years, and, as a condition thereof, he was ordered to serve the first ten months in the county jail with good time allowed if earned; bail was exonerated, and defendant was remanded to the county jail.

January 8, 1951—the remittitur from the district court of appeal was filed with the clerk of the superior court.

July 18, 1951—a *nunc pro tunc* order was made recalling the commitment issued December 13, 1949, and the warden of the state prison was so notified.

November 6, 1951—the People filed a motion to set aside the order placing defendant on probation and the order recalling the commitment.

November 21, 1951—the defendant filed a motion that the court reconsider his application for probation on the ground that on December 27, 1950, the date he had been placed on probation, the remittitur from the district court of appeal had not been filed with the superior court; that it was filed on January 8, 1951.

December 13, 1951—the motion of the People filed November 6, 1951, and the motion of the defendant for reconsideration of his application for probation were denied.

December 14, 1951—the People filed a notice of appeal from the order denying the motion filed November 6, 1951.

The sole contention of the People is that the superior court was without jurisdiction to place the defendant on probation. The argument is that probation may not be granted after the execution of the sentence has begun. The attorney general does not raise any question with respect to the validity of any of the other orders which were made. Although the notice of appeal says the People appeal from the order recalling the commitment of defendant to the state prison, no point is made with respect to the validity of that order except as it is related to the order placing the defendant on probation.

At the time in question, section 1203 of the Penal Code [1] in relevant part provided that at such time or times fixed by the court, the court must hear and determine an application for probation; and if the court shall determine that there are cir-

1. Unless otherwise indicated, all section references are to the Penal Code.

cumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, the court shall have power, in its discretion, to place the defendant on probation.[2]

There is nothing in section 1203, as it read at the time in question, expressly limiting the power of the court to place a defendant on probation to the time before the execution of the sentence has begun. If such limitation exists, it arises by implication on the theory that jurisdiction of the trial court for all purposes ends when the execution of its sentence begins on a judgment of conviction.

Section 1243 in part provides: "An appeal to the Supreme Court or to a District Court of Appeal from a judgment of conviction does not stay the execution of the judgment in any case unless the trial or appellate court shall so order." Section 1245 provides: "If before the granting of the certificate [staying execution of the judgment], the execution of the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody." Section 1265 provides that upon the going down of the remittitur from an appellate court to the court below, all orders necessary to carry the judgment into effect must be made by the court to which the remittitur is remitted.

[1, 2] Section 1272 provides: "After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail: 1. As a matter of right, when the appeal is from a judgment imposing a fine only. 2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor. 3. As a matter of discretion in all other cases." The discretion in granting bail after conviction is in the trial court in the first instance. In re Torres, 80 Cal.App.2d 579, 580, 182 P.2d 573. The fact that the defendant has been convicted of a felony, sentenced, and has appealed, does not deprive the trial court of jurisdiction to grant bail pending the appeal. Pen.Code, § 1291; People v. Perdue, 48 Cal. 552; People v. Cornell, 28 Cal.App. 654, 655–656, 153 P. 726.

[3] An appeal may be taken by the defendant in a criminal action from any order made after judgment, affecting his substantial rights. Pen.Code, § 1237, subd. 3. An order denying a defendant's motion to set aside the judgment and his plea of guilty is such an order. People v. Shorts, 32 Cal.2d 502, 506–507, 197 P.2d 330.

People v. Durrant, 119 Cal. 54, 50 P. 1070, held that a certificate of probable cause may be issued upon an appeal by a defendant from an order made after judgment. On receipt of the remittitur from the reviewing court, the jurisdiction of the superior court is restored to it. In re Maguth, 103 Cal.App. 572, 574, 284 P. 940.

[4] If the trial judge refuses or neglects to pass on the question whether there is probable cause for the appeal, or improperly denies a certificate to that effect, the defendant may make an application to a justice of the court to which the appeal is taken, even though he may have commenced serving his sentence. 8 Cal.Jur. 550, § 552.

In re Mayen, 49 Cal.App. 531, 193 P. 813, was a proceeding in *habeas corpus* in which the petitioner sought an order that he be taken from the custody of the warden of the state prison and delivered to the custody of the sheriff. He had been convicted of a felony, sentenced to the state prison, and had appealed from the judgment of conviction. Thereafter, the trial judge had issued a certificate of probable cause which he later revoked, and ordered that a commitment to the state prison issue. An application was made to the district court of appeal for an order staying execution of the judgment until such time as the record on appeal could be prepared and transmitted to that court and an application for a certificate of probable cause made to a justice thereof. The sheriff, in the meantime, had taken the petitioner to the state prison under the judgment and

2. Section 1203, was amended in 1951, Stat.1951, ch. 1438, p. 3396.

commitment of the superior court. Thereafter, the district court of appeal ordered that execution of the judgment be stayed until such time as the record on appeal from the judgment could be prepared and transmitted to that court and an application made to a justice thereof for a certificate of probable cause. In the course of its opinion in the *habeas corpus* proceeding, the court said, 49 Cal.App. at page 536, 193 P. at page 815: "The effect of our order staying execution of the sentence was to make illegal petitioner's detention in the state prison during such time as the stay of execution may continue in force. A stay of execution of a judgment of conviction suspends the judgment and arrests all proceedings thereon during the continuance of the stay. The effect of the suspension of the judgment is that, during the time of the judgment's suspension, the defendant cannot be treated as a convict undergoing punishment for his crime, nor as one who is subject to imprisonment in the state prison—even for the purpose of detention. * * * Therefore, pending our stay of execution of the judgment of conviction, petitioner should be remanded to and remain in the custody of the sheriff (Ex parte Rodley, 132 Cal. 40, 64 P. 91); and the sheriff must keep his prisoner in the usual place of confinement—the county jail. * * * [49 Cal.App. at page 538, 193 P. at page 816] Where the certificate is refused by the trial judge in the first instance, the defendant is permitted to make application to a justice of this court for a certificate of probable cause, *even though he may have commenced serving his sentence.* * * * [49 Cal.App. at page 539, 193 P. at page 816] [T]he authority of the trial judge and that of a justice of this court to issue the certificate of probable cause are concurrent and co-ordinate. * * A certificate of probable cause, in all its effects, is substantially the equivalent of an order staying execution pending an appeal from a judgment of conviction—nothing more and nothing less. Its filing with the clerk, by whomsoever it may have been granted, operates as a *supersedeas.* * * * [49 Cal.App. at page 545, 193 P. at page 816] Our conclusion is that the confinement of petitioner in the state prison, during the continuance of our order staying execution of the judgment of conviction, is unwarranted and illegal, and that, during such time as our order staying execution may be in force, he should be remanded to the custody of the sheriff of Los Angeles county, to be by him confined in the county jail in that county." (Italics added.) See also: In re Murphy, 185 Cal. 298, 197 P. 59.

In re Brahm, 98 Cal.App. 731, 277 P. 895, was an application to the district court of appeal for a stay of execution of a judgment in a criminal action. The defendant had been convicted of a felony and sentenced to the state prison. Thereafter, he moved the trial court to vacate the judgment; the motion was denied, and he appealed from the order. It was held, 98 Cal.App. at page 732, 277 P. at page 896: "Although the intimation contained in the language found in section 1243 of the Penal Code is to the effect that on appeal *from a judgment of conviction* on a charge where sentence less than death has been imposed, 'in the sole discretion of the trial court' execution of the sentence may be stayed, the point has been directly ruled that, independent of statutory provision, the power of this court is inherent and plenary in all cases to issue writs or orders by which execution of the judgment will be stayed pending the determination of an appeal, whether such appeal be from the judgment itself, or from some other order made after judgment but which would be directly affected by the execution of the judgment * * *. [98 Cal.App. at page 733, 277 P. at page 896.] It follows that an order staying execution of the judgment should be and it is granted. However, in so doing, this court again directs attention to the fact that in a proper case the duty of issuing such orders or certificates of probable cause rests primarily with the trial court, * * *." See to the same effect People v. Shorts, 32 Cal.2d 502, 197 P.2d 330; People v. Tuthill, 32 Cal.2d 819, 198 P.2d 505.

Beggs v. Superior Court, 179 Cal. 130, 175 P. 642, held that section 1203, as it read in 1918, construed with sections 1191, 1263,

and 1265, limited the power of the superior court to grant probation to a time prior to, or at the time of, pronouncing judgment and sentence. See Lloyd v. Superior Court, 208 Cal. 622, 283 P. 931. In 1923, the Legislature expressly so provided by inserting the words "before judgment and sentence" in the section. Stat.1923, ch. 144, p. 291. In 1927, the Legislature deleted the words "before judgment and sentence" from section 1203. Stat.1927, ch. 770, p. 1493.

Lloyd v. Superior Court, 208 Cal. 622, 283 P. 931, was a proceeding for a writ of mandate to compel the superior court to entertain an application for probation. The defendant, in a criminal action, had been convicted of a felony and sentenced to the state prison. He appealed from the judgment. The judgment was affirmed, and a remittitur filed with the clerk of the superior court. Upon the taking of the appeal, a certificate of probable cause had been issued and the defendant had remained in the county jail pending the appeal. After the judgment had become final by affirmance, but before any further order of the superior court had been made looking to the execution of the judgment, the defendant applied for an order placing him on probation. The superior court declined to entertain the application on the ground it was without authority to do so. The proceeding for a writ of mandate followed. After discussing similar statutes and the decisions thereunder in other states and in the Federal courts, the court declared, 208 Cal. at page 629, 283 P. at page 934: "It thus sufficiently appears that the uniform trend both of legislation and of judicial decision, state and federal, during the ten years which have intervened since the decision of the Beggs Case has been steadfastly in the direction of upholding the power of trial courts to grant applications of offenders for probation at any time prior to the actual execution of the judgment or sentence, in the absence of an express limitation upon the exercise of such power contained in the terms of the probation laws. The amendment which the Legislature of this state adopted in 1927 (St.1927, p. 1493) was in entire harmony with the then prevailing trend of both legislation and decision, insisting upon a liberal application to offenders of the merciful provisions of probation laws." It was held that the superior court had authority to entertain the application, the court stating 208 Cal. at page 630, 283 P. at page 935 "we are of the opinion that it was the intention of the Legislature, by its last amendment of section 1203 of the Penal Code, adopted in 1927 (St.1927, p. 1493), expressly removing the limitation of time imposed by the express terms of its earlier amendment, to invest trial courts with the power under said amended section to hear and determine applications for probation at any time prior to the execution of sentence, and that without reference to whether the defendant had in the meantime undertaken to prosecute a vain and unsuccessful appeal."

People v. Superior Court, 203 Cal. 692, 284 P. 451, was a proceeding instituted by the People for a writ of mandate to compel the superior court to issue an appropriate order to put into effect a judgment in a criminal action. The defendant in the criminal action had been convicted of a felony and sentenced to the state prison. He had appealed from the judgment and it had been affirmed. Upon the going down of the remittitur, the trial court had made an order purporting to amend the judgment which had been affirmed. On appeal by the People from the latter order, it was reversed, and the remittitur filed with the superior court. Thereafter, the district attorney moved the superior court to direct that the commitment be issued and delivered to the sheriff for the purpose of enforcing the judgment. Concurrently, the defendant made an application for probation. The motion was denied and the application was granted. The court held that the superior court had the power to grant the application for probation.

Where a judgment was imposed under the indeterminate sentence law for a crime committed before its enactment, it was held that the superior court had jurisdiction to resentence the defendant even though he had served part of the sentence. In re McCready, 179 Cal. 514, 516, 177 P. 459. And In re Fritz, 179 Cal. 415, 177 P. 157, clearly indicates that the court was em-

powered to grant probation at the time fixed for such resentencing.

The People rely on People v. Sloper, 198 Cal. 601, 246 P. 802; In re Bost, 214 Cal. 150, 4 P.2d 534; In re Sargen, 135 Cal.App. 402, 27 P.2d 407; People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072 and People v. Sidwell, 27 Cal.2d 121, 162 P.2d 913. These cases are not controlling.

People v. Sloper, 198 Cal. 601, 246 P. 802, was an application to the Supreme Court for a stay of execution of a death sentence and for a certificate of probable cause. The defendant had been convicted of murder, sentenced to pay the extreme penalty, had appealed, and the judgment had been affirmed. During the pendency of the appeal, he had been confined in the county jail, and was there confined when the remittitur went down. He was then brought before the superior court for the purpose of having a day fixed for the execution of the judgment. He then interposed a motion that no proceedings relating to the fixing of the time for execution be taken for the reason that since the rendition of the original judgment, he had become, and was at the time of making the motion, insane, and that a jury be impanelled for determining that question. The motion was denied. The court held that under the provisions of the Penal Code the power to determine the question of insanity was not vested in the superior court; that, therefore, no substantial right of the defendant was affected by the action of the superior court in denying his motion, and that the order was not appealable.

In re Bost, 214 Cal. 150, 4 P.2d 534, merely held that the superior court has no jurisdiction to grant probation where, pending appeal, no stay of execution was ordered, the defendant was committed to the state prison and released for a temporary purpose. The opinion recognizes the fact that delivery of a defendant to the warden by the sheriff does not in all cases permanently remove him from the jurisdiction of the superior court. It also recognizes the fact that if a certificate of probable cause had been issued after the sentence had been executed in part, the superior court, on the going down of the remittitur, would then have had jurisdiction to entertain an application for probation.

In re Sargen, 135 Cal.App. 402, 27 P.2d 407, was a proceeding in *habeas corpus*. After a judgment of conviction and delivery of the defendant to the warden of the state prison, he filed a motion to vacate the judgment. No order was made staying execution of the judgment. An order was made for the return of the defendant to the custody of the sheriff in order that he might testify on the hearing of the motion, which was done. The motion was granted; a plea of not guilty entered; a trial had; the defendant found guilty, and again sentenced to the state prison. He immediately applied for, and was placed on, probation. The warden was not advised of the order, and after the defendant was released, took him into custody. The defendant then sought a writ of *habeas corpus*. The court held that because the warden had not been notified officially of the order placing the defendant on probation, the commitment of the defendant to his custody remained in effect, saying, 135 Cal.App. at page 410, 27 P.2d at page 410: "If, therefore, any order be made in such or any other proceeding, purporting to affect the terms of the commitment theretofore issued, the order so made or a certified copy thereof must be served upon the warden; otherwise under the provisions of said section 1168 of the Penal Code it is his duty to enforce the mandate of imprisonment directed by the judgment of sentence embodied in said commitment," and, 135 Cal.App. at page 411, 27 P.2d at page 410: "It is ordered, therefore, that when such an order is served upon the warden, the prisoner is entitled to be released." It is implicit from what is said in the Sargen case that the superior court had jurisdiction to place the defendant on probation, and that the only defect in procedure was in not serving the order on the warden. In the present case, a certified copy of the order placing the defendant on probation was served on the director of corrections.

People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072, merely held that a trial court, after having imposed a fine, and prior to the

time the clerk has entered the sentence in his minutes, has jurisdiction to add an alternative provision of imprisonment in case of failure to pay the fine.

People v. Sidwell, 27 Cal.2d 121, 162 P.2d 913, was an appeal from a judgment of conviction and from an order denying a new trial. The judgment recited, 27 Cal.2d at page 129, 162 P.2d at page 917: "The Court will consider suspending all or part of sentence if restitution is made within five days." The court said that the superior court had no power to suspend execution of the sentence except as an incident to granting probation, but indicated that on the going down of the remittitur, it could entertain the application.

The attorney general has not cited us to any authority holding that when execution of the sentence has begun and a certificate of probable cause has then issued, or a defendant has then been released on bail, pending the determination of an appeal from an order made after judgment, the superior court is without jurisdiction to place the defendant on probation either pending the appeal or on the going down of the remittitur.

A defendant has ten days after rendition of the judgment within which to appeal. Rule 31, Rules on Appeal; 36 Cal. 2d 26. If a sheriff complies with a commitment immediately and delivers the defendant to the custody of the warden of the state prison execution of the sentence will have begun before an appeal has been taken. If the contention of the People is to be upheld the trial court has permanently lost jurisdiction and the defendant may never thereafter be placed on probation even though later a certificate of probable cause has issued, or the defendant has been released on bail. To so hold would be contrary to the cases we have referred to which decide that on the going down of the remittitur the superior court has jurisdiction to place the defendant on probation.

[5, 6] An appeal from an order denying a motion to set aside a judgment does not operate to deprive the trial court of all jurisdiction over the cause pending the appeal from the order, but only over so much of it as is affected by the appeal. An appeal of that character does not divest the trial court of jurisdiction as to purely collateral or supplemental matters distinct from the question involved on the appeal. See McKenzie v. Los Angeles Life Ins. Co., 88 Cal.App. 259, 263 P. 338; Bivins v. McDonald, 50 Ga.App. 299, 177 S.E. 829; State v. De Grace, 144 Or. 159, 22 P. 2d 896, 898, 90 A.L.R. 232. In this respect we are in accord with the view expressed by the learned trial judge in his memorandum opinion, which we quote and adopt in part: "That officer [the Attorney General] has pointed out that this court placed the defendant on probation before the remittitur had been received from the District Court of Appeal, after its refusal to set aside the order of the trial court, denying defendant's motion to set aside its plea and entering a different plea. When there is an appeal from a judgment of conviction, the whole matter properly leaves the jurisdiction of the trial court and rests in the hands of the Appellate Court until it has seen fit to remit it once again to the trial court. During such period the trial court has and should have no power to act with respect to such pending matters, but when the matter has once again been sent back to the jurisdiction of the trial court, then even if the Appellate Court affirms the judgment of conviction it has the power to rehear the defendant's request for probation. Lloyd v. Superior Court, 208 Cal. 622, 623 [283 P. 931]. But here there was no direct attack by appeal from the judgment but a collateral attack on the refusal of the trial court to set aside a plea. It was this collateral attack on the judgment which was appealed. The Appellate Court therefore was not passing on the *merits* of the conviction, but merely on the question as to whether or not the judgment should be set aside for a limited reason. The equivalent of a writ of *coram nobis* jurisdiction obviously rests and must rest in the trial court during this collateral attack, and unless the trial court has the authority to issue a certificate of probable cause, it can by inaction and alleging it was without authority flout the possible review of its

action by the Appellate Court by punishment of the defendant. The granting of the writ of *coram nobis* to an innocent defendant would avail him nothing if the trial court could not issue its certificate of probable cause. * * * To permit the People to come into court on November 6, 1951, after the defendant has served his time and apparently successfully embarked upon the period of probation and rehabilitation would tend to defeat the very purpose of all our criminal legislation, the rehabilitation of the individual offender." See also: In re Byrnes, 26 Cal.2d 824, 828, 161 P.2d 376; City Properties Co. v. Meacham, 33 Cal.App. 696–697, 166 P. 593; dissenting opinion of Mr. Justice Richards in Beggs v. Superior Court, 179 Cal. 130, 138, 175 P. 642, whose views prevailed as the majority opinion in Lloyd v. Superior Court, 208 Cal. 622, 283 P. 931; 3 Cal.Jur.2d 682, §§ 193–195.

[7–10] Our conclusions from the authorities we have referred to are: (1) If a defendant has noticed a motion to set aside the judgment, the superior court has jurisdiction to issue a certificate of probable cause and thus stay execution of the sentence after it has begun. (2) The superior court has jurisdiction to admit a defendant to bail, except in a case punishable with death, after the execution of the sentence has begun. (3) If a defendant has noticed a motion to set aside the judgment and a certificate of probable cause has issued or he has been admitted to bail, the superior court has jurisdiction of the defendant and of so much of the cause as is not affected by the appeal. (4) As long as the superior court has jurisdiction of that part of the cause not affected by the appeal and of the defendant, it has jurisdiction to place him on probation.

[11] Whatever view is taken of the proceedings below, the court had jurisdiction to place defendant on probation. On the granting of the certificate of probable cause after the appeal was taken from the order denying the motion to set aside the judgment, the further execution of the sentence was suspended, defendant was restored to his original custody, and he was released on bail. From the time the certificate was issued, jurisdiction of the defendant and of the cause was in the superior court except as such jurisdiction was affected by the appeal from the order denying the motion to set aside the judgment and the plea of guilty. The *nunc pro tunc* order of July 18, 1951, recalling the commitment was nothing more than suspension of the sentence which had therefore been effected. Ex parte Slattery, 163 Cal. 176–177, 124 P. 856. If the appeal from the order did not divest the court of jurisdiction of the entire cause and over the defendant, and we think it did not, then the court had jurisdiction to place defendant on probation on December 27, 1950. If, however, it can be said that the appeal from the order denying the defendant's motion to set aside the judgment and his plea of guilty divested the superior court of jurisdiction to place the defendant on probation until the judgment of the district court of appeal became final, its jurisdiction was restored on the going down of the remittitur on January 8, 1951. After the remittitur went down no further order was made by the superior court looking to the execution of the sentence, and the stay of execution remained effective. We construe the order denying the defendant's motion to reconsider his application for probation as an order placing him on probation on the terms and conditions specified in the order of December 27, 1950. This fact is apparent from the memorandum opinion of the trial judge, which is a part of the record on appeal, and which was filed at the time he denied the motion of the People and denied defendant's motion to reconsider his application for probation.

We conclude that the superior court had jurisdiction to place the defendant on probation on either December 27, 1950, or December 13, 1951, and that, therefore, the order appealed from should be affirmed.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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PEOPLE ex rel. FORDE et al. v. TOWN OF CORTE MADERA et al.

Civ. 15302.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1952.

Hearing Denied Feb. 19, 1953.

Action in quo warranto by Attorney General on relation of realty owners to have set aside and declared invalid a certain city annexation proceeding which involved territory of which plaintiffs' realty was a part and which was prior to another city's annexation proceeding which also involved territory of which plaintiffs' realty was a part. The Superior Court, County of Marin, Homer W. Patterson, J., entered judgment denying plaintiffs any relief, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that the existence of the prior annexation proceeding rendered the subsequent one void.

Judgment affirmed.

1. Municipal Corporations ⇐29(4)

Where the first annexation of uninhabited territory to a city is completed, subsequent proceedings to annex the same land are positively prohibited, and are an absolute nullity and are void, and no life can be breathed into them by a failure to contest them. Government Code, §§ 35300–35326; Code Civ.Proc. § 349½.

2. Contracts ⇐105

An act is void if specifically prohibited by statute.

3. Municipal Corporations ⇐33(1)

With regard to annexation of uninhabited territory by a city, rule conferring priority on first city to file proceedings was a rule at common law and is part of the public policy of the state. Government Code, §§ 35300–35326.

4. Constitutional Law ⇐193

Curative legislation cannot be used as against a prior valid proceeding to breathe life into a subsequent proceeding which, from its very inception, was, as against the prior proceeding, void and violative of the state's statutory law.

5. Municipal Corporations ⇐29(3)

Proceeding to annex uninhabited territory to city, which was void from inception because instituted after another city's proceeding to annex same territory had been completed, were not validated by failure of interested parties to contest such proceedings within time allowed by statute in which to contest validity of annexation proceedings. Government Code, §§ 35300–35326; Code Civ.Proc. § 349½.

6. Municipal Corporations ⇐29(4)

Where legislature, in codifying act relating to annexation of territory by municipal corporations, adopted, with respect to inhabited territory, a provision which was merely declaratory of existing law as to annexation of both inhabited and uninhabited territory, to effect that territory might be annexed as one parcel although divided by road, stream, or other natural or artificial barrier or right of way, such action did not have effect of changing existing law as to annexation of uninhabited territory. Government Code, §§ 35105, 35300 et seq.

7. Municipal Corporations ⇐63(1)

The courts will interfere with an annexation proceeding that amounts to a fraudulent abuse of the powers conferred by the statute upon the municipal corporation. Government Code, § 35000 et seq.

8. Municipal Corporations ⇐29(4), 63(1)

Since question whether a municipal corporation should annex certain territory is political rather than judicial, use of railroad right of way one mile long and 150 feet wide, with shorter corridor at right angles to it, to reach and establish contiguity with parcel annexed, could not be considered, and even if statute amendments designed to limit gerrymandering had been applicable to such annexation, they would not have prevented it. Government Code, §§ 35000 et seq., 35002.5, 35105.5, 35304.5.

Edmund G. Brown, Atty. Gen., and Lee Chamberlain, Deputy Atty. Gen., Delger Trowbridge, San Rafael, for appellants.

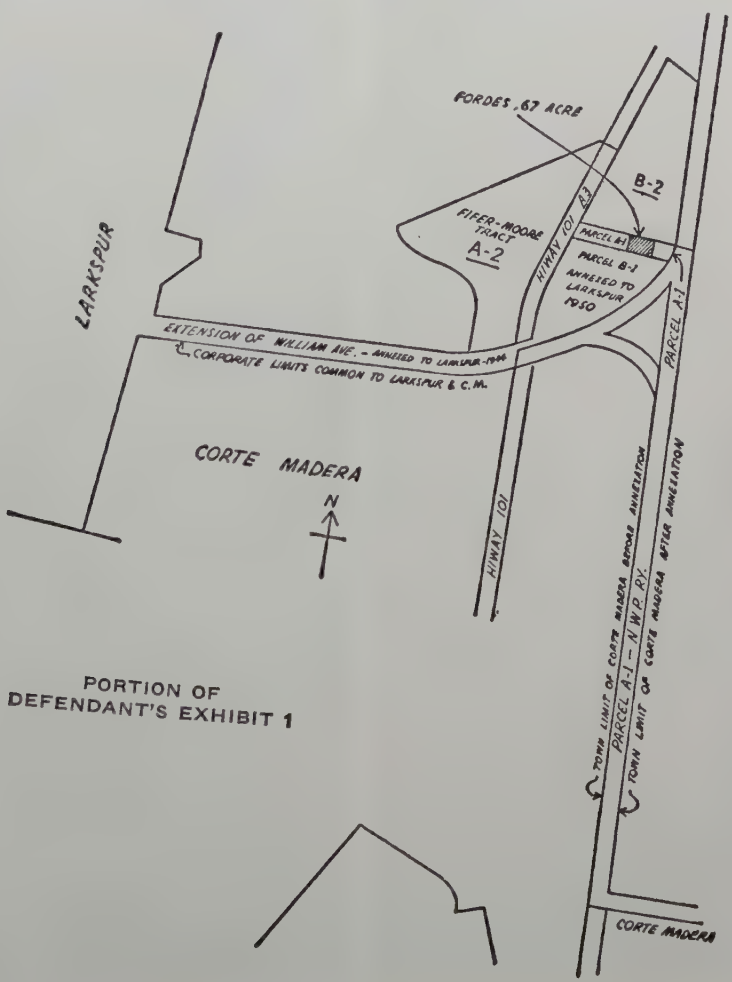
John B. Ehlen, San Francisco, for respondents.

PETERS, Presiding Justice.

This action in *quo warranto* was instituted by the Attorney General on the relation

of Edward and Lucille Forde, the real parties in interest, to have set aside and declared invalid a certain annexation proceeding of the town of Corte Madera in Marin County, which annexation included .67 of an acre owned by the Fordes. It appears that the town of Larkspur, which on its southerly and easterly boundaries abuts Corte Madera, annexed some land adjoining that annexed by Corte Madera, and including the strip in which the Fordes' property is located. The basic question presented is whether the Corte Madera or the Larkspur annexation shall prevail. The trial court concluded that the Corte Madera annexation was valid and prior, and, therefore, superior to that of Larkspur, and entered its judgment denying the plaintiffs any relief. From that judgment the plaintiffs appeal.

The map, which is made a part of this opinion, discloses most of the factual situation. Corte Madera and Larkspur are sixth class cities in Marin County. The two towns have a common boundary towards the north and northwest of Corte Madera. The Fordes, the appellants, own .67 acres in the corridor which runs east and west and is marked part of Parcel A–1 on the map. The Fordes' property is marked with diagonal lines. A–1 also includes a long corridor along the easterly boundary of Corte Madera running north and south. The owners of the Fifer-Moore tract, consisting of 37.85 acres, and designated as Parcel A–2 on the map, desired to annex their property to Corte Madera. The long right-angled corridor designated A–1 is connected to A–2 by Parcel A–3, which is simply that part of the roadbed



PORTION OF
DEFENDANT'S EXHIBIT 1

of Highway 101 that touches A–2. The long, narrow corridor marked Parcel A–1 that runs north and south is occupied by the Northwestern Pacific Railroad Company's main line, and is used solely for railroad purposes. At the south of the map that right of way is within the town limits of Corte Madera, but prior to the annexation proceedings the westerly boundary of the right of way was the easterly boundary of Corte Madera.

On August 28, 1950, the sole owners of A–2, being the owners of more than one-fourth of the area sought to be annexed by area and assessed value, petitioned Corte Madera to annex A–1, A–2 and A–3. This petition was filed under the "Annexation of Uninhabited Territory Act of 1939," Government Code, sections 35300 to 35326. It is conceded that the area is uninhabited within the meaning of that statute. On October 2, 1950, the Fordes appeared before the city council of Corte Madera and protested the annexation, but their protests were overruled. See § 35313, Gov.Code. On October 9, 1950, an annexation ordinance was introduced which was passed by the council October 16, 1950. A copy of this ordinance was filed with the Secretary of State on November 27, 1950. See Gov. Code, § 35316. It will be noted that if Corte Madera desired to annex the Fifer-Moore tract, it was necessary to go around certain areas already annexed to Larkspur. In 1944 Larkspur had annexed a long corridor extending westerly from the town of Larkspur and marked on the map "Extension of William Avenue." It is not now developed as a street. This constitutes part of the north boundary of Corte Madera. In 1950, Larkspur had annexed "Parcel B–1," so that the Fifer-Moore tract was cut off from Corte Madera unless a corridor of the type of A–1, and the portion of the highway (A–3), were also annexed.

In the meantime, Larkspur had also commenced an annexation proceeding. On September 5, 1950, eight days after the institution of the Corte Madera proceedings, a petition under the Uninhabited Territory Act was filed to annex to Larkspur the area marked "B–2" on the map, which includes that portion of the corridor in which the Fordes' property is located. It was necessary for Larkspur to annex this corridor, for otherwise, because of the Corte Madera annexation, B–2 would not be contiguous to Larkspur. The Larkspur annexation ordinance was passed October 10, 1950, and was filed with the Secretary of State on November 13, 1950. It is this inclusion of the easterly-westerly leg of the A–1 corridor in both annexation proceedings that has led to the present controversy. No proceeding of any kind has ever been brought by Corte Madera or anyone else to contest the validity of the Larkspur annexation ordinance. The evidence shows that Corte Madera is closer to the disputed area by road than is Larkspur. The trial court held that the Corte Madera annexation, having been started prior to that of Larkspur, prevailed over the Larkspur annexation. It is this holding that appellants challenge on this appeal.

One of the major contentions of appellants is that the present proceeding constitutes an attack on the Larkspur annexation in violation of section 349½ of the Code of Civil Procedure which provides: "The validity of any proceedings for the annexation of territory to a municipal corporation, or for the consolidation of municipal corporations, shall not be contested in any action unless such action shall have been brought within three months after the completion of such proceedings, or, in case such proceedings are completed prior to the time that this act takes effect, then within three months after this act shall have become effective."

Admittedly, this statute is applicable to *quo warranto* proceedings, and would warrant, if applicable to the problem here involved, the relief prayed for by appellants. People v. City of Los Angeles, 93 Cal.App. 532, 269 P. 934. Respondents do not challenge this, but contend that the section cannot be used to perfect a subsequent annexation in derogation of a valid prior annexation.

There can be no doubt that the Uninhabited Territory Act, under which both annexations proceeded, grants priority to Corte Madera as the annexer prior in time. The sections of the Government Code so

providing are sections 35308 and 35309. They read as follows:

Sec. 35308: "When a petition for the annexation of any territory to a city has been received by its legislative body a petition asking for the annexation of any of the territory described in the petition shall not be presented to the legislative body of any other city until an ordinance disapproving such annexation becomes effective."

Sec. 35309: "After one legislative body has received a petition, no other legislative body shall take any action for the annexation of any part of the territory described in the petition, until the ordinance of the first city disapproving annexation becomes effective."

[1, 2] It is the theory of the respondents, found to be correct by the trial court, that, where the first annexation is completed, these sections constitute a positive prohibition of subsequent proceedings; that such subsequent proceedings are an absolute nullity and are void; that no life can be breathed into such void subsequent proceedings by the failure to contest them; and that section 349½ of the Code of Civil Procedure does not accomplish this result. With this theory we agree. This result follows because the absence of a prior annexation is, by the law, made an indispensable condition precedent to the filing of a subsequent proceeding. The existence of a prior proceeding renders the subsequent one void, under the well settled principle that an act is void if specifically prohibited by statute. Smith v. Bach, 183 Cal. 259, 191 P. 14; Bourke v. Frisk, 92 Cal.App.2d 23, 206 P.2d 407; Herkner v. Rubin, 126 Cal. App. 677, 14 P.2d 1043.

[3] The rule conferring priority on the first city to file is part of the public policy of the state. It was the rule at common law. People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal.App. 715, 181 P. 825. In that case an annexation proceeding was first instituted and a later attempt was made to separately incorporate the area. The court held that section 7 of the Annexation Act of 1913 as amended in 1915, Stats. of 1915, Chap. 149 at p. 309, conferring priority as between two conflicting annexation proceedings on the first to be instituted was declaratory of existing common law, and that the same rule applied where the conflict was between an annexation proceeding and an incorporation proceeding even in the absence of a statute.

It should be pointed out that section 7 of the Act of 1913, in less wordy form, is now section 35115 of the Government Code governing annexation of inhabited territories. The two sections here involved—sections 35308 and 35309—relate to annexation of uninhabited territories. Thus, at common law, and pursuant to a consistent statutory scheme, priority is granted to that city first instituting proceedings. In City of Burlingame v. City of San Mateo, 90 Cal.App.2d 705, 203 P.2d 807, the court declared that this rule of priority under the very act here involved operates so that "the first proceeding in point of time excludes the jurisdiction of the later one." 90 Cal.App.2d at page 706, 203 P.2d at page 809.

But, say appellants, conceding that the proceedings instituted by Corte Madera had priority, nevertheless section 349½ of the Code of Civil Procedure operates to confer priority on Larkspur, because the Larkspur proceedings were not contested within three months after their completion. In support of this somewhat startling concept that a proceeding invalid when instituted, a proceeding that was then void and in violation of law, becomes not only valid but takes priority over a proceeding valid when instituted and entitled by law to priority, appellants cite many cases that hold that invalid acts, even those infected with a jurisdictional defect, are subject to being perfected by the passage of a limitation period, or by the application of a general or special validating act. Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015, is typical. There, a one-year no contest upon the validity of a tax sale proceedings provision was held to cut off the title of an owner, out of possession, even though there had been a failure to comply with the requirement of service by registered mail. See, also, City of Fairfield v. Hutcheon, 33 Cal.2d 475, 202 P.2d 745. Particular reliance is placed upon the case of Sacramento Municipal Utility Dist. v. All Parties, etc., 6 Cal.2d 197, 57 P.2d 506, where the court

held that a provision of the Municipal Utility District Act, Deering's Gen.Law, Act 6393, substantially identical to section 349½ of the Code of Civil Procedure prevented, after three months, an attack upon the inclusion of a water district in a municipal utility district. Particular reliance is placed on the following language, 6 Cal.2d at page 200, 57 P.2d at page 508: "Section 6e provides in substance that the validity of any proceedings for the annexation of any county water district to a municipal utility district shall not be contested in any action not brought within three months of such proceedings. Such limitation as to the time for commencing an action to test the validity of the annexation proceedings is not subject to attack on the ground that it is unconstitutional. [Citing cases.] Even if section 6e be regarded as a curative act, it will cure all defects and proceedings not in violation of the Constitution."

That language seems pretty broad, but it was not directed at the effect of a statute of limitations provision upon a conflict between a prior valid and a subsequent invalid annexation proceeding. The case did not, in fact, involve the unauthorized extension of the boundaries of a utility district. The actual holding of the court was that there was no vice in the extension of the district's boundaries, and, in truth, not even a procedural defect that might be cured by section 6e.

Appellants also rely upon Miller & Lux, Inc., v. Secara, 193 Cal. 755, at page 765, 227 P. 171, at page 174, where the court, in reference to a problem completely different from the one here involved, stated: "We agree with counsel for appellant that a total lack of jurisdiction due to absence of notice sufficient to constitute due process of law cannot be cured by a curative act or by a curative provision in the statute, but we see no reason why such a defect may not be cured, in effect, by a statute of limitations, provided the latter is not unreasonable, and is therefore valid."

[4] Curative legislation, however, cannot be used as against a prior valid proceeding to breathe life into a subsequent proceeding which, from its very inception, was, as against the prior proceeding, void and violative of the state's statutory law. None of the appellants' cases, except one, even hints at the proposition that a statute of limitations provision can breathe life into a void later instituted proceeding as against a valid prior instituted proceeding. The one case that contains some language that supports appellants' position is Hunt v. Atkinson, Tex.Com.App., 17 S.W.2d 780. That case must be read in conjunction with an earlier appeal in the same proceeding found in 12 S.W.2d 142. That case did involve competing annexation proceedings, and the court did hold that the subsequent proceeding prevailed over a proceeding instituted four days prior to the subsequent one by reason of a general validating statute. However, a reading of the opinions on both appeals, particularly the earlier opinion, demonstrates that the Texas court gave no consideration at all to the rights, if any, of the city that had first started proceedings. The court was only concerned with the results that followed because the city of Houston had failed to follow, precisely, the procedure set up in the annexation statute. The case is not controlling nor convincing on the problem here presented.

[5] Upon general and fundamental principles, we are convinced that the curative provisions of section 349½ of the Code of Civil Procedure will cure any failure to comply with the procedural provisions of the annexation statute, but we are equally convinced that such section cannot operate, as against a prior valid proceeding, so as to vitalize a completely invalid subsequent proceeding. A curative statute may operate to cure any procedural irregularity—even one going to jurisdiction—but it cannot operate to breathe life into a proceeding, the very filing of which is prohibited by statute. As the United States Supreme Court declared in Turpin v. Lemon, 187 U. S. 51, 57, 23 S.Ct. 20, 22, 47 L.Ed. 70, quoting from Cooley, "Curative laws may heal irregularities in action, but they cannot cure want of authority to act at all". In the instant case, the subsequent proceedings were void in their inception. The prior proceeding was entitled to priority under the law. No statute of limitations nor so-called curative statute can breathe not only

life, but priority, into a subsequent annexation proceeding. To so hold would be to violate the statutory policy and common law of this state.

Appellants next attack the Corte Madera annexation, contending that, on the merits, that annexation was illegal. They urge that, under the facts, there was neither physical nor substantial contiguity as required by the statutes, and that the Corte Madera annexation was therefore invalid.

There can be no doubt that only an area that is contiguous to the existing town may be annexed under the Uninhabited Territory Act. See section 35302, Gov.Code. This is conceded.

The argument that physical contiguity does not exist is predicated upon the contention that the railroad right of way and the portion of Highway 101 designated as Parcel A–3, separate Parcel A–2 from Corte Madera, with the legal result that physical contiguity does not exist. Appellants base this argument upon the claimed authority of prior case law and upon the terms of the relevant statutes.

The contention that prior case law has determined that, where a railroad right of way or public highway separates a city from the area sought to be annexed, such area is not physically contiguous to the city, is based primarily on that part of the decision of People v. City of Lemoore, 37 Cal.App. 79, 174 P. 93, that has frequently been distinguished and disapproved. In that case the city of Lemoore sought to annex nine parcels of land in one single election. Considered separately, some of the nine parcels were inhabited and some uninhabited. The court properly held that this constituted an attempt to annex land constituting more than "one body" of land as those words are used in the annexation statutes. Parcel One (see map page 83 of 37 Cal.App., page 95 of 174 P. of opinion) was completely separated from all other parcels, except that it was connected to Parcel 2 by a strip of the county road 1650 feet long and 20 feet wide. The actual holding is that Parcel One and Parcel Two are separate "bodies" of land and therefore, under then existing law, their annexation had to be submitted separately to the voters. In so holding, the appellate court stated, 37 Cal.App. at page 84, 174 P. at page 95: "If we confine our attention to parcels Nos. 1 and 2, it would be a strained construction to hold that they were made a continuous and contiguous body by the attempt to join them through the instrumentality of a portion of a public road 20 feet wide and 1,650 feet long. They remain two separate and distinct bodies. The continuity of other portions is prevented also, and they are divided into separate parcels by county roads and the right of way of the Southern Pacific Company."

This very language, the Supreme Court in denying a hearing refused to approve. At page 86 of 37 Cal.App., at page 96 of 174 P. the Supreme Court stated:

> "The conclusion of the District Court of Appeal is fully sustained by what is correctly stated as to parcel No. 1, and the remaining parcel or parcels, and in denying a hearing in this court we are not called upon to express or indicate any opinion with regard to whether the parcels other than that numbered 1 together constitute a single body of land.
>
> "Our denial of the petition for a hearing in this court is not to be taken as an assent to what is said in the opinion of the District Court of Appeal on this point."

Thus what the Supreme Court condemned was the attempt to use the corridor so as to make two separate parcels one body of land. That court did not approve the holding that a highway or right of way prevented physical contiguity with the city.

In People ex rel. Strong v. City of Whittier, 133 Cal.App. 316, 24 P.2d 219, the appellate court discussed the Lemoore case, refused to follow it, and adopted the common sense rule that the existence of a highway or right of way does not prevent land from being contiguous nor, when traversing an area sought to be annexed, do such factors *per se* make each segment a separate body of land. At page 320 of 133 Cal.App., at page 220 of 24 P.2d the court stated: "Almost every annexation case reported in appellate decisions of this state shows the annexed area to be traversed by streets, and in no case except the Lemoore Case can

there be found a word of support for the proposition that a street traversing a body of land divides the portion lying on one side from the portion lying on the other side so as to constitute separate bodies of land under the annexation acts." A petition for a hearing was denied in this case without a dissenting vote.

In People ex rel. Crowl v. City of South Gate, 118 Cal.App. 428, 5 P.2d 482, cited by appellants, the holding in fact supports respondents. There it was held that rights of way, water courses, railroad lines and public highways did not divide lands so as to make each segment a separate parcel.

Appellants next make a statutory argument, contending that the existence of such a highway or right of way in an annexation under the Uninhabited Territory Act, when the statute is properly interpreted, prevents physical contiguity as required by the statute. This statutory argument is predicated upon the fact that Title 4, Division 2, Part 2, of the Government Code, deals with "Alteration of Boundaries". Chapter One of Part 2 is entitled "Annexation of Territory", and that chapter, which deals with various methods and types of annexation, is, in turn, divided into five Articles. Article 2 contains the Annexation Act of 1913, as amended and codified, which relates to the annexation of inhabited territory. Article 5 contains the Annexation of Uninhabited Territory Act, the particular statute here involved. In Article 2 dealing with the annexation of inhabited territory, appears section 35105 which provides: "Contiguous inhabited territory may be annexed as one parcel although divided by a road, stream, or other natural or artificial barrier or right of way." A similar section does not appear in the Annexation of Uninhabited Territory Act. Appellants argue that such omission brings into play the maxim *"expressio unius est exclusio alterius,"* contending that as to uninhabited territory the statute must be interpreted, because it omitted a section similar to section 35105, to have adopted a rule contrary to section 35105. See for a proper application of such rule of construction, People ex rel. Paganini v. Town of Corte Madera, 97 Cal.App.2d 726, 218 P.2d 810.

[6] The argument lacks merit. Section 35105 was added to the Government Code in 1949 when the provisions of the Annexation Act of 1913, as amended, were incorporated into that code. Previous to that time the statutes—both the inhabited and uninhabited annexation acts—merely had a provision requiring physical contiguity. Prior to 1949, as the cases already cited indicate, it was the rule that physical contiguity was not broken by the existence of a highway or right of way. That was the rule before section 35105 was adopted as to both inhabited and uninhabited territories. By expressly including this established rule of law in the Annexation of Inhabited Territory Act the Legislature could not have intended to adopt a contrary rule as to uninhabited territory. To arrive at such a conclusion not only would be highly unreasonable, no logical explanation existing as to why such a basic difference should exist between the two statutes, but would require us to imply that by non-action the Legislature intended to change existing law. Section 35105 must be construed as being merely declaratory of existing law as to the annexation of inhabited territory, and it in no way changed existing law as to the annexation of uninhabited territory.

The last major contention of appellants is predicated upon the fact that Corte Madera has used a long narrow railroad right of way one mile long and 150 feet wide, and a right angle corridor to reach Parcel A–2. It is urged that this is "a sham attempt to comply with the law requiring contiguity," that such "shoestring strips" are a "fraud" upon the statute and prevent the annexation from being valid. (App.Op.Br. p. 12.) This is a somewhat strange argument for appellants to make in view of the fact that the validity of the Larkspur annexation depends upon a prior annexation by Larkspur in 1944 of a "shoestring strip" much more pronounced than the one here involved. Appellants do urge, however, that even though there may be physical contiguity, such physical contiguity is not sufficient unless it is also substantial contiguity, and that the courts may set aside an annexation proceeding as a fraud upon the act where the contiguity is secured by a long narrow

corridor of the type here involved. To hold otherwise, say appellants, would be to countenance the use of corridors to accomplish a subterfuge and a fraud upon the statute requiring physical contiguity.

The point is without merit. Before discussing the law, something should be said about the facts. The annexation proceeding here did include the right of way of the railroad for a distance of about one mile. But the use of that strip could not have been any part of an attempt to evade the statute so far as Parcel A–2 is concerned. An examination of the map will disclose that to the south of the map that right of way is now within the city limits of Corte Madera. Such examination will also disclose that it was not necessary for Corte Madera to secure contiguity with Parcel A–2 to condemn the mile long strip. Actual physical contiguity with Parcel A–2 could have been secured by simply condemning the east-west corridor of Parcel A–1 and a very short portion of that corridor that runs north and south.

[7, 8] There can be no doubt that the courts will interfere with an annexation proceeding that amounts to a fraudulent abuse of the powers conferred by the statute. People v. City of Lemoore, 37 Cal. App. 79, 174 P. 93; People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal. App. 715, 181 P. 825; City of Anaheim v. City of Fullerton, 102 Cal.App.2d 395, 227 P.2d 494, are typical cases. These were cases where by various subterfuges the Annexation of Inhabited Territory Act was used to annex uninhabited territory (the procedure for annexation being radically different under each statute) or vice versa. With the exception of the City of Lemoore case, supra, none of them involved the question as to whether the courts have power, where physical contiguity exists, to inquire into the extent of such contiguity. The City of Lemoore case, supra, is no longer authority on that point, as already pointed out. There are cases from other jurisdictions of which Wild v. People ex rel. Stephens, 227 Ill. 556, 81 N.E. 707, is typical, which hold that the use of a corridor, there 50 feet wide and half a mile long, was a mere subterfuge and not a compliance with the law requiring contiguity.

The Illinois case, however, does not represent the law of this state. The leading case is People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 P. 311. There our somewhat aggressive neighbor to the south, the City of Los Angeles, then situated some 16 miles from the sea, sought to annex a strip of land one-half mile wide and 16 miles long, leading from its then corporate limits to San Pedro Bay. The effect of this march to the sea by Los Angeles was to cut off the cities of Wilmington and San Pedro from further expansion in the direction of the annexed strip. It was contended that this was a fraud upon the statute and should be prohibited. The court, unanimously, held that the shape and extent of the territory to be annexed were political and not judicial questions. At page 223 of 154 Cal., at page 312 of 97 P. the court stated: "We make no comment on them [the claimed improper object and purposes of the annexation proceeding] because we are satisfied that whether the territory in question, and of the shape, extent, and character fixed, should be annexed to the city of Los Angeles, was purely a political question, which, under the act [Annexation of Inhabited Territory Act], was left to the exclusive determination of the voters of the municipality and the territory sought to be annexed."

Again at page 224 of 154 Cal., at page 312 of 97 P. the court stated: "Hence it was doubtless concluded by the legislature in conferring a power of annexation in the general terms used in the statute that the voters in a municipality could best determine whether its growth and the conditions surrounding it called for an extension of its municipal limits by the increase of additional territory and its extent, and that the voters of the territory proposed to be annexed could with equal wisdom determine whether it was of advantage to them to become a part of the municipality to the extent and in the form as proposed. With the wisdom of their determination in the matter the courts cannot interfere. They only interfere where some substantial pro-

vision of the law has been violated or where fraud was perpetrated in the matter of the boundaries or the extent of the annexed district. That the extent and shape which the annexed territory shall take is a political, and not a judicial question, is clear from the conclusion announced by this court in the case of People [ex rel. Russell] v. Town of Loyalton, 147 Cal. 774, 82 P. 620." See, also, People ex rel. Strong v. City of Whittier, 133 Cal.App. 316, particularly at page 322, 24 P.2d 219.

These two cases, as pointed out by appellant, did arise under the Annexation of Inhabited Territory Act, while the present case arises under the Annexation of Uninhabited Territory Act, but there is no substantial difference in the two statutes on the point under discussion. Moreover, under the very act here involved, it has been held that the rule of the Los Angeles case is applicable. In City of Burlingame v. County of San Mateo, 90 Cal.App.2d 705, 203 P.2d 807, the Mills Estate, consisting of 730 acres, was located in unincorporated territory lying between the cities of Millbrae and Burlingame. The city of Burlingame annexed a hundred-foot strip 2.8 miles long completely surrounding the Mills Estate on three sides so as to cut it off from all contact with Millbrae, and to enclose the Mills Estate as unincorporated territory free from any possibility of being annexed to any other city but Burlingame. Certainly the factual situation thus disclosed shows, on its face, far clearer than do the facts of the instant case the purpose and intent of the annexing city. The court refused to consider the charge that the motives of the annexing city were improper, or that there was not substantial contiguity, holding those to be political and not judicial questions.

At page 709 of 90 Cal.App.2d, at page 810 of 203 P.2d the court stated: "Contiguity does not depend on the extent of the property annexed and the question whether a municipal corporation should annex certain territory is political rather than judicial." After quoting extensively from the Los Angeles case, supra, the court stated, 90 Cal.App.2d at page 710, 203 P.2d at page 811: "The only limitation imposed by the statute in our case is that the annexed property must be contiguous to Burlingame. The 'horseshoe strip', as respondent calls it, is contiguous to, i. e. has a common boundary with, Burlingame for an aggregate distance of 200 feet and 'the extent and shape which annexed territory shall take is a political, and not a judicial question.'" After again quoting from the Los Angeles case the court continued, 90 Cal.App.2d at page 711, 203 P.2d at page 811:

> "The wisdom or expediency of the annexation of this territory is not a concern of the courts. We can go no further than to see that the existing laws are complied with. * * *
>
> "The motives of the city council of Burlingame, 5 Cal.Jur. 640, or of Mills Estate, Inc., 1 Cal.Jur. 336, cannot be inquired into so long as they proceeded according to established law."

The Supreme Court denied a hearing in this case, with but one justice dissenting. That case is decisive of the problem here presented. It was not qualified in any respect by the decision in People ex rel. Paganini v. Town of Corte Madera, 97 Cal.App.2d 726, 218 P.2d 810, because that case involved an entirely different problem—i. e., whether three different parcels each contiguous to the annexing city but not contiguous with each other, could be annexed in one proceeding. That is not the problem here presented.

It should be pointed out that the extremes of gerrymandering made possible by the Burlingame case are now at least partially prohibited by changes in the law adopted in 1951. See sections 35002.5, 35105.5 and 35304.5 as added in 1951. These statutory changes, however, are not applicable to the present case, having been passed subsequent to the proceedings here challenged. They would not, if applicable, have prevented the annexation here involved.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

PEOPLE v. ARGIT et al.

Cr. 4885.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1953.

Rehearing Denied Jan. 19, 1953.

Hearing Denied Feb. 5, 1953.

Defendant was convicted in Superior Court, Los Angeles County, William B. Neeley, J., of burglary, and he appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Judgment affirmed.

Burglary ⇐41(1)

Evidence sustained conviction for burglary. Pen.Code, § 31.

Wardell Tucker, in pro. per.

Edmund C. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Appellant and one Nick Argit were charged by information with two counts of burglary. The information also alleged three prior convictions of felony against appellant Tucker.

A jury trial was duly waived and the issues submitted by stipulation on the transcript of the preliminary examination. Defendant was adjudged guilty and the charges of the three prior convictions were found to be true.

It is contended on appeal "That no testimony were adduced from any of the police officers that would prove or show that the appellant 'entered' the stores, or committed the burglarys so falsely alleged in the information by the district attorney.

"That the convictions are based upon the false averment of 'enter' in the information; the wilful and knowing use of 'perjured testimony' of the district attorney and must be reversed."

There is no merit to the appeal. Defendant and codefendant were caught by the officers burglarizing two stores about 2:30 a. m. That the evidence supports the judgment there can be no question. Who are principals in the commission of a crime a defined by section 31 of the Penal Code refutes all of appellant's contentions.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



115 Cal.App.2d 252

PEOPLE v. GHIONE.

Cr. 2870.

District Court of Appeal, First District, Division 2, California.

Jan. 8, 1953.

Defendant was charged with manslaughter and convicted of battery. The Superior Court, County of San Benito, Thomas P. O'Donnell, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Dooling, J., held that where defendant was charged with manslaughter and was convicted of a battery and defendant had no valid defense, and evidence was sufficient to support verdict of battery, defendant could not claim that court committed prejudicial error in instructing jury on battery as an included offense.

Affirmed.

1. Criminal Law ⇐1165(3)

Principle that one convicted of a lesser offense than one of which he is guilty according to undisputed evidence is precluded from complaining of conviction, is applicable to trial before jury.

2. Homicide ⇐340(3)

Where defendant was charged with manslaughter and was convicted of a battery, defendant had no valid defense, and evidence was sufficient to support verdict of battery, defendant could not claim that court committed prejudicial error in instructing jury on battery as an included offense.

Chester E. Ross, Hollister, for appellant.

Edmund G. Brown, Atty. Gen. of the State of California and David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was charged with manslaughter and convicted of battery by a jury. The unfortunate series of incidents leading to the death of one Sullivan occurred in a bar in the City of Hollister. Appellant, a former amateur boxer, met one Hudson in the bar and after an argument with him struck Hudson twice on the face or head with his fists breaking his jaw and knocking him out. Taking defendant's own testimony as to what afterwards occurred we quote from the record:

"Q. While you were in that position and watching, as you have described, what happened next, Mr. Ghione? A. Well, while I was standing there I heard somebody from in back of me say, 'You can't do that to my Buddy'.

"Q. What did you do then? A. Well, as I turned around I saw this fellow—

"Q. You saw what? A. I saw Sullivan, Bob Sullivan, and he was ready to fight and challenge me so I took a cut at him.

"Q. When you say he was 'ready to fight and challenge' you, what did you observe? A. He had his fists clenched and you can tell from the expression of his face when a man is ready to fight—a man can tell when a man is ready to defend himself.

"Q. Have you had some boxing training, Mr. Ghione? A. Yes, I did.

"Q. You made a statement there that you can tell by a man's eyes whether he is going to defend himself, is that something you learned in your boxing experience? A. Yes, that's right.

"Q. At the time when this—when you observed Mr. Bob Sullivan there, do you recall about how far you were apart? A. Well, we weren't but about three feet apart, I guess.

"Q. And he was facing you, was he? A. Yes, he was.

"Q. Where were his hands that you say were clenched? A. They were to the side of him but they were clenched.

"Q. How did he hold them, down at the bottom—is that right? A. That's right.

"Q. What did you do at that particular time? A. I just hauled off and hit him—I just reached out and hit him."

Appellant's sole attempted justification before the jury was that in striking the fatal blow he was acting in self-defense. His own testimony above quoted demonstrates that this defense was hardly even a colorable one. Appellant at no time testified that he was in any fear of Sullivan, let alone in fear of death or great bodily injury, and applying the reasonable man test a former amateur fighter 6 feet 1 inch in height and weighing 180 pounds would hardly be in fear of a man 5 feet 8 inches tall and weighing 147 pounds whose hands were clenched at his sides. (13 Cal.Jur. 638–640.)

Appellant's sole complaint on appeal is that if he was guilty of battery he must have been guilty of manslaughter and that the court committed prejudicial error in instructing the jury on battery as an included offense of which they might find the appellant guilty.

Appellant cannot dispute that the evidence is ample to support the jury's verdict of battery. The case is not at all similar in this respect to People v. Kelley, 24 Cal.App. 54, 140 P. 302, most strongly relied upon by appellant. In the Kelley case the defendant was charged with murder. He intentionally fired the fatal shot so that there was no theory under the evidence by which he could be convicted of *involuntary* manslaughter. The court held it prejudicial error under these facts to instruct the jury on *involuntary* manslaughter. Some doubt is cast even upon that holding in People v. Powell, 34 Cal.2d 196, 206, 208 P.2d 974, where the court said of the Kelley case and People v. Huntington, 138 Cal. 261, 70 P. 284: "It may be noted, also, that each was decided before the adoption of section 4½ of article VI of the California Constitution, which requires that a conviction not be set aside on the ground

of misdirection of the jury unless, after an examination of the entire cause, the court is of the opinion that the error resulted in a miscarriage of justice."

We are completely satisfied that this case is properly governed by the rule announced in the same case with supporting authorities, 34 Cal.2d 205–206, 208 P.2d 980:

> "Furthermore, even if it be assumed that the trier of fact erred here when he found defendant guilty of manslaughter, defendant cannot invoke reversal on an error which is favorable to him. (See Code Civ.Proc., § 475; 2 Cal.Jur., Appeal and Error, §§ 493, 595; 8 Cal. Jur., Criminal Law, § 562.) An appellant is precluded from complaining that he was convicted of a lesser offense than the one of which he is guilty according to undisputed evidence, or according to that view of the evidence which, it indisputably appears, the trier of fact accepted. (People v. Barnhart, 1881, 59 Cal. 381, 384; People v. Maroney, 1895, 109 Cal. 277, 279, 41 P. 1097; People v. Muhlner, 1896, 115 Cal. 303, 305, 47 P. 128; People v. Glab, 1936, 15 Cal.App.2d 120, 122, 59 P.2d 195; People v. Blackwood, 1939, 35 Cal.App.2d 728, 733, 96 P.2d 982; other cases stating this rule are collected in 13 Cal.Jur., Homicide, § 64.)"

[1] While the Powell case involved a non-jury trial the cases cited are all jury cases and the principle is well settled in its application to trials before a jury. See also: People v. Amick, 20 Cal.2d 247, 125 P.2d 25; People v. Yip, 164 Cal. 143, 127 P. 1031; People v. Cota, 53 Cal.App.2d 455, 127 P.2d 1010; People v. Wolcott, 137 Cal.App. 355, 30 P.2d 601; People v. Jenkins, 118 Cal.App. 115, 4 P.2d 799; People v. Tugwell, 32 Cal.App. 520, 163 P. 508; People v. Lopez, 21 Cal.App. 188, 131 P. 104; 8 Cal.Jur. 379.

[2] The case on its facts was anything but close and on the record before us it seems clear that the jury seized, for some reason known only to themselves, on the opportunity, given them by the instruction that they might find the defendant guilty of battery, to ameliorate the law in its application to the facts. For this undeserved windfall appellant should be grateful instead of attempting to capitalize on it to escape even the modicum of punishment meted out to him for a battery which resulted in the death of a fellow human being.

Judgment and order denying a new trial affirmed.

NOURSE, P. J., and GOODELL, J., concur.



115 Cal.App.2d 390

PEOPLE v. MARINGER.

Cr. 934.

District Court of Appeal, Fourth District, California.

Jan. 15, 1953.

Consolidated motions to vacate judgment of conviction and to grant defendant a new trial and motion for removal from prison order. The Superior Court, Riverside County, Russell S. Waite, J., entered orders denying the motions, and defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that since the only new evidence relied upon in support of the motions was that some medical writers disagreed with some incidental opinions expressed by doctor who had testified for state in murder prosecution against defendant, the motions were properly denied.

Affirmed.

1. Criminal Law ⇐998

Matters which could have been raised on appeal from judgment of conviction and which were passed upon in coram nobis proceeding could not be raised on motion to vacate the judgment. Pen.Code, §§ 1181, 1182.

2. Criminal Law ⇐998

Where only new evidence relied upon as warranting vacation of judgment of con-

viction and granting of new trial was statements by some medical writers disagreeing with incidental opinions expressed by doctor who testified for people in murder prosecution, motions for vacation of judgment and new trial would be denied.

3. Criminal Law ⇐998

Trial court did not abuse discretion in refusing to order defendant brought to hearing on defendant's motions for vacation of judgment of conviction and for a new trial.

Fred Charles Maringer, in pro per.

Edmund G. Brown, Atty. Gen. and Michael J. Clemens, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was convicted of murder and, on April 9, 1949, was sentenced to life imprisonment. He was represented at the trial by the public defender, and no appeal was taken. On February 8, 1950, he filed an application for a writ of error coram nobis. After a hearing, at which he was represented by the public defender, his petition was denied. On appeal, that order was affirmed. People v. Maringer, 101 Cal. App.2d 586, 225 P.2d 656. The general factual background is set forth in that decision.

On July 28, 1952, the defendant filed consolidated motions to vacate the judgment and to grant him a new trial, and also filed a "motion for removal from prison order." The motions to vacate the judgment and for a new trial were based on the grounds that he had discovered new evidence showing that a doctor, who had testified for the prosecution, had knowingly testified falsely; that he is informed and believes that the district attorney knew that this testimony was false; that a portion of this testimony was based on hearsay; and that the public defender did not properly protect his rights.

The court denied the motion for removal from prison, and the district attorney filed an affidavit in opposition to the motions to set aside the judgment and to grant a new trial. The defendant then filed a motion to strike this affidavit from the record. After a hearing, the defendant being represented by a new public defender, the court denied the motions to set aside the judgment, for a new trial, and to strike the affidavit.

The defendant has appealed from these orders, contending that the court erred in denying his motion for removal from prison so that he could present his new evidence; that the "falsified" affidavit filed by the district attorney prejudiced "the trial judge's mental attitude"; that the court erred in denying the motion to strike this affidavit; that the public defender did not properly present the motions to set aside the judgment and to grant a new trial; that the court erred in denying the motions to set aside the judgment and grant a new trial; and that the court's action in denying these motions without giving the defendant a full and complete opportunity to produce his witnesses and new evidence deprived him of due process of law under the state and federal constitutions.

[1] Most of these contentions are based upon matters which could have been raised on appeal, and which were passed upon in the coram nobis proceeding. They may not be raised on a motion to vacate the judgment. People v. Ward, 96 Cal.App.2d 629, 216 P.2d 114. The defendant argues that on the prior appeal this court indicated that he was entitled to move the trial court to vacate the judgment and grant a new trial. It is insisted that the present proceeding is not one in coram nobis, but is a motion to vacate the judgment and grant a new trial brought specifically under the provision of Section 1181 of the Penal Code. Section 1182 of that code provides that the application for a new trial, referred to in Section 1181, must be made before judgment. Nothing in our former opinion in any way suggests that such a remedy is now available to the defendant.

[2] The defendant's claim of newly discovered evidence consists of an attack upon portions of the testimony of the doctor who

testified for the People at the trial. The only new evidence referred to is the claim that defendant has found statements made by some medical writers which disagree with some of the incidental opinions expressed by this doctor. Aside from other considerations there is nothing to indicate that this doctor testified falsely, knowingly or otherwise. The supposed new evidence, if received, would not throw any doubt on the essential part of this doctor's evidence, his opinion as to the cause of the victim's death, and the presence or absence of such evidence could not have affected the verdict.

The contention that the district attorney filed a false affidavit in opposition to these motions is entirely without merit. In a summary of the general facts, contained in this affidavit, it was stated that "An unsuccessful attempt to enter the cabin was made by Mrs. Knight's sister." The defendant contends that this statement was false, and sets forth five pages of testimony as demonstrating this fact. No falsehood appears, and the statement in the affidavit is merely a brief and fair summary of the meaning and effect of the five pages of testimony thus quoted.

[3] The defendant's attack on the manner in which the public defender handled the hearing on these motions in the trial court is unwarranted. No abuse of discretion appears in the refusal of the trial court to order the defendant brought to the hearing. The matters set forth in the application were entirely insufficient to show what facts the defendant wanted to present, and there was no showing as to what witnesses were desired or as to what they would testify if called. Such facts as are referred to, if they had been established, would not have been sufficient to justify any relief. None of the matters relied on in this proceeding, had they been presented at the trial or been raised on a timely motion for a new trial or on an appeal, could have affected the result.

The orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

115 Cal.App.2d 277

In re JEPHCOTT'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. BELOUS et al.

Civ. 19172.

District Court of Appeal, Second District, Division 3, California.

Jan. 8, 1953.

Proceeding in the matter of the distribution of estate of deceased testatrix who died more than thirty days after executing will leaving more than one third of estate to charity but less than six months after executing will. Both nephews of testatrix and sons of predeceased spouse of testatrix filed objections to distribution of estate. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered judgment of distribution adverse to sons of predeceased spouse, and they appealed. The District Court of Appeal, Shinn, P. J., held that sons of predeceased spouse were not entitled to take charitable bequests in excess of one third of testatrix' estate.

Judgment affirmed.

Wills ⇐13(3)

Sons of predeceased husband of deceased testatrix could not invalidate charitable gifts made by testatrix less than six months before her death to extent that gifts exceeded one-third of her estate under statute permitting spouse, brother, sister, nephew, niece, descendant, or ancestor to challenge charitable gifts in excess of one-third of estate, if made less than six months before death, and therefore sons were not entitled to take estate of testatrix in excess of one-third under statute providing that where there is no will and estate of deceased was separate estate of predeceased spouse and came to deceased by gift, descent, devise, or bequest, estate should go to heirs of predeceased spouse. Probate Code, §§ 41, 43, 229.

Ernest Eugene Walker, Hollywood, for contestants and appellants.

A. A. Rotberg, Los Angeles, for devisees and respondents.

SHINN, Presiding Justice.

By findings made on a hearing for distribution of the estate of Rebecca Jephcott, deceased, and objections thereto, the following facts were established.

Rebecca Jephcott was the surviving wife of Montague F. Jephcott; all the property which was in her estate at the time of her death was acquired by her through gift, devise and bequest from the estate of her husband. Joseph, Leon, Israel and Henry Belous, are nephews of Rebecca, her next of kin and only heirs at law. Douglas S. Jephcott and Norman C. Jephcott are the children of Montague Frank Jephcott by a former wife, and are his next of kin and only heirs at law. Rebecca made a will by which she left more than one-third of her estate to charities and she died four months and ten days thereafter. When the estate was ready for distribution the nephews filed objections, claiming the right to receive the excess of said one-third of the estate. The stepsons, Douglas and Norman, also filed objections and sought distribution of the excess to themselves. All objections were overruled and distribution was made to the charities. Upon this appeal, Douglas and Norman are the appellants and the charities are the respondents.

The foregoing facts bring in question the application of section 41 of the Probate Code. Under that section, the will having been executed at least 30 days before death, the legacies to the charities were valid and not subject to question as to one-third of the estate, but they could not exceed collectively more than one-third of the estate as against the decedent's spouse, brother, sister, nephew, niece, descendant or ancestor, who except for the will would have taken the excess over one-third. The section reads in part as set out below.[1] Although the objections of the nephews were overruled, they have not appealed and the order as to them has become final.

The claim of appellants is based upon section 229 of the Probate Code which, so far as material here, provides a rule of succession where there is no will and the estate of the decedent was the separate estate of a predeceased spouse and came to the decedent by gift, descent, devise or bequest. In that event the estate goes to the heirs of the former spouse, who, in the present case, upon the facts related, are appellants. If the property had been the community property of decedent and her former husband, and there had been no will, then, under section 228, Probate Code, appellants would have taken one-half the estate and the nephews of decedent the other half. The finding that the property came "from the estate of her previously deceased spouse, Montague F. Jephcott" means, we assume, that it was the separate estate of the former husband. It would appear, therefore, that the objections of the nephews were ineffective for any purpose for the reason that in the absence of a will the entire estate would have gone to appellants as sole heirs of the decedent's predeceased spouse. See In re Estate of Randall, 86 Cal.App.2d 422, 194 P.2d 709.

It is the contention of appellants that when section 41 is read with sections 228 and 229 it should be so construed as to give those who, under the latter sections, would inherit in the absence of a will, the right to object to the bequests in excess of one-third of the estate. Such a construction would clearly be judicial legislation. It was said in Re Estate of Randall, 86 Cal.

1. "All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relatives, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

App.2d at page 426, 194 P.2d at page 711: "Section 41 of the Probate Code is obviously intended as a complete exposition of the law of charitable gifts, and except as therein specifically indicated confers no additional rights upon any person. Nor is it permissible to ignore any of its definite provisions in favor of general statements found in other sections dealing with ordinary, noncharitable disposition." Section 41 was amended in 1937. Before the amendment the "legal heirs" of the decedent could challenge the devise or bequest of more than one-third of the estate to charity whereas, after the amendment, they can be challenged only by "a spouse, brother, sister, nephew, niece, descendant or ancestor" etc. As stated in Re Estate of Cottrill, 65 Cal.App.2d 222, 226, 150 P.2d 214, 216: "The effect of the amendment, therefore, was to make a limitation as to the degree of relationship of heirs who could invalidate such testamentary gifts to charity. Such a limitation enlarged or extended the right of a testator to make testamentary gifts to charity, by decreasing the number or classes of heirs who could object to such disposition of property. The 1937 amendment eliminated some of the collateral and more distant relatives in whose behalf the charitable gift restrictions had theretofore operated." So far as bequests and devises to charities are concerned section 41 not only is a limitation of the power of testamentary disposition but also of the rights of inheritance prescribed by sections 228 and 229 for estates of intestates. Only those heirs who are named in section 41 may question the validity of gifts to charities by will executed more than 30 days but less than six months (section 43) prior to the death of the testator. Children of a predeceased spouse, unless they also belong to one of the classes specifically named, have no right to question the validity of charitable bequests. The objections of appellants were properly overruled and the share of the estate which they claimed was properly distributed to the respondents.

The judgment settling the final account and decreeing distribution is affirmed.

WOOD and VALLÉE, JJ., concur.

115 Cal.App.2d 273

GIBSON v. WESTOBY et al.

Civ. 19131.

District Court of Appeal, Second District, Division 3, California.

Jan. 8, 1953.

Action by an incompetent by his guardian for a decree that a conveyance made by the incompetent was void. The Superior Court of Los Angeles County, C. A. Paulsen, J., granted a new trial to defendant and plaintiff appealed. The District Court of Appeal, Vallée, J., held that the deed was void.

Order reversed.

1. Insane Persons ⇐26

An inquisition of insanity found in a sister state is entitled to same faith and credit it receives in state where it was found as to issues decided.

2. Insane Persons ⇐26

An adjudication of incompetency fixes status of incompetency until incompetent is restored to capacity.

3. Insane Persons ⇐26

An adjudication in lunacy proceedings is in nature of a judgment in rem.

4. Judgment ⇐812(3)

A judgment in rem is conclusive as to status adjudicated.

5. Insane Persons ⇐26

An adjudication that a person is incompetent constitutes notice to all the world of the incapacity of such person to make valid conveyance and wherever and whenever it is binding on any person it is equally binding on all persons, though they had constructive notice only under statute.

6. Insane Persons ⇐61

A conveyance by a person who has been adjudicated to be incompetent is void and not merely voidable.

7. Vendor and Purchaser ⇐239(1)

A void conveyance passes no title and cannot be made foundation of a good title even under equitable doctrine of bona fide purchase.

8. Insane Persons ⇐61

Where a plaintiff had been found by court of sister state to be mentally incom-

petent to look after his affairs, and under laws of sister state property of such person could not be sold except by court order upon petition of guardian of such person, deed subsequently executed by such person without joinder of his guardian and without authorization of court order would be held to be void by California court. Probate Code § 1460 et seq.; 1941 Comp.N.M. § 35–207.

Matot, Gabrielson & Manley and Arthur J. Manley, Los Angeles, for appellant.

No appearance for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an order granting a new trial in an action by an incompetent for a decree that a conveyance made by him was void.

On November 3, 1927, the District Court of Curry County, New Mexico, found that plaintiff "is a person of unsound mind, insane and incompetent to look after his own affairs and it is so Ordered by the Court" and appointed a guardian of his person and estate. This judgment was in full force and effect at least until January 16, 1950.

On June 28, 1949, the probate court of this state, in and for the County of Los Angeles, under the provisions of sections 1460 et seq., of the Probate Code, found that plaintiff "is unable, unassisted properly, to manage and take care of himself or his property," adjudged that he was incompetent, and appointed a guardian of his person and estate. This judgment has been in full force and effect at all times in question.

On June 8, 1949, a deed purporting to have been signed and acknowledged by plaintiff on November 18, 1948, granting a parcel of realty, a part of his estate, to John McMahon, was recorded. Plaintiff's guardian did not join in the deed, and no court order was ever made authorizing its execution.

On June 27, 1949, John McMahon signed and acknowledged a deed conveying the parcel of realty to defendants. This deed was delivered to defendants in the latter part of August, 1949, and was recorded September 6, 1949.

On the trial of the action the court found the facts stated and rendered judgment for plaintiff quieting his title in the realty. Defendant's motion for a new trial was granted on the grounds of insufficiency of the evidence to support the findings and "error of law."

[1] The foregoing facts are undisputed. An inquisition of insanity found in a sister state is entitled to the same faith and credit as it receives in the state where it was found, as to the issues decided. 44 C.J.S., Insane Persons, § 32d, p. 92. The New Mexico statute provides that the district court having supervision of the guardian of the estate of an insane or incompetent person shall have the power, upon the petition of any interested party, to order and direct the sale or conveyance of any part of his estate, real or personal, or both, upon such terms and under such conditions as, in its discretion, it may deem fit and proper. 2 N.M.Stat.1941 Anno. § 35–207. In Frkovich v. Petranovich, 48 N.M. 382, 151 P.2d 337, 155 A.L.R. 295, it was held that this and related statutes provide an adequate procedure for the sale and conveyance of property belonging to an insane or incompetent person, and that such a person should not be divested thereof except by the most strict compliance with the law, and then only with the best security for the preservation of his use and benefit of the proceeds of the divestiture. The court also held, 151 P.2d 345: "It appears to be the general rule that a conveyance obtained from an insane person by one having knowledge of his incapacity will be set aside without requiring a restoration of the consideration received, under the principle that anyone dealing with an insane person, knowing his insanity, deals with him at his own peril and must bear alone whatever loss arises from the transaction." See 12 C.J.S., Cancellation of Instruments, § 44(7), p. 1009.

[2] Section 40 of the Civil Code provides: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other

contract, nor delegate any power or waive any right, until his restoration to capacity." In Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794, 795, it was adjudged under then sections 1763–1767 of the Code of Civil Procedure (now Probate Code sections 1461, 1462, 1470–1472, 1631) that a party at the date of the filing of the petition was "and for a long time prior thereto had been, and was at the date thereof, by reason of old age and weakness of mind, unable unassisted to properly care for himself or his property, and by reason thereof was likely to be imposed upon by designing and artful persons * * *." The court held, 206 Cal. at pages 604–605, 275 P. at pages 794, 799: "When, however, a court has regularly adjudged one to be incompetent, he thereby becomes incapable of making a valid contract, and it is deemed to be void, not because he is unable, unassisted, to properly care for his property, or lacked understanding of the nature and effect of the particular transaction, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract. * * * It seems evident that the term incompetent is intended to include not only the insane, but also those who are afflicted with less serious derangements of the mind. The adjudication of mental incapacity therefore applies to both the insane and the incompetent, regardless of the character or degree of the mental derangement. No further evidence of mental incapacity is required under our statute while such a decree remains in full force and effect. The proof of the adjudication of incompetency presupposes a lack of mental capacity to understand the nature and effect of a contract." In Carroll v. Carroll, 16 Cal.2d 761, 108 P.2d 420, after quoting part of the foregoing from Hellman Commercial T. & S. Bk. v. Alden, supra, the court stated, 16 Cal.2d at page 767, 108 P.2d at page 423: "It is therefore clear that if the note and deed of trust had been executed by plaintiff while the decree of May 29, 1929, adjudging her to be an incompetent, was in force and effect, she could rely on said decree alone to establish her incapacity as a matter of law." See, also: O'Brien v. United Bank, etc., Co., 100 Cal.App. 325, 279 P. 1048. The effect of an adjudication that a person is incompetent is to fix the status of incompetency until such time as the incompetent is restored to capacity. Vigne v. Superior Court, 37 Cal.App.2d 346, 352, 99 P.2d 589.

[3–7] An adjudication in lunacy proceedings is in the nature of a judgment *in rem*. 2 Freeman on Judgments, 5th ed. 1898, § 902; 44 C.J.S., Insane Persons, § 32, p. 88. A judgment *in rem* is conclusive as to the status adjudicated. Code Civ. Proc. § 1908; 15 Cal.Jur. 237, § 245. An adjudication that a person is incompetent constitutes notice to all the world of the incapacity of such person to make a valid conveyance. Hellman Commercial T. & S. Bk. v. Alden, 206 Cal. 592, 604, 275 P. 794. Wherever and whenever it is binding on any person, it is equally binding on all persons, though they had constructive notice only under the statute. 3 Freeman on Judgments, 5th ed. 3114, § 1519; cases collected 28 West's Cal.Dig. Judgment, ⇐812(3). A conveyance by such a person is void, and not merely voidable. Hellman Commercial T. & S. Bk. v. Alden, supra, 206 Cal. 592, 604, 275 p. 794. A void conveyance passes no title, and cannot be made the foundation of a good title even under the equitable doctrine of bona fide purchase. Bryce v. O'Brien, 5 Cal.2d 615, 616, 55 P.2d 488; Montgomery v. Bank of America, 85 Cal. App.2d 559, 564, 193 P.2d 475.

[8] We are unable to find any basis for the conclusion that the evidence is insufficient to support the findings. As a matter of law, there is no evidence to support a judgment for defendants. At the times the deeds were executed, plaintiff was incompetent and without capacity to convey title. All the world had notice of the fact. McMahon acquired no title and he could convey none to defendants. We are also unable to find any error of law committed by the trial court. Defendants have not favored us with a brief or with any assistance. In accord with Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 361, 170 P.2d 465, we have considered the entire record on which the order was based to discover whether there is any error which

would justify the trial court in making the order, to see if there is any ground on which the order can be upheld. We have found none.

Order reversed.

SHINN, P. J., and PARKER WOOD, J., concur.



115 Cal.App.2d 339

HAYWOOD v. HAYWOOD et al.

Civ. 15119.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1953.

Action by wife against husband for divorce. The Superior Court, County of Alameda, Thomas J. Ledwich, J., granted wife an interlocutory decree of divorce, and awarded her lump sum for future maintenance, and imposed lien upon husband's property to secure its payment, and husband appealed from portion of decree fixing the lien. The District Court of Appeal, Dooling, J., held that judgment could properly require payment of sum in gross, secured by lien against separate property of husband, even though there were no minor children as issue of the marriage.

Decree affirmed.

Divorce ⇐222, 241, 256

Where wife was awarded an interlocutory decree of divorce, court could properly make provision for her future support, and could require payment of a sum in gross, and provide, as security for payment thereof, that lien be enforced against the separate property of the husband, even though there were no minor children issue of the marriage. Civ.Code, § 142.

Lawrence Sledge, Oakland, for appellant.

Hamilton Wright, Oakland, for respondent.

DOOLING, Justice.

Respondent secured an interlocutory decree of divorce from appellant. The court awarded her two thousand dollars in a lump sum "as and for plaintiff's future maintenance" and imposed a lien upon appellant's separate property to secure its payment. Appellant attacks only the portion of the decree creating the lien, saying:

"It is Appellant's contention that the lien affixed by the Court of Appellant's real property where there were no Minor Children the issue of said Marriage, the lien was unwarranted and improper and cannot be supported as a matter of Law."

Appellant cites as his only authorities Civil Code, section 142 and Baldwin v. Baldwin, 28 Cal.2d 406, 412–413, 170 P.2d 670. The citations do not support the argument. In the Baldwin case the court quoted that portion of Civ.Code, sec. 142 which provides that where "there are no children, and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party." While there are no children of this marriage the court expressly found "that plaintiff has no separate estate." One of the conditions of sec. 142 above quoted is therefore not present.

The applicable rule is thus stated in Honey v. Honey, 60 Cal.App. 759, 761–762, 214 P. 250, 251: "Our Supreme Court has definitely determined, also, that in an action for divorce where the court * * * make provision for the future support of the wife, the judgment may require the payment of a sum in gross, and provide, as security for the payment thereof, that a lien be enforced against the separate property of the husband." See also Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 102, 69 P.2d 845, 111 A.L.R. 342 and cases there cited; Scheibe v. Scheibe, 57 Cal.App.2d 336, 343, 134 P.2d 835.

The decree is affirmed.

GOODELL, Acting P. J., and JONES J. pro tem., concur.

GREEN v. BROWN et al.

Civ. 19197.

District Court of Appeal, Second District, Division 3, California

Jan. 13, 1953.

Hearing Denied March 12, 1953.

Action involving controversy over title and possession of residential property. The Superior Court, Los Angeles County, Irvin Taplin, J., entered judgment for defendants, without taking evidence or making findings, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where earlier judgment in cause had been reversed by Supreme Court without qualification, trial court could not enter judgment based upon Supreme Court's decision, without re-trying and re-determining all issues of fact.

Judgment reversed.

1. Appeal and Error ⇐1180(1)

An unqualified reversal remands cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable.

2. Appeal and Error ⇐1212(1)

Where earlier judgment was reversed by Supreme Court without qualification, trial court could not enter judgment based upon decision of Supreme Court without retrial and redetermination of all issues of fact. Code Civ.Proc. § 632.

Jefferson & Jefferson, Bernard S. Jefferson, Martha Malone Jefferson, Los Angeles, for appellant.

Oscar S. Elvrum, Los Angeles, for respondent.

SHINN, Presiding Justice.

This case arose out of a controversy over the title and possession of a residential property in Los Angeles which is now and for a number of years has been occupied by the plaintiff Green and the defendants Mr. and Mrs. Brown. Green appealed from an earlier judgment, which was reversed by the Supreme Court without qualification. Green v. Brown, 37 Cal.2d 391, 232 P.2d 487. When the case came on for trial after the reversal, defendants made a motion for judgment based upon the decision of the Supreme Court. The court denied the motion but without taking any evidence or making findings entered a judgment. Plaintiff appeals.

A brief outline of the nature of the issues will suffice as the framework of our decision. Green claims a life estate in the property and the right of possession by virtue of a reservation in a deed by himself and his wife, now deceased, to Mr .and Mrs. Brown, the latter, a daughter of Mrs. Green. The Browns claim the right to occupy the property as their home under an oral agreement with Mr. and Mrs. Green and that under another oral agreement with Mr. Green his use of the premises is limited to two rooms in which he has been living. They claim that these oral agreements became binding upon the Greens by reason of certain acts and conduct of the parties which constituted partial performance and foreclosed Green from questioning the validity of the agreements upon the ground they were not in writing. The situation became further involved when Green remarried. The Browns claim that he promised that if he remarried he would not bring his new wife to the home and they deny that she has any right to be there. The Browns assert by way of estoppel that the oral agreements, upon which they rely, were the reason for their expending some $4,000 in paying off a trust deed indebtedness which existed at the time they received their deed, and in making improvements on the property. All this and more appears from the full discussion of the case in the opinion of the Supreme Court.

When the case came on for trial there was an extended hearing in which, by the employment of an abbreviated procedure, disposition of the cause was greatly accelerated. Defendants made a motion for judgment on the ground that if the judgment at the first trial had read the same and had been in the "form and manner" as the one they were presenting with their motion, it would have been affirmed by the Supreme Court. They argued that the facts, which had been in dispute, were settled by the Supreme Court's opinion. Plaintiff through-

out the hearing insisted that all issues of fact must be retried. No stipulation as to the facts was entered into and no evidence was offered or received. No reference to or use was made of the evidence given at the former trial. The court agreed with the legal theories of the defendants and although it denied their motion for judgment it entered judgment in their favor at the close of the argument.

The judgment, by way of introductory recital reads in part: "Now, in accordance with other appropriate proceedings and pursuant to findings of fact and conclusions of law hereinbefore prepared, served, approved, filed herein and reviewed by the Supreme Court in its opinion filed in the above entitled cause, the above entitled Court, under its interpretation of said Supreme Court's opinion, and under its ruling with reference to clarifying the issues that are involved, and limiting under its ruling an interpretation of said opinion * * *. It Is Hereby Ordered" etc. It is unnecessary to state the terms of the judgment further than to say that it was based upon facts not tried or determined and it gives effect to the alleged oral agreements between the parties, thereby sustaining the claims of oral agreements, part performance and estoppel upon which the defendants relied. However, the judgment while awarding plaintiff a right to the use of an undivided one-half interest in the property, purported to deprive him of his life estate therein.

[1, 2] On the former appeal the judgment was reversed without directions. An unqualified reversal remands the cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable. Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521; 4 Cal.Jur.2d 589. Upon the trial of a question of fact findings must be made unless they are waived. Code Civ.Proc., sec 632.

From statements made at the hearing it appears that the parties and also the present Mrs. Green are living in the home. We feel impelled to remark that after more than three years of litigation, in which Mr. Green's life estate has been established, the more profitable course for the parties to pursue would be to compose their differences. We can do nothing but reverse the judgment for continuance of the litigation, if the parties are not so wearied of it that they will agree upon a final judgment to be entered.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.



115 Cal.App.2d 213

STIENBACK v. HALSEY.

Civ. 4478.

District Court of Appeal, Fourth District, California.

Jan. 5, 1953.

Action for recovery of property given by plaintiff to defendant in contemplation of their marriage which did not occur. The Superior Court, Orange County, Raymond Thompson, J., entered judgment for plaintiff as to most of the property, and defendant appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evidence was sufficient to support findings that defendant had agreed to marry plaintiff, though she had no intent to do so, for purpose of obtaining as much of his property as possible.

Affirmed.

1. Replevin ⇐72

In action for recovery of property allegedly given woman in contemplation of marriage with plaintiff, evidence supported findings that defendant, by her acts and conduct and acceptance of gifts, implied a promise to marry plaintiff without further delay and that it was defendant's intention to extract as much property from plaintiff as possible without, at any time, having any intention of entering into the marriage relation. Civ.Code, § 1590.

2. Replevin ⇐69(5), 107

Where allegations and prayer of complaint in action for recovery of property which plaintiff had given defendant in contemplation of marriage was for return of the two rings involved, the alleged value thereof was only incidental, and evidence that rings were of greater value than alleged did not result in a variance between pleadings and evidence, and order directing payment of higher value was only a condition attached in case defendant refused to return rings and was not inconsistent with pleadings and proof. Civ.Code, § 1590.

3. Replevin ⇐113

The unsuccessful defendant in replevin action may deliver the property and discharge himself from so much of the judgment as is made up by the assessed value. Civ.Code, § 1590.

4. Pleading ⇐388

A material variance between allegations and proof is one which has misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a difference between allegation and proof which relates merely to quantity or degree rather than kind is not a variance. Civ. Code, § 1590.

5. Pleading ⇐388

In case of immaterial variance between pleadings and proof, the court may direct the fact to be found according to the evidence.

6. Pleading ⇐430(2)

A variance between pleading and proof is immaterial and may be disregarded where case was fully and fairly tried upon merits as though variance had not existed.

7. Appeal and Error ⇐1041(4)

Where pleading in action for recovery of property given in contemplation of marriage alleged property was of a certain value, evidence showed that property was of a greater value than alleged, plaintiff moved to amend pleading to conform to proof, court took motion under advisement and neglected to rule thereon, and defendant failed to call such fact to attention of trial judge, no prejudicial error resulted from failure to rule upon the motion.

8. Appeal and Error ⇐197(3)

Objection of variance between pleading and proof may not be raised for first time on appeal.

9. Replevin ⇐103(1)

Where petition in action for recovery of property alleged that plaintiff had given the property to defendant in contemplation of their marriage and proof showed that defendant had agreed to marry plaintiff, though she had no intent to do so, for purpose of acquiring as much of his property as possible, judgment awarding most of the property to plaintiff but awarding some personal items to defendant was not inconsistent with the pleadings and proof, in view of evidence that such personal items had been gifts to defendant and had not been obtained by any false promise of marriage. Civ.Code, § 1590.

Drumm & Drumm, and John Martell, Santa Ana, for appellant.

Ridley C. Smith, Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Emil E. Stienback, an officer in the United States Coast Guard, a widower aged 59 years, alleges in his complaint that he proposed marriage to defendant and appellant Bernice G. Halsey, and that she accepted his proposal; that relying upon her promise he gave her (a) diamond engagement and wedding rings valued at $1,185; (b) Hoover vacuum cleaner valued at $118.60; (c) Pontiac automobile valued at $2,400; (d) silverware valued at $756; (e) sewing machine valued at $214.45; (f) money in various amounts totaling $1,655.12; and (g) described improved real property. He then alleges that on many occasions since the engagement plaintiff requested defendant to consummate the marriage; that she refused and that he demanded the return of the property which she also refused.

Defendant's answer admitted receipt of the property; denied that plaintiff requested her to consummate the marriage; that she had refused to enter into the marriage relation; and alleged that ever since said

engagement she was willing to marry plaintiff; that she set a date for the wedding and plaintiff repudiated the marriage agreement.

A trial before the court resulted in detailed findings as to each article obtained, which findings were in favor of plaintiff and against defendant's claimed defense. Judgment was that defendant reconvey the real property described; to return the car, or plaintiff would be entitled to recover its value fixed at $2,400; that he was to recover possession of the silverware, sewing machine, vacuum cleaner, and rings above mentioned, and in case delivery of the rings could not be had plaintiff was entitled to recover $1,426.64, their value. Judgment was also given for $576 on account of cash advanced. The court allowed defendant to retain certain luggage, perfumery, clothing, and money which apparently were found to be gifts.

It is defendant's contention (1) that the evidence is insufficient to support the findings; (2) that the court was inconsistent in awarding defendant a part of the property obtained under the alleged agreement of marriage instead of ordering the return of all of it to plaintiff; (3) that there was a material variance or inconsistency between the pleadings, proof, findings and judgment.

Plaintiff's evidence shows that his wife died March 21, 1950, and he was quite grief stricken. He owned a little home in Santa Ana. He had placed a "For Sale" sign on it. When he arrived home from Terminal Island one evening around July 1st, defendant, who was visiting her cousin next door, came over, introduced herself to plaintiff as a real estate agent, and inquired about listing his property. He showed her the home and told her of the tragedy of losing his wife and said he did not contemplate remarriage. She ridiculed the idea and consoled him by saying there were other people, even older than he, who found considerable happiness by remarriage. She invited him next door to dinner and he declined. About 15 minutes later she asked plaintiff if he would come over and help her move a swing, which he did. She asked him to be seated and they talked a while. He then went to dinner and to a drive-in movie with her. The next morning she invited him to coffee, and he refused. She asked him if he would take her to Laguna. He did. While walking around she saw a bathing suit in a little dress shop window which she liked. She modeled it for plaintiff and wanted to know if he liked it. He did. He then was called upon to pay $31 for it. They went from there to another dress shop. She tried on a dress and he paid $30 for it. Two or three days later they went to a show. Plaintiff proposed marriage to defendant and she said she would accept. He then asked her if she knew a reputable jeweler. She did. The next day samples of engagement and wedding rings were shown to them. Defendant picked out the rings. The next day he presented them to defendant and said: "You can consider yourself engaged." She made no comment. On the way home she took them off and said she did not want any one to know they were engaged. She later wanted the rings exchanged for platinum. He exchanged them. She also purchased a chain that went around her neck so she could keep the rings on the chain and hide them in her bosom when she was not wearing them. A few days later she asked plaintiff if he would find her an apartment in Monrovia. He did, at $60 per month. The next day she called plaintiff to visit her and take her to Santa Ana. In a few days she asked him for a car. She said she knew a person who was leaving and would sell his car for $2,400. He borrowed $1,200 of that amount and gave her $2,400 in cash. The car needed insurance so he bought that. On August 6, he drove her to Pasadena and she spent $96 of his money "for her type of shoes". Shortly thereafter they planned a trip to Sequoia Park. She took him to a style shop, modeled a new outfit, and asked him if he would buy it for her at $306. He replied: "If you will go and get married I will buy this ensemble for you." She said: "Maybe, we will see." She accepted the suit and he paid the bill. At her suggestion, he purchased, for himself, a new suit for the wedding. Defendant complained about her luggage, and he purchased new lug-

gage. He testified that it was their intention to get married on the trip to Sequoia Park; that they discussed going by way of Las Vegas or Reno, and marrying before going to Sequoia; that she wanted to see the park first and that after two days visit in the park she declined to get married.

It appears that she wanted to move to Santa Ana because plaintiff complained about the added expense of the apartment. She moved to a motel. There was no car in her garage when plaintiff came to see her. He asked about the Pontiac and she informed him that "My friend has it". About August 25th, she approached plaintiff about deeding his home property to her and said she could live there and he could live at the base on Terminal Island and save expense; that she was now wearing the engagement ring and no longer cared if people knew that they were engaged. She had her attorney prepare a grant deed conveying the property to her. She took plaintiff to the attorney's office and the attorney asked plaintiff if he knew what he was doing. Plaintiff testified that before he had a chance to reply, defendant spoke up and said: "We are going to be married", and that he then said, before he signed the deed, that he presumed that if they were not married it would be null and void and that defendant shook her head and said: "Of course". Thereafter, he signed the deed and defendant then showed the attorney her wedding ring which she carried concealed on her neck chain.

Plaintiff thereafter advanced money to her, at her request, and started the purchase of more clothes on the "lay away plan". He said he did all of this believing that they would be married before the Christmas holidays, and that the clothing would not be delivered until then. About two weeks before Christmas he obtained the clothing, believing they were to be married. Defendant thereafter bought silverware, totaling $756.92, and had the home property decorated at plaintiff's expense. Many gifts of money and perfumery, etc. were given to defendant by plaintiff. Defendant made expensive charges against plaintiff's charge accounts. Christmas passed and no marriage took place. About December 30, plaintiff told defendant his expenses were getting so high he didn't understand how she could expect him to support her and not get married. She made no comment. Thereafter, she became enraged and said: "I suppose you want your rings back", and he said: "Yes". She stated she intended to give them back but that she "found out" she had lost them. He then asked her to return his property, both real and personal. She refused and told him to "Get out and stay out". He then told her he would have to sue for its return. A "For Sale" sign was placed on the home property and on January 4, the complaint in this action was filed.

Counsel for defendant relies upon certain testimony of plaintiff, produced upon his cross-examination, indicating that plaintiff was the one who refused to carry out the marriage agreement when he finally told defendant he was "getting sick and tired of the whole damn deal and I think that we should call it off"; that when they were originally engaged, defendant mentioned that out of respect for his dead wife they should wait about a year before marrying; that no specific date was then set. In this respect, however, he did explain that he would have waited a year but defendant later led him to believe and they planned that they were to be married by Christmas; that he told her he could not go on supporting her when he was not married to her, and that he received no definite answer from her as to any date. Plaintiff's deposition was offered in evidence wherein defendant contends plaintiff made statements inconsistent with his present testimony. Therein he stated that some time after the claimed loss of the rings, plaintiff asked defendant if she "actually lost them" and she said "Yes"; that she then said they could go to Nevada and get married and he told her he could "not see that" then; that he had no money left; that if she would return all of the property to him and show her good faith, he might "talk marriage"; that he had lost faith in her and could not see how their marriage could become a success, and that she said: "Well, I guess I have wasted my time". She then borrowed $1 from plaintiff for gasoline for

the automobile and left. Immediately thereafter, she secured a chattel mortgage of $1,100 on the car and endeavored to obtain a loan on the real estate. She claims she was planning a trip to Arizona for her health when served with process in this case.

Defendant's testimony is that plaintiff proposed marriage; that he agreed to wait a year before consummating it; and that plaintiff called off the marriage. Defendant's version of the meeting and proposal is somewhat at variance with the testimony of the plaintiff. However, she admits receiving the property indicated, but claims it was plaintiff's idea and was not based upon any promise of hers in regard to marriage. Plaintiff's evidence shows that defendant, during plaintiff's absence from the home premises, had at least one weekend gentleman caller (the man who previously owned the Pontiac) but defendant claims he was just an old time friend.

At the conclusion of the trial plaintiff's counsel moved the court for permission to amend the complaint to allege the value of the rings at $1,426.64, instead of $1,185, and to also allege that the marriage agreement was given up by mutual consent of both parties. Objection to the amendment was made and the court took it "under submission" with the case. Apparently, the trial court failed to rule upon the motion other than the inference that may be drawn from the findings entered.

Section 1590 of the Civil Code provides:

> "Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just."

It is defendant's position that the evidence conclusively shows that there was no specific date fixed for the marriage; that she had one year from the engagement in which to perform and that plaintiff was the one who breached the agreement by "calling off" the wedding and that at all times defendant was willing to perform according to the terms of their engagement and that no property was obtained under any false promise to marry. She cites such cases as Simonian v. Donoian, 96 Cal. App.2d 259, 261, 215 P.2d 119; and Vickers v. Vickers, 133 Ga. 383, 65 S.E. 885, 24 L.R.A.,N.S., 1043.

The court specifically found, from the facts related, that defendant, by her acts and conduct and the acceptance of gifts, implied a promise to marry "without further delay" and that it was defendant's intention "to extract as much property from the plaintiff as possible without, at any time, having any intention of entering into the marriage relation".

[1] Without further demonstration, the evidence fully supports these findings. In Simonian v. Donoian, supra, relied upon by appellant, the court said, 96 Cal.App.2d at page 261, 215 P.2d at page 120:

> "The breach of a marriage contract may be shown by any words or conduct although there is neither verbal nor written refusal to marry. * * *"
>
> "The finding that appellant refused to celebrate the connubial alliance and by his conduct prevented it was amply supported by the evidence. * * *"

And on page 262 of 96 Cal.App.2d, on page 121 of 215 P.2d:

> "Where any substantial evidence supports the findings it will not be disturbed on appeal. * * * And this is true even though there is sufficient support for a contrary finding." (Citing cases.)

See, also, Campbell v. Arbuckle, 51 Hun 641, 4 N.Y.S. 29; Id., 123 N.Y. 662, 26 N.E. 750; Holmes v. Jennison, 14 Pet. 540, 39 U.S. 540, 10 L.Ed. 579; Stevens v. Dillon, 74 Cal.App.2d 178, 168 P.2d 492.

In view of these specific findings, the proposed amendment to the pleadings, as suggested, in reference to a claimed mutual agreement to give up the marriage, was

unnecessary. The judgment was not inconsistent with the pleadings and proof.

[2–6] Since the allegations and prayer of the complaint were for return of the two rings involved, the alleged value of $1,185 was only incidental thereto. The order for payment of $1,426.64 was only a condition attached in case defendant refused to comply with the judgment for their return. It is a well-known rule that the unsuccessful party may deliver the property and discharge himself from so much of the judgment as is made up by the assessed value. Hunt v. Robinson, 11 Cal. 262; 5 Cal.Jur. 212, sec. 41. A difference between the allegation and the proof which relates merely to quantity or degree rather than kind, is not a variance in contemplation of law. A material variance is one which has misled the adverse party to his prejudice in maintaining his action or defense on the merits. In case of an immaterial variance the court may direct the fact to be found according to the evidence. A variance is immaterial and may be disregarded where the case was fully and fairly tried upon the merits as though the variance had not existed. 21 Cal.Jur. pp. 262–266, secs. 182, 183 and 184.

[7, 8] Here, the evidence as to the value fixed by the trial court was not disputed and defendant made no point of it before the trial court. If defendant claims a material variance between the pleadings and proof no prejudicial error resulted by reason of the failure of the trial judge to rule upon the motion to amend, particularly where defendant stood mute and failed to call this fact to the attention of the trial judge. Such an objection may not now be raised for the first time on appeal. Robson v. O'Toole, 60 Cal.App. 710, 214 P. 278; 2 Cal.Jur. p. 278, sec. 89; 21 Cal.Jur. p. 253, sec. 177.

[9] The claim that the court made an inconsistent finding in allowing defendant to retain certain property and ordering her to return certain other property is without merit. The evidence might well indicate that these items allowed to be retained were personal gifts to defendant and were not obtained by any false promise of marriage. We perceive no prejudicial error.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



115 Cal.App.2d 281

EVANS v. HORTON.

Civ. 19175.

District Court of Appeal, Second District, Division 3, California.

Jan. 8, 1953.

Action for damages for fraud wherein defendant pleaded res judicata as a special defense to specific paragraphs of the complaint. The Superior Court, Los Angeles County, Leo Freund, J., entered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeals, Vallée, J., held that the defendant's plea of res judicata had been properly sustained, but that it had been error not to try remaining issues.

Reversed with directions.

1. Judgment ⇐713(2)

Judgment rendered after trial on merits is res judicata not only as to issues actually raised but as to issues which could have been raised in support of the action.

2. Action ⇐53(2)
Judgment ⇐589(1)

A party claiming to have been defrauded must seek all the relief to which he may be entitled in one action, and he may not, after having failed in trial on merits of an action to rescind a purchase for fraud, thereafter bring a second action for damages.

3. Judgment ⇐589(1)

Where either of two remedies is equally available to vindicate same right, judgment on merits in an action seeking one of them bars resort to the other.

4. Judgment ⇐589(1)

Judgments for defendant in prior rescission actions were a complete bar to subsequent action against same defendant, in so far as damages were sought therein for fraud as to transactions which were subject of prior actions.

5. Judgment ⇐728

Prior judicial determination is not res judicata of issue in subsequent litigation only if such issue was immaterial to decision of prior case, or was only incidentally cognizable, or only collaterally in question.

6. Judgment ⇐720

In general, a fact, question, or claim is within doctrine of res judicata when an issue concerning it is tendered and accepted by pleadings in case and is determined on merits; and, unless expressly excluded from effect of adjudication, if questions involved in suit are tried and decided, no matter how numerous they may be, estoppel of judgment applies to each point so settled in the same degree as though it were sole issue in case.

7. Judgment ⇐719

In determining conclusiveness of a finding or holding on a certain point, inquiry is not whether court might have avoided making finding on particular point but whether finding or holding is on a point in issue and whether it is consistent with, or supports or contributes to, actual decision rendered; and a judgment based on several grounds or points, each of which was put in issue by pleadings and expressly decided, is conclusive as res judicata or estoppel as to each of such grounds or points, since a court is not confined to single point or ground in deciding an action.

8. Judgment ⇐720

Mere fact that it was determined in rescission actions that plaintiff had not taken all necessary steps to rescind did not render court's findings of fraud mere surplusage or prevent them from becoming res judicata, where issue of fraud was tendered by pleading, went to merits of suits, and was litigated and expressly decided.

9. Judgment ⇐194

It is only when decision on trial of special defense is that entire action is barred by prior judgment that court is empowered to render judgment for defendant who has pleaded special defense; and therefore, where court proceeded to try special defense, which did not constitute a bar to entire action, before trial of any other issue, and its decision was in favor of defendant, it was error to render judgment without trying remaining issues, and trial court should have made a minute order showing its decision on the special defense and then proceeded to trial and judgment on remaining issues. Code Civ.Proc. § 597.

Sanner, Fleming & Irwin, Joseph C. Smith, and John Amos Fleming, Los Angeles, for appellant.

Paul R. Hutchinson, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff brought this action for damages for fraud. As a special defense to specific paragraphs of the complaint defendant pleaded *res judicata*. At the instance of plaintiff the court proceeded to the trial of the special defense before the trial of any other issue. The decision on the special defense was in favor of defendant and judgment for him followed. Plaintiff appeals.

Prior to commencing the present action, plaintiff brought four suits against defendant for rescission. Two of these suits, Nos. 549296 and 549297, pertained to the purchase by plaintiff of a building, the investment of funds in The Mothimune Company, and the vesting in defendant by plaintiff of a half interest in the real property and business of that company, referred to as the Mothimune transactions. These suits were tried, resulting in a judgment in each case in favor of defendant. The other two suits, Nos. 549298 and 549299, pertained to the purchase by plaintiff of an interest in Columbia Carpet Service Company, the transfer by plaintiff to defendant of an interest in that company, and the repurchase by plaintiff from defendant of that interest, referred to as the Columbia transactions. The Columbia cases have not been tried.

In this action the complaint alleged that plaintiff was induced to enter into the Mothimune transactions by reason of false and fraudulent representations of defendant respecting the business, its prospects, and future profits. It alleged that the representations were known to defendant to be false, were made to induce plaintiff to purchase the property and invest his money, and that he relied thereon to his damage. It is alleged that at a later time plaintiff was induced to enter into the Columbia transactions by reason of false representations made by defendant, known by him to be false, on which plaintiff relied to his damage. It also alleged that at a later time, by reason of threats made and duress exerted by defendant, plaintiff, to his damage, bought defendant's interest in Columbia.

In his answer, defendant denied the allegations of fraud, threats, and duress, and pleaded affirmatively that all claims of fraud with respect to the Mothimune transactions had been finally adjudicated in the rescission suits Nos. 549296 and 549297, in which judgments for defendant had been rendered and had become final.

The judgment in this action reads as follows: "It is hereby ordered, adjudged and decreed that the plaintiff is barred from proceeding against the defendant upon any matter adjudicated by this court in proceedings numbered 549,296 and 549,297 in the files of this court; that no trial of the other issues in this action shall be had unless this judgment shall be reversed on appeal or otherwise set aside or vacated." No trial was had, findings made, or judgment rendered concerning the issues made by the pleadings with respect to the Columbia transactions, or with respect to the purchase by plaintiff of defendant's interest in Columbia.

[1, 2] Plaintiff says his unsuccessful attempt to secure rescission in the Mothimune cases does not bar his present action for damages for fraud, and that, in any event, the judgments in those cases are not *res judicata* as to the Columbia transactions. Defendant says the former judgments in the Mothimune cases are *res judicata* of all issues here. The rule is that if, in a suit for rescission, a judgment is rendered after a trial on the merits, such judgment is *res judicata* not only as to the issues actually raised but as to issues which could have been raised in support of the action. A party claiming to have been defrauded must seek all the relief to which he may be entitled in one action, and he may not, after having failed in an action to rescind a purchase for fraud which has been adjudicated after a trial on the merits, thereafter bring a second action for damages. Wulfjen v. Dolton, 24 Cal.2d 891, 151 P.2d 846.

In Nos. 549296 and 549297 plaintiff sought decrees rescinding the Mothimune transactions. In each of those actions, plaintiff pleaded the same fraud as is alleged in this action. In each of those actions, the court found that plaintiff did not enter into the transactions because of, or relying on, any representations of defendant; that the representations alleged in this action with respect to the Mothimune transactions were not true; that it was not true that any representation made by defendant to plaintiff was false or made for the purpose of inducing plaintiff to enter into the transactions; and that it was not true that "plaintiff has been damaged in any way by any fraud or misrepresentations or promises on the part of defendant, or that there has been any fraud or misrepresentations or false or unfilled promises." At the trial of this action, plaintiff's counsel said: "We will state that we do seek in this case to prove the same material facts as we did in those two cases referred to between the same parties." He makes the same concession here.

[3, 4] This action, as respects the Mothimune transactions, is on the same claim as the suits for rescission; different relief only is sought. Where either of two remedies is equally available to vindicate the same right, a judgment on the merits in an action seeking one of them bars a resort to the other. Suisun Lumber Co. v. Fairfield School Dist., 19 Cal.App. 587, 593–594, 127 P. 349; Richard v. St. John, 264 Mich. 192, 249 N.W. 501. The prior judgments therefore operate as a complete bar to the present action in so far as damages are sought for fraud as to the Mothimune

transactions. See Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242; Detwiler v. Clune, 77 Cal.App. 562, 574–577, 247 P. 264. In Krier v. Krier, 28 Cal. 2d 841, at page 843, 172 P.2d 681, at page 682, it is said: "It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is res judicata, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. [Citations.] And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination." Cases such as McGibbon v. Schmidt, 172 Cal. 70, 75, 155 P. 460, and Herdan v. Hanson, 182 Cal. 538, 189 P. 440, in which the prior judgments claimed to be *res judicata* were judgments of nonsuit, are not in point. See Keidatz v. Albany, 39 Cal.2d 826, 249 P.2d 264.

[5, 6] Plaintiff argues that because the court, in the prior actions, found he had not taken all necessary steps to rescind the Mothimune transactions the findings of want of fraud were surplusage, not necessary to the judgments, and therefore the judgments are not *res judicata* on the question of fraud. The rule invoked by plaintiff applies only when the issue was immaterial to the decision of the prior case, or was only incidentally cognizable, or only collaterally in question. 50 C.J.S., Judgments, §§ 721–725, p. 206; Annotation 133 A.L.R. 840. In general, a fact question, or claim is within the doctrine of *res judicata* when an issue concerning it is tendered and accepted by the pleadings in the case and is determined on the merits. Clark v. Bauer, 135 Cal.App. 65, 69–74, 26 P.2d 729; Bank of America Nat. T. & S. Ass'n v. Feig, 21 Cal.App.2d 247, 68 P.2d 985. See Keidatz v. Albany, 39 Cal.2d 826, 249 P.2d 264. Unless expressly excluded from the effect of the adjudication, if the questions involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment applies to each point so settled in the same degree as though it were the sole issue in the case. 50 C.J.S., Judgments, § 721, p. 208.

[7, 8] A court is not confined to a single point or ground in deciding an action. Where a court has decided an action on more than one ground, it cannot be said that one ground rather than the others was essential to the decision, and that the others were immaterial or unnecessary. In determining the conclusiveness of a finding or holding on a certain point, the inquiry is not whether the court might have avoided making a finding on the particular point but whether the finding or holding is on a point in issue and whether it is consistent with, and supports or contributes to, the actual decision rendered. A judgment based on several grounds or points, each of which was put in issue by the pleadings and expressly decided, is conclusive as *res judicata* or estoppel as to each of such grounds or points. See cases collected—133 A.L.R. 846. If a case is decided on one or more grounds, each ground is a good estoppel. Irving Nat. Bank v. Law, 2 Cir., 10 F.2d 721, 724. See Dobbins v. Title Guarantee & Trust Co., 22 Cal.2d 64, 70–71, 136 P.2d 572. Mr. Freeman says: "But there is a difference between a finding or adjudication which is immaterial and one which is material, though perhaps unnecessary in view of other findings. The mere fact that the court goes further than is absolutely necessary to sustain its judgment in determining material issues presented to it does not prevent such issues from becoming res judicata." 2 Freeman on Judgments, 1478, § 698. The question of fraud in the Mothimune transactions was not immaterial to the decisions in the prior rescission suits, nor was it only incidentally cognizable nor only collaterally in question. It was tendered and accepted by the pleadings; it went to the merits of the suits; it was litigated; expressly decided; and is *res judicata*. See Henderson v. Miglietta, 206 Cal. 125, 273 P. 581.

The court found that in the prior Mothimune suits plaintiff made the same, or substantially the same, allegations pertaining to the alleged fraud of defendant in the Mothimune transactions as he makes in this action, and concluded that plaintiff is

barred by said judgments from recovering any relief on account of the facts adjudicated in favor of defendant in those suits. At the conclusion of the trial, the court stated that under section 597 of the Code of Civil Procedure "judgment must be entered and no trial of other issues in this action may be had." In accord with this view, the judgment heretofore quoted was rendered.

[9] The court erred in not trying the remaining issues and in rendering judgment. The special defense of *res judicata* was directed only to certain specific paragraphs of the complaint pleading fraud with respect to the Mothimune transactions. It did not in any way affect the issues as to the Columbia transactions. The latter issues remained in the case and should have been tried. It is only when the decision on the trial of the special defense is that the entire action is barred by a prior judgment that the court is empowered to render judgment for the defendant who has pleaded the special defense. See Code Civ. Proc. § 597; Woodhouse v. Pacific Elec. Ry. Co., 112 Cal.App.2d 22, 245 P.2d 701. When, as here, the court proceeds to try a special defense which does not constitute a bar to the entire action before the trial of any other issue, and the decision on such special defense is in favor of the defendant, the proper procedure is to make a minute order to that effect, proceed to the trial of the remaining issues, make findings of fact and conclusions of law on all issues, and render judgment accordingly. In such a case, the decision of the court on the special defense and all rulings on it may be reviewed on appeal from the judgment. Plaintiff pleaded three separate causes of action in one count: one with respect to the Mothimune transactions and two with respect to the Columbia transactions. One of those causes only was affected by the plea and the finding of *res judicata*. By insisting he has a right to try the two causes of action not affected by the plea plaintiff is not splitting a cause of action, nor is he basing his claim on the same right, as to those causes, on which he based his claim in the prior Mothimune suits nor on the same violation of duty by defendant, as defendant argues.

The judgment is reversed with directions to enter a minute order sustaining the defense of *res judicata* with respect to the Mothimune transactions, to try the remaining issues, to then make findings and conclusions of law as to all issues, and to render judgment accordingly.

SHINN, P. J., and WOOD, J., concur.



115 Cal.App.2d 255

PEOPLE v. BERLING.

Cr. 4713.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1953.

Rehearing Denied Jan. 21, 1953.

Hearing Denied Feb. 5, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, Fred Miller, J., of murder, and she appealed. The District Court of Appeal, Doran, J., held that it was reversible error to continue with the trial during times when defendant did not know what was going on because she was either unconscious or semi-unconscious.

Judgment and order denying motion for new trial reversed, and cause remanded for new trial.

1. Homicide ⇐268

In murder prosecution, guilt of defendant was for jury under evidence.

2. Criminal Law ⇐636(1)

An accused in a felony case must be both physically and mentally present during the whole of his trial. Pen.Code, § 1043; Const. art. 1, § 13.

3. Criminal Law ⇐636(1), 1166½(4)

Where defendant, on numerous occasions in murder prosecution, did not know what was going on because she was either in an unconscious or semi-unconscious state, it was reversible error to proceed

with the trial while defendant was in such condition. Pen.Code, § 1043; Const. art. 1, § 13.

4. Criminal Law ⇐419(12), 1169(1)

In murder prosecution, admission of an anonymous letter accusing mother of deceased of the partial responsibility for the alleged murder of the deceased, and using derogatory epithets in reference to the mother and the defendant, for purpose of showing the possible state of mind of the mother, was improper, but not prejudicial error.

5. Criminal Law ⇐1169(5)

In prosecution for murder of ten year old girl, wherein defendant contended that girl's injuries were self-inflicted, and wherein jury was instructed that it was not bound to accept opinion of an expert as conclusive and could disregard such opinion if jury found opinion unreasonable, it was not prejudicial error to permit psychiatrist to testify that he had never known of a case of a sane child, who had not reached puberty, mutilating herself masochistically in areas and to extent shown by postmortem photographs of deceased girl.

Albert C. S. Ramsey, Milton Emlein, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., S. Ernest Roll, Dist. Atty., Los Angeles, Thomas W. Cochran, Deputy Dist. Atty., Long Beach, and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The appellant was charged with the murder of Kay Frances Erickson, a ten-year old girl, who died at Long Beach on October 12, 1950. Appellant was an accordion teacher; the deceased child was studying under appellant's tutelage, and at the time in question was staying at appellant's studio. The trial commenced January 3, 1951 and ended on April 20, 1951. After eight days deliberation a jury returned a verdict of murder in the first degree with recommendation of life imprisonment. A motion for new trial was argued and denied.

It appears from the record that Kay Frances was born on April 22, 1940, at San Pedro, entered kindergarten there, and at the age of five took dancing and piano lessons for 8 or 9 months. The family moved to Long Beach in July, 1947, where the girl resumed dancing lessons. In May, 1950, Mrs. Erickson took Kay Frances out of school because of a nervous stomach condition and because the teacher had advised that the girl was not going to pass. School teachers testified that Kay Frances was apparently a normal child in school, but somewhat immature, and had an I.Q. of 88 which was somewhat below normal. The school record noted that the child was "Artistic in singing and dancing".

About June 28, 1948, Mrs. Erickson conferred with Miguel Verdugo, an accordion teacher, and was referred to the appellant Violet Berling, a teacher of beginning students, with whom the mother arranged weekly lessons for Kay Frances at appellant's studio in Long Beach. Miguel Verdugo occupied a home in Long Beach, but shared a studio with appellant, Verdugo using the studio on Mondays. Appellant took Verdugo's phone calls and arranged appointments, while Verdugo paid bills connected with the studio.

At first Mrs. Erickson accompanied Kay Frances to appellant's studio and waited until the accordion lesson was completed; later the daughter was left there, sometimes all day and until as late as 10:30 p. m. Much of the time Mr. Erickson was unemployed and Mrs. Erickson worked to support the family. After March, 1949, the girl continued the accordion lessons without payment because of the parents' inability to pay. Some other students were also given free lessons by appellant.

A children's accordion quartette was formed, consisting of Kay Frances, and three other children, 9, 8 and 6 years old respectively. This quartette came to the studio to practice several times a week after school hours and spent the balance of the day and evening there. Sometimes one or more of the children stayed all night with appellant at the studio, all sleeping on the studio couch. Appellant bought the children gifts of clothing and toys, including gold wrist watches for Kay Frances and another pupil. The children were washed

and generally taken care of, and were taken individually or as a group to places of amusement, usually accompanied by Mr. Verdugo and the appellant. On some occasions the children were taken out to eat; at other times food was brought to the studio.

According to defendant's testimony, Mrs. Erickson had expressed dissatisfaction with Mr. Erickson, stating that a separation was imminent, and had asked appellant to take care of Kay Frances day and night for a period of time. On July 17, 1950, appellant found that the girl had been left at the studio where Verdugo was teaching on that day. Thereafter Kay Frances lived with appellant at the studio until death occurred on October 12, 1950. The appellant had an apartment at 32 Orange Street in Long Beach, but preferred living at the studio because of the inconvenience of transportation and the existence of a telephone at the studio. Appellant stated that the mother only visited the daughter once and that there was no indication of affection between the two.

On the morning of October 12, 1950, in answer to a telephone call, the fire department ambulance went to appellant's studio at about 6:30–6:40 a. m. The ambulance attendant found the body of Kay Frances Erickson lying on a studio couch. Although apparently dead the body was removed to the ambulance and a resuscitator applied with negative results. Upon arrival at the Seaside Hospital the girl was pronounced dead. Later that morning the body was taken to the Los Angeles County Morgue where an autopsy was performed by Dr. Victor Cefalu, Assistant Chief Autopsy Surgeon. The body was covered with multiple cuts, burns, abrasions, and contusions.

The cause of death was given as "aspiration of food", defined by Dr. Cefalu to mean "the drawing down of food into the air passages due to multiple injuries". Under circumstances similar to those found in the instant case, such aspiration of food might result from two causes, namely a state of unconsciousness resulting from injuries, or from some obstruction to normal ejaculation of vomit such as a gag tied around the mouth.

In the opinion of the examiner, none of the wounds were self-inflicted; some were so located as to make self-infliction unlikely. Some of the wounds were apparently of recent origin; others were superimposed upon older wounds. There were numerous slicing wounds from some sharp instrument such as a razor blade, some apparently inflicted only a short time prior to the girl's death. Certain burning wounds had been produced only a few minutes or a few hours before death.

A triangular area of abrasion appeared in the pubic region; a vaginal tear was present, and both vagina and anus were found to be dilated and open. It was the examiner's opinion that these conditions indicated a frequent stretching of the parts over some period of time, and the introduction of some object "of considerable resistance".

The girl's head had been subjected to a series of injuries which could well have been caused by blows; some of such injuries were of recent origin, while others may have been received a few weeks before death. Marks and indentations upon wrists and ankle were compatible with a condition caused by tying straps tightly around those areas. Likewise, a state of lividity found in feet and legs was consistent with the theory that the child died while strapped in a chair.

The body appeared somewhat emaciated, which condition could have been the result of a continued or intermittent series of torturing injuries, and of insufficient feeding. It was the examiner's opinion that the wounds found would have been sufficient to cause unconsciousness, and taken in the aggregate would have ultimately resulted in the girl's death. Although it was not possible to fix the exact hour, Kay Frances' death was estimated to have occurred at about 1:00 a. m. on October 12, 1950.

The appellant contended that the injuries must have been self-inflicted; that Kay Francis had a habit of inflicting similar injuries and of masturbation; that Miss Berling had never "laid a hand on the child in any way", and had not fastened the girl to a chair. Appellant's account is

that Kay Frances appeared to be all right at the time of retiring on the evening before the death, and at that time was not strapped in a chair. Miss Berling claims to have fallen asleep in a chair after writing some music; that about 6:00 a. m. noise from the adjoining room wakened appellant where the little girl was discovered strapped to a chair, but conscious and able to speak. There was a white shirt wrapped around the girl's head in bandana fashion with the arms of the shirt tied about the neck. Another shirt was on backward with a couple of buttons fastened in the back.

When found by appellant, Kay's head was hanging down as though asleep, and "her eyes appeared as though she were in a trance". After removing the straps, appellant claims to have placed the girl on the couch, and telephoned Mr. Verdugo that Kay Frances was either in a trance or dying. Mr. Verdugo arrived shortly thereafter; appellant telephoned Dr. Hanson, and pending arrival of the ambulance, attempted to administer artificial respiration. It was appellant's opinion that the girl was alive when wheeled out of the studio on a stretcher, and that the aspiration of food may have occurred when the ambulance attendants attempted artificial respiration.

[1] As hereinbefore indicated, there were no eyewitnesses to the crime and no direct evidence of appellant's guilt. The record discloses, however, various circumstances leading to a legitimate inference of guilt, and a tenable hypothesis in support of the conviction. In this connection it may be noted that appellant was alone with Kay Frances in the locked studio all of the night preceding the girl's death; Miss Berling's contention that the wounds were self-inflicted is refuted by medical testimony as before mentioned; it is improbable that the victim could have strapped herself in the chair. Certain witnesses testified to having previously seen Miss Berling strap the girl to chairs and a filing cabinet, and commit other acts towards the child, such circumstances leading to an inference of guilt rather than innocence. It cannot be said, as appellant's brief avers, that "the inference of guilt drawn from the evidence was wholly unwarranted".

Contradicting appellant's protestations of affection for Kay Frances and denials of the use of force or violence is the testimony of Lora Carpenter, aged nine years, who had taken accordion lessons from appellant for two and one-half years. The witness testified that two or three days before the death appellant had tied Kay Frances in a standing position to a filing cabinet, the girl being left thus tied while Mr. Verdugo took witness and appellant out to dinner, a period of about one and one-half hours. Kay had been tied to the filing cabinet at least two or three times; the witness had also seen appellant strap Kay in a chair several times, and on one occasion defendant had left Kay on the floor for several hours with hands tied.

Lora had seen a bandage tied all over Kay's face except the eyes and nose at least three or four times; on one occasion when the children had been taken to a movie, Kay Frances' eyes were covered with several scarves which were left on during the entire picture. On other occasions appellant had kicked Kay Frances for not getting the accordion right and had told the other children to kick Kay. Appellant had also been seen to hit Kay's hands with a ruler many times, and to slap Kay quite hard across the face.

On one occasion when Lora, Jimmie and JoAnn, all accordion pupils, were at the studio, appellant directed Kay Frances to "pull her pants down", stand about two feet in front of the children, and "play with herself", and was told to "keep showing us what she was doing" until appellant told Kay to stop. Violet had Kay continue the performance until the other children looked away. The appellant "told us kids if we told our parents that something dreadful would happen to us". At that time Lora saw bruises and cuts on Kay Frances' legs up to the knees.

The witness had seen other cuts and bruises on Kay's head and body, and had seen appellant tie bandages around Kay's head. "Whenever she would punish Kay, before she would do so, she would say some-

thing dreadful would happen to us if we told". Sometimes cuts on the girl's legs would be bleeding and blood would be dripping on the floor. To cover up black and blue marks on Kay's head and face, appellant put on "cream cake makeup". The witness had also seen Mr. Verdugo spank Kay Frances with a strap. Lora had seen appellant hit JoAnn, another pupil, on the face, while the children were practicing.

Somewhat similar, if less detailed, is the testimony of another pupil, Mary Jo Furey, aged 14, who had seen appellant slap Kay Frances' face, and to say "I am not scared to beat you in front of her", meaning Mary Jo. Kay was required to stare at Mary Jo and was kicked in the shin quite hard to enforce the order.

Thelma Watts, who took lessons from Mr. Verdugo, saw Kay Frances in September, 1950, with blackened eyes, described as purplish, puffy, and barely open. Appellant's explanation was that "the little girl believed she could heal herself and that was the reason she had done—blacked her eyes, made her eyes in the condition they were". One of Kay's fingers was bandaged and two or three other fingers were black and blue. Miss Berling had stated that Kay had "bumped her head against the wall and on the accordion in self abuse", and in respect to the finger injuries, "she said she had chewed them".

Waitresses of the Panama Cafe testified that appellant and Verdugo often brought Kay Frances there; that the little girl was quiet and did not look happy; that bruises on face and legs were explained as having been self-inflicted. One waitress could not recall any occasion when a meal was ordered for Kay although sometimes the child would get a cracker or a little soup from one of the others. On one occasion, in answer to the waitress' inquiry as to the condition of Kay's eyes, the appellant said, "she is not telling anything about how she got her eyes, she isn't talking".

Although, as appellant points out, there was evidence of gifts being made to Kay Frances and other pupils, etc., the general purport of the testimony is that the child had at times been mistreated by appellant, who had instilled fear in the children's minds with threats that "something dreadful would happen to us" if parents were told what was going on at the studio.

What may be denominated as appellant's main contention is that "A major part of the trial was conducted in the absence of appellant", who, although physically present in the court room, was often unconscious or only semiconscious, and "mentally absent during much of the trial". Appellant's affidavit seeking a new trial recites that "her trial began January 3, 1951 * * *; she recalls the selection of the jury, the opening statement by Mr. Ted Sten, co-counsel for the People, and many of the witnesses who testified against her * * *".

Miss Berling "recalled wire-playing apparatus set up" on or about March 8, 1951; that thereafter she became unconscious and recalls only occasional happenings in the court room * * * until April 28, 1951, when she heard a woman scream, and thereafter heard the judge read something to the effect that the defendant was guilty of murder in the first degree, and heard him ask the jury if that was their verdict, at which time she again lapsed into unconsciousness * * * that she has no recollection of conferences with her attorney between March 8 and April 13; that she had desired to have Miguel Verdugo called as a witness on her behalf and was not aware of the fact that he had not been called; that she was unaware of the fact that she had fainted 11 times in the court room, twice on the witness stand", etc.

That during the latter part of the trial Miss Berling was unwell is fully borne out by the record. According to appellant's count, there are 47 separate references to appellant's mental and physical condition between March 8 and April 12, 1951, including many (appellant's brief says 20) recesses granted for this reason, extending from a few minutes to 5 days. For example, on March 8, the trial court excused the jury, having observed that appellant appeared ill with "a severe tremor and she is sitting now at the counsel table with her head down and her eyes closed part of the time". To the Court's inquiry "She gave me no answer, which doesn't show an alert-

ness that is necessary for a defendant in her position".

Although appellant "stated she could carry on", and did not wish to have a doctor called, the Court did not "agree with her"; a recess was taken until the afternoon session, and a physician was called. According to the doctor, appellant "appeared listless and apathetic", although then conscious. The patient complained of headaches, weakness and dizziness.

It was the physician's opinion that "her present condition is functional, that it is an emotional and nervous upset from strain. * * * Well, I believe she is capable of understanding a wire recording or understanding questions and answers. I think that with an emotional disturbance such as she has, some inattention to her surroundings is apt to result". The witness further stated that whether the trial might proceed without detriment to appellant's interests, "is largely up to her".

Upon appellant's statement that the trial might go on, "but I might become dizzy", the Court said: "We can't tell when you are going to become dizzy or when you are in such a condition that you don't know what is going on. Will you try, if you feel something like that coming on, to let Mr. Ramsey or the Court know of that condition so that we can stop any proceedings until you are not dizzy and are fully conscious?" to which appellant responded, "Yes". Miss Berling stated that "Sometimes the room keeps going round".

On March 14, appellant was unnerved and shaking; the judge again stated, "If you feel faint, or if you are not conscious of what is going on", Miss Berling, "tell me or your counsel". However, as noted in appellant's brief, the Court did not indicate "How appellant would inform the Court of her unconscious state, if she were unconscious"! Later that same day, while on the witness stand, the accused asked for and was given a recess.

Again, on March 15, the Court's attention was called to the fact that Miss Berling appeared tired. Later that day the Court got no response to an inquiry as to appellant's condition; finally appellant admitted being upset, dizzy, and not able to think clearly. Then, although the Court stated "She is ill and we will have to go over until tomorrow morning because of her illness", nevertheless the proceedings continued with stipulations and corrections of testimony in the daily record and in the preliminary transcript. Certain testimony was stricken from the record and the jury admonished to disregard it. A recess was then taken because of appellant's condition.

On March 20, appellant's answers to questions became inaudible, and the condition of dizziness having returned, the trial was recessed until the following day. On March 28, during cross-examination, appellant, as Judge Miller stated, had "the appearance of being very tired and of not being in a position to look after your interests very well. * * * Now you are closing your eyes. You are practically dropped over as though you were in a poor physical and mental state". However, appellant indicated the trial could proceed; later the District Attorney called attention to appellant's tired and worn appearance; a short recess was taken, and appellant again claimed to be able to proceed. A few minutes later appellant asked for a recess and fainted.

The following morning appellant thought the trial might safely proceed. The Court, however, observed that "She has the appearance of being not clear in her mental behavior. She is just not alert, to me, plus the other things we have in the record. I don't think she is in condition to go ahead this morning" and mentioned that the day before appellant had "seemed to lose partial consciousness at least". The jail physician, Dr. Crahan, reported that appellant was not physically or mentally ill but was suffering emotionally due to strain; that "she was subject to fainting spells". Appellant complained of feeling dizzy, but felt able to go ahead; the District Attorney resumed cross-examination whereupon appellant fainted and fell from the witness stand.

Court was adjourned until the following Monday, April 2, at which time a woman deputy sheriff was requested to sit beside appellant. Later a recess became necessary because of the appellant's faintness. On April 3d although dizzy and "woozy", Miss

Berling resumed the witness stand but about 11:00 a. m. fainted again and fell out of the witness box. Appellant's condition appeared to be worsening rather than improving, causing the judge to remark: "I can't have the jury sitting here watching a defendant fall to the floor day after day in a fainting condition and in a condition that shows she gives every impression she is not able to look after her interests". In the afternoon the defendant was still weak and dizzy and a recess taken until the next day, appellant being then returned to the hospital section of the jail.

On April 4th, appellant was "somewhat dizzy, your Honor, but I can go on the stand". Mrs. Baust, deputy sheriff, reported that appellant's condition was "Very poor, * * * worse than yesterday morning. On the way in she seemed to be on the verge of consciousness and that is all. * * * I let her sleep on the way down. When she got out she would stagger and I would catch her. She pitches forward and then regains consciousness the minute I catch her. It is touch and go". Counsel for both sides agreed that the trial could not go on and adjournment was taken until April 9th.

On the adjourned date, cross-examination of appellant was resumed but some of the questions had to be repeated three times. Appellant again became weak and faint whereupon court was recessed until the next day. Cross-examination was again resumed although appellant was somewhat dizzy; in the middle of a statement by the District Attorney appellant started to faint and a recess was declared. The next day appellant resumed the stand but swayed back and forth, was having tremors, and finally started to faint but "said she wanted to keep on going".

The record discloses that similar episodes occurred on ensuing days, and on April 12, appellant again fainted. After a brief recess, the trial court stated: "I have been informed by the Deputy Sheriff, Mrs. Baust, that the defendant did not lose consciousness during this last partial fainting and loss of strength to go ahead, but that she was in a state of collapse". Notwithstanding the above condition appellant still expressed a desire to proceed with the trial, and re-examination was continued. However, because of Miss Berling's condition, the re-examination was concluded by the making of stipulations as to matters to which the witness would have testified.

Frequent remarks by the trial judge to the effect that "the defendant gives evidence of not being in a condition to proceed", cannot but indicate that the Court entertained serious doubts as to whether appellant was conscious, semiconscious, or unconscious during various phases of the trial. It is well to note that in the present case there appears to be no charge that Miss Berling was malingering. Indeed, appellant's condition was readily observable, not only calling forth comment from the trial judge but also from the deputy district attorney who openly questioned the advisability of continuing with cross-examination. That the situation was of an especially serious nature seems to have been recognized by everyone connected with the case.

[2] Article I, Section 13 of the California Constitution gives a defendant the right to appear and defend in person, and Section 1043 of the Penal Code provides that "If the prosecution be for a felony, the defendant *must* be personally present at the trial". (Italics added.) The rule is familiar and fundamental, "that the prisoner, in case of a felony, must be present during the *whole* of his trial", (Italics added), quoting from People v. Kohler, 5 Cal. 72. The same case states: "In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed".

The only reasonable interpretation of the above requirement that a defendant be present at every stage of a felony prosecution is that the accused person must be both physically and mentally present. Mere physical presence without mental realization of what was going on would obviously be of no value to the accused. A defendant in such condition would be unable to confer with or assist counsel, unable to testify, and without ability to understand the nature of the accusation or the mechanics or consequences of the trial. An interpretation of the rule as requiring only physical presence would lead to such an absurdity as the

purported trial of an imbecile or an insane person without the least understanding of what was taking place in the court room. Only in the most unenlightened age could such a so-called trial be countenanced.

Founded as it is on reason and natural justice, it is hardly necessary to cite authority for the principle just mentioned. The question has apparently not received the direct attention of courts of this state, and rarely elsewhere, perhaps because of its obvious nature. However, in an English case, Rex v. Lee Kun (1916) i K.B. 337, 9 British Ruling Cases 1121—C.C.A. cited in 14 Am.Jur. 899, it is held that "The presence of the accused means that he must be not merely physically in attendance, but also capable of understanding the nature of the proceedings".

Appellant has cited Reid v. State, 138 Tex.Cr.R. 34, 133 S.W.2d 979, 980, where although a defendant had suffered an epileptic fit and a physician had stated it would be an hour or more before defendant would be conscious, the trial court denied continuance and ordered the trial to proceed through the jury challenges. In that case the reviewing court said: "If a defendant in a felony case should be bodily present in the court room but in an unconscious condition, it cannot avail him his right to be present in the fullest sense, for it certainly cannot be said that he has the opportunity * * * to assist his counsel in the conduct of his case. It would be a mere sham to say that he was confronted with his accusers if he were not able mentally to realize their presence".

That the principle just mentioned would in a proper case find adoption by the California courts is indicated by the following quotation from People v. Singh, 78 Cal.App. 476, 481, 248 P. 981, 983: "Appellant further complains of the refusal of the court to grant a motion for continuance made during the trial * * * on the ground that defendant was ill and could not be consulted by his counsel. The record on appeal, however, satisfactorily shows that on such suggestion being made by counsel for defendant, an adjournment of court was had until the following day, at which time, so far as appearances as disclosed by the transcript are concerned, defendant had recovered from his indisposition and was able to advise with his counsel".

If, in the instant case, it could be safely said that the trial only proceeded during such times as Miss Berling was fully conscious of what was going on, all would be well. Unfortunately, the record seems to disclose that such was not the case. The trial court repeatedly remarked that the defendant gave the impression of not being "able to look after her interests", and not "being able to proceed". Many statements made during the trial clearly indicate that it was impossible to know whether the defendant was entirely conscious or able to proceed with the trial despite Miss Berling's willingness to go on. "When your voice drops as it does and your eyes partially close and open slowly, the appearance is that you are not in a condition to observe what is going on". There was "a serious question" in the trial court's mind as to how cross-examination could be conducted "under these circumstances".

Notwithstanding these legitimate doubts as to whether the defendant was mentally present at all stages of the proceeding, the trial continued and was finally submitted to the jury. The affidavit offered in support of the motion for a new trial averred that Miss Berling possessed only a fragmentary and hazy recollection of what took place during the latter part of the trial. Only when the trial was finished did appellant realize that a most important witness, Mr. Verdugo, had not been called to testify. The testimony of this witness who was intimately familiar with affairs at the studio, might easily have changed the entire aspect of the case by proving or disproving contentions put forward by the appellant and the District Attorney.

That the trial court fully appreciated the seriousness of the situation is apparent from the many adjournments and statements hereinbefore mentioned. Although it is evident that the trial judge made a sincere effort to fathom the defendant's condition, it is also apparent that neither the judge, nor the physicians, nor the appellant, were able to solve the problem. Although it became increasingly apparent that

Miss Berling was in no fit condition to be tried, the inquisition went on.

The real reason for continuing with the trial of the case is shown by the trial court's statement made at the argument of appellant's motion for a new trial: "it was our attempt to get this case ended so that we could have a conclusion of it one way or the other, and that's what we did". In other words, anxiety to finish the long and difficult trial was given priority over the more important question of the defendant's mental condition. The trial court's statement at the hearing of the motion for a new trial, that the trial was always stopped when the defendant was not in a proper condition to go on, is not reassuring in view of the record.

[3] As appellant's brief points out, "that the court was unable to assess appellant's condition is illustrated by the fact that he not only allowed, but ordered, proceedings to continue to the point where, on numerous occasions, she collapsed into unconsciousness while on the witness stand, and several times fell from the witness box". The exact periods and extent of Miss Berling's unconsciousness and semiconsciousness are unknown. In dealing with such a defendant who had fainted some 11 times during the trial; who was so frequently "dizzy", "groggy", "woozy", inattentive to surroundings, "unable to think clearly", unable to advise with counsel, only semiconscious if conscious at all at various periods, the only safe procedure, obviously, was to entirely stop the trial. This was not done. Any idea that such an error was harmless cannot be entertained.

Respondent's assertion that "since the evidence warrants the verdict, and since there was no prejudice, the conviction should be affirmed", is untenable. The existence of substantial evidence in support of the verdict does not cure the fundamental error of forcing the accused to stand trial while not in the full enjoyment of consciousness and mental power. Whether guilty or innocent the same rule must be given application. Constitutional and statutory provisions in reference to the conduct of a felony prosecution were designed to secure to every accused person a fair trial, not merely to those who are innocent. Full and strict observance of such rules is the primary responsibility of every tribunal essaying to try such a case.

Nor will it do to dispose of the matter by saying that it was within the trial court's discretion to go ahead with the trial as was done in the instant case. No court possesses any discretion whatsoever in reference to giving or withholding the fundamental rights and privileges of one accused of murder.

In reference to the other points relied on by appellant as justifying reversal, it need only be said that the record fails to show prejudicial error. One of these contentions relates to the admission of evidence concerning the defendant's background, personal and family history, and general activities not directly germane to the issues. Some of this evidence was of no particular importance one way or the other; some of the testimony was subsequently stricken and the jury admonished to disregard it.

[4] Likewise, the admission of an anonymous letter accusing Kay Francis' mother of partial responsibility for the murder, and using derogatory epithets in reference to the mother and appellant, to "show the possible state of mind" of the mother, was doubtless an error, but can hardly be deemed of prejudicial nature.

The same may be said in reference to the reading to the jury of the District Attorney's transcript of a wire recording of an interview with the appellant. The recording itself was played to the jury and the appellant had the opportunity to correct any erroneous rendering. Other items of evidence specified by appellant were likewise without material prejudice to the rights of the accused.

Appellant's brief also complains of conduct and statements made by the Deputy District Attorney during trial of the case. Most of these incidents occurred in the heat of animated discussion, and appear to have had no prejudicial effect. The jury was duly cautioned that the arguments of counsel are not to be considered evidence.

Complaint is made that "The Court erred in permitting Volumes 34 and 35 of the

daily transcript to be taken to the jury room". These volumes concern testimony about wire recordings, and Deputy District Attorney Sten's version thereof, and include certain argument and discussion in chambers concerning admissibility of evidence. Section 1137 of the Penal Code prohibits a jury from taking "depositions" into the jury room. Appellant also cites Section 1181 prohibiting reception of evidence out of court, in reference to off-the-record discussions in chambers. Respondent's brief notes that no objection to the above procedure was made by the defendant, and in any event, no prejudice can be said to have resulted.

Another assignment of error relates to the giving and refusing of instructions relating to the effect of filing the information, defining proximate cause of death, presumption of innocence, etc. No prejudice to defendant's rights can have resulted where the instructions, taken as an entirety, constitute a correct statement of the law, as was the situation in the instant case.

Misconduct of jurors is alleged in that "Juror No. 3 mingled with a hostile crowd" after the trial had recessed for the day; that the same juror had "answered a material voir dire question falsely" when "asked if she had studied psychology", the juror's answer being that "she had not, except for the usual courses in college". In denying defendant's motion for a new trial, the judge stated that the only showing was that the juror had "stood down on the street or in the alleyway down here, or somewhere else close by", and had looked on while appellant was being taken from the building. The further statement of the trial judge, "I can't find that that conduct is anything at all that would entitle the defendant to a new trial", correctly sums up the matter.

[5] The final contention is that "The Court erred in admitting certain psychiatric testimony" to the effect that the expert, Dr. Dwankowski, had never known of a case of a sane child who had not reached puberty, "mutilating herself masochistically" in the areas and to the extent shown by post-mortem photographs, etc. Since it was the appellant's claim that the child's injuries were self-inflicted, and the jury was instructed, "You are not bound to accept the opinion of an expert as conclusive, but you should give it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable", no prejudicial error is apparent in respect to this matter.

As hereinbefore indicated, however, the conviction cannot be approved because of the violation of defendant's fundamental right to be physically and mentally present and fully conscious during all stages of the trial.

The judgment and order denying motion for new trial are reversed, and the cause remanded for a new trial.

WHITE, P. J., concurs.

DRAPEAU, Justice (concurring).

I have checked the record against the able statement of the facts by my associate, Mr. Justice DORAN. I agree with him that it must be concluded that the defendant on numerous occasions did not, and could not have known what was going on at her trial. It is a fair assumption that for a part at least of her trial defendant's mental and physical condition precluded that participation in the defense of every person charged with crime which our law requires and guarantees. I concur.

Hearing denied; EDMONDS, TRAYNOR and SPENCE, JJ., dissenting.

115 Cal.App.2d 238

MALONEY v. RHODE ISLAND INS. CO. et al.

Civ. 15318.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1953.

Conservatorship proceedings wherein the insurance commissioner, as conservator for the insurer, secured an order requiring members of copartnership engaged in business as an insurance broker to show why they should not be required to pay to the conservator the amount of the premium on a policy previously accepted by the defendants for transmission to the assured and collection of the premiums due thereon. The Superior Court, in and for the City and County of San Francisco, Wm. T. Traverso, J., ordered the defendants to pay the amount of the premiums, less commission, to the commissioner, and the defendants appealed. The District Court of Appeal, Peters, P. J., held that the defendants were agents of the insurer for the purposes of delivering the policy and transmitting the premium, and that the conservatorship court had jurisdiction to hold them liable, in a summary proceeding, for wrongfully returning a portion of the premium to the assured after institution of the conservatorship proceedings.

Affirmed.

1. Insurance ⇐98

Insurance Code section defining broker merely declares that broker, in securing policy for client, acts only as agent for client and not as agent for insurer, and such section does not declare that if broker assumes to act for, and on behalf of, insurer, actual agency cannot be created. Insurance Code, § 33.

2. Insurance ⇐74, 82

Broker who had accepted policy from insurer for delivery to assured and collection of premium was agent of insurer for such purposes, and therefore could be required to pay over to conservator, who had taken over assets of insurer premiums received from assured. Insurance Code, § 33.

3. Courts ⇐92

Where subject of inquiry and holding in case was that conservatorship court had same equitable discretionary jurisdiction over attorneys fees both before and after 1935 codification of insurance law, court's statement that, as far as conservatorship court's equity powers were concerned, the post-1935 law was not broader than the old law, was dicta. Insurance Law, § 1058.

4. Insurance ⇐44

Under insurance code provisions relating to proceedings against insolvent insurers, conservatorship court has general jurisdiction over even third parties to determine questions relating to claims of insolvent insurance company which has been taken over by insurance commissioner. Insurance Law, § 1058.

5. Insurance ⇐44

Conservatorship court does not have jurisdiction to bring into pending conservatorship proceedings, by mere order to show cause, persons who are not parties to conservatorship and who assert independent claim of ownership to assets in their possession.

6. Appeal and Error ⇐187(3)

Point as to non-joinder, when not made in trial court, could not be raised for first time on appeal.

7. Insurance ⇐44

Where broker, which had acted as agent for insurer in forwarding policy to assured and collecting premiums from assured, had violated its duty to remit premium by refunding unearned premium to assured after insurance commissioner had instituted statutory proceedings for conservatorship over insurer, conservatorship court had jurisdiction to hold broker liable, in summary proceedings, for disposing of assets. Insurance Law, § 1058.

Hindman & Davis, by E. Eugene Davis, Los Angeles, for appellants Miller, Kuhrts & Cox.

Edmund G. Brown, Atty. Gen., T. A. Westphal, Jr., Harold B. Haas, Deputies Atty. Gen., for respondent.

PETERS, Presiding Justice.

Respondent is the insurance commissioner of California, and conservator of the Rhode Island Insurance Company, a company whose assets have been taken over by and vested in the commissioner because of the possible insolvency and hazardous condition of that company in this state. Appellants are Miller, Kuhrts and Cox, a copartnership engaged in business as an insurance broker. The broker secured a policy of insurance from Rhode Island for one of its clients, the Southern California Edison Company, delivered the policy to the Edison company, and had in its possession the full premium for that policy. The assured directed the broker to cancel the policy, to pay over to the commissioner the earned premium, and to return to it the balance of the premium. The commissioner contended that the broker held such premium as agent for him as conservator, and demanded that the entire premium be paid over to him. The broker paid the unearned premium to the Edison company. Pursuant to an order to show cause instituted by the commissioner the broker was ordered to pay the amount of the premium, less commission, to the commissioner. The broker appeals, urging that, while the premium was in its possession, it was agent for the assured, and was at no time and for no purpose agent for the insurer. It is also contended that the trial court lacked jurisdiction to enter the judgment appealed from. Neither contention is sound.

The evidence in this case consists primarily of two depositions, one of T. F. Burke, an employee of the Edison company and in charge of securing insurance for it, and the other of O. L. Cox, a member of appellants' firm. These two men conducted the transaction here involved. Except for a few minor points, there is no conflict in their testimony.

The record shows that appellants, as broker, had been handling the major fire and earthquake insurance for the Edison company since 1943. The broker secured such coverage from various insurance companies on behalf of the Edison company, without consultation with that company as to the selection of insurers. On February 27, 1949, all of the existing fire and earthquake insurance of the Edison company was to expire, and it was the function of appellants to procure the renewal of this coverage. Several months before the expiration date appellants began negotiations for renewals with many companies, a job made particularly difficult not only because of the size of the risk, but because many insurance companies were reluctant or unwilling to write earthquake coverage. By February 27, 1949, however, appellants had secured "binders" from various insurance companies, one of which was from Rhode Island, fully covering the risks involved. These "binders" are brief memoranda of insurance effecting coverage for a 60-day period, it being contemplated that formal policies would be issued during that period.

About the middle of April, 1949, Burke first directly learned that Rhode Island was one of the companies on the risk, and also learned from Cox that Rhode Island was having some difficulty with the state insurance department. Burke told Cox that the Edison company did not want to keep the policy if Rhode Island was "in any serious trouble," and may have used language indicating a desire to cancel the Rhode Island policy. Both the witnesses agreed that cancellation was then ordered if the troubles of Rhode Island developed into anything serious, and Burke demanded that Cox make a full investigation and report. Cox sent Burke a letter dated May 2, 1949, stating how difficult it was to secure earthquake coverage, and generally describing the then condition of Rhode Island. Enclosed was a report from an insurance reporting service calling attention to and describing the then serious difficulties of Rhode Island. Cox promised to keep abreast of the situation with an eye to the possible replacement of the policy.

Just before or just after this letter was sent, Cox and Burke had a second conversation about Rhode Island and Burke was informed of the serious condition of that company. Burke then ordered the policy cancelled, with the implied understanding that such cancellation was not to take place until coverage in another company was secured. This, in fact, took another month.

In the meantime, on April 24, 1949, Cox sent to Burke a series of policies, including that issued by Rhode Island, and an invoice for such policies. The Edison company in due course, on May 10, 1949, paid to appellants the full amount of this invoice, that is, $40,712.28, of which $2,380 was apportioned on the voucher attached to the draft to the Rhode Island policy. Appellants deposited the draft in their premium account, and either then or later the amount due Rhode Island was duly credited on the books of appellants as a premium received for the Rhode Island account.

Sometime around the middle of May, Burke, in conversation with Cox, learned that appellants had received the Rhode Island premium from his company. Burke specifically ordered Cox not to pay the premium to Rhode Island and confirmed the order of cancellation previously given. Whether this conversation took place before or after Burke knew that respondent had been appointed conservator of Rhode Island is not clear from the testimony.

The order of conservatorship is dated May 17, 1949. It recited the facts in reference to the financial status of Rhode Island, vested title to all assets of the company in the Commissioner, appointed him conservator with authority to pay and defer claims, and enjoined the officers, employees, agents "and all other persons" from transacting Rhode Island business and the "disposition of any of its property or assets until the further order of this Court." The order likewise prohibited anyone from interfering with the conservator's title to the assets of the company or management of the business. The order specifically directed that any funds held by insurance agents or brokers "in their fiduciary capacities, as specified by section 1730 of the Insurance Code" be accounted for and transmitted to the commissioner. On the same date as this order, and pursuant to its terms, the commissioner sent a letter to all California agents of Rhode Island and to all brokers doing business with that company. Such a letter was sent to appellants. The letter summarized the terms of the order and called attention to the fact that the order did not terminate Rhode Island's business nor cancel its policies. It directed the agents and brokers not to commit Rhode Island to any further insurance business, to hold all funds or premiums collected or to be collected in their fiduciary capacity in trust pending further instructions, and not to otherwise disburse them. The letter specifically applied these limitations to return premiums due an assured upon cancellation, prohibiting their return to the assured or their use to purchase other insurance.

Cox notified Burke about the conservatorship and also told him that the Rhode Island premium was still in appellants' possession. Thereupon Burke instructed Cox to pay over to respondent the earned premium on the policy, but directed him not to pay over the balance.

The commissioner sent a second form letter to agents and brokers dated June 2, 1949, which letter was also received by appellants. It enclosed and described the vesting order, nominated an agent for transmittals, prohibited, except for a minor exception, further business with Rhode Island, ordered the collection of premiums to be continued, and contained in italics the same provisions and directions as were in the first letter as to the handling of fiduciary funds, with transmittal directions, and specifically warned that return premiums upon cancellation could not be used to purchase other insurance or returned to the assured.

In the meantime, appellants had been attempting to secure insurance to supplant that of Rhode Island. On June 6 or 7, 1949, they secured a commitment from another company. The Rhode Island policy was formally cancelled on June 9th. On June 24th the Edison company received from appellants a credit memorandum for an amount representing the difference between the total premium for the Rhode Island insurance less the amount of the premium earned up to the date of cancellation. The amount of such earned premium was $241.63, which amount was tendered to the conservator by appellants, but refused by him, he having made formal demand on June 1st for the total premium.

On October 10, 1950, the conservator filed a petition which was granted, directing

the appellants to show cause why they should not be compelled to pay to the conservator the full amount of the premium involved, that is, $2,380. The petition alleges some of the facts above set forth and specifically avers that the Edison company paid the premium on May 10, 1949, "to said broker as agent of, and for transmittal to, Rhode Island Insurance Company" and that appellants' firm received this sum "in the capacity of agent for Rhode Island Insurance Company."

Appellants filed objections to the order to show cause, and a supporting affidavit of Cox. These documents set forth the pertinent facts, averring also that except for the amount of the premium earned at the date of cancellation appellants held no money belonging to the conservatorship, and urging that appellants' firm was a broker for the Edison company.

The trial court found the allegations in the conservator's petition to be true and expressly found that on May 10, 1949,[1] appellants "as agents for Rhode Island Insurance Company" received the premium in question. It found that appellants were indebted to respondent for the full amount of the unearned premium less a broker's commission of $60.25 (thus leaving a balance of $2,319.75). Judgment was entered in that amount.

Appellants vigorously contend that the evidence shows that they were brokers acting for the Edison company, and for it alone, and that there is no evidence to establish that they were the actual or ostensible agents of Rhode Island for any purpose. This contention is almost entirely predicated upon the general definition of "broker" contained in section 33 of the Insurance Code which provides: "'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer." It is contended that since this statute expressly provides that a broker transacts business "not on behalf of" the insurer, it operates as a statutory limitation on the broker's functions so as to preclude such broker from acting as the agent for such insurer. It is urged that the fiduciary duties imposed by section 1730 of the Insurance Code are owed only to the assured. That section, prior to the 1951 amendments not here applicable, reads as follows: "All funds received by any * * * broker * * * as premium or return premium on or under any policy are received by such agent, broker or solicitor in his fiduciary capacity. Any agent, broker or solicitor who diverts or appropriates such funds to his own use is guilty of theft and punishable for theft as provided by law."

The appellants contend, without citation of case authority, that these two statutes conclusively establish, as a matter of law, that appellants owed a fiduciary duty only to the Edison company, and hence that appellants could not have been the agent of Rhode Island. Then appellants devote a major portion of their brief to refuting the existence of any ostensible authority of appellants to act for Rhode Island. They argue that there was no negligent or intentional misleading of a third person as to their authority, and no grounds for an estoppel, all elements of an ostensible agency.

The doctrine of ostensible agency is not here applicable. This is a dispute between a claimed principal, Rhode Island, and a claimed agent, appellants. No claim is or can be made that any third person was misled as to the agent's authority. The findings in this case are predicated upon the theory that appellants were the agents in fact for Rhode Island—that is, that they had actual authority to act. The case must rise or fall on the question as to whether the facts support the finding that appellants were the agents of Rhode Island for the purposes of delivering the policy and transmitting the premium.

[1, 2] In our opinion the facts demonstrate that the appellants acted in a dual capacity. As broker, appellants, of course, acted as agent for the Edison company to procure the policy. Although that policy was procured from Rhode Island, in procuring that policy appellants were not the

1. Erroneously found as May 10, 1947, in the findings.

agent of that company. That is what section 33 of the Insurance Code provides. But when the policy was delivered to the broker by Rhode Island for delivery to the Edison company, and when the Edison company delivered to the broker the premium to be delivered to Rhode Island, the broker became agent for the insurer to deliver the policy and to collect the premium. The facts create the agency and fiduciary relationship with the insurer. All that section 33 of the Insurance Code does is to declare that the broker in securing a policy for a client acts only as agent for the assured and not as agent for the insurer. But the section does not declare that if the broker assumes to act for and on behalf of the insurer that an actual agency cannot be created. When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium.

A provision similar to section 33 of the Insurance Code appears in the law of many states. It has uniformly been held that such a provision does not prevent an actual agency relationship, different from that described in the section, from arising from the fact of conducting a transaction. These cases all hold or imply that statutes defining "broker" are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called. Midwest Transfer Co. of Illinois v. Preferred Acc. Ins. Co., 342 Ill. App. 231, 96 N.E.2d 228; Wood v. Firemen's Fire Insurance Co., 126 Mass. 316; John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N.W. 84, 37 L.R.A. 131; Transcontinental Oil Co. v. Atlas Assur. Co., 278 Pa. 558, 123 A. 497.

Thus the real question is whether or not, when the broker is intrusted with and accepts the policy from the insurer for delivery to the assured, and accepts the premium from the assured for delivery to the insurer, such facts create an actual agency.

The English and American cases are uniform in holding that in such cases the broker acts as agent for the insurer. Appellants recognize the existence of such authorities but contend that all of the cases involved an ostensible agency or agency by estoppel. This contention is far too broad. As already pointed out, when the controversy arises between the insurer, as principal, and the broker as agent, the doctrine of ostensible agency has no application. Such cases can be explained only on the theory of actual agency.

There are several English authorities that involve such controversies between the insurer on one side and the broker on the other. They uniformly hold that an agency relation exists to collect the premium. Thus in Minett v. Forrester (1811), 128 Eng.Rep. 441, 443, it is stated: "The broker is agent for the assured, and also for the underwriter [insurer]; he is agent for the insured, first, in effecting the policy, and in every thing that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter." (See, also, Shee v. Clarkson (1810), 104 Eng.Rep. 199; Goldschmidt v. Lyon (1812), 128 Eng.Rep. 438; Houstoun v. Robertson (1816), 128 Eng.Rep. 1109.)

The American cases involving the broker-insurer relationship are also uniform in holding that in remitting the premium the broker acts for and owes a fiduciary relationship to the insurer. This is also the rule of the Restatement of Agency. Section 71 provides: "Unless otherwise agreed, authority to receive payment is inferred from authority to conduct a transaction if the receipt of payment is incidental to such a transaction, usually accompanies it, or is a reasonably necessary means for accomplishing it."

The "authority to conduct a transaction" referred to in this section is to be found in the fact that the broker was intrusted with possession of the policy for delivery. The California cases have adopted the rule stated in the restatement, California Stearns Co. v. Treadwell, 82 Cal.App. 553, 256 P. 242; Schomaker v. Petersen, 103 Cal.App. 558, 285 P. 342, and it is generally codified in section 2319 of the Civil Code.

One of the typical American cases is Pearl Assur. Co. v. National Ins. Agency,

151 Pa.Super. 146, 30 A.2d 333, see, also, 2d., 150 Pa.Super. 265, 28 A.2d 334. There it was held that the premium collected by the broker from the assured belonged to and was the property of the insurer, being merely intrusted to the broker as agent for the insurer. The court stated, 30 A.2d at page 335: "There is nothing inherently inconsistent between the position of an insurance broker in the placing of policies and his acting for the insurance company in collecting the premiums and remitting the proceeds after deducting his commissions." This result was reached although Pennsylvania has a statute similar to section 33 of the Insurance Code. Such a section, said the court, does not prevent a broker from acting as agent of the insurer in the collection and paying over of the premium, because having accepted the responsibility from the insurer to deliver the policy and to collect the premium, the broker owes the insurer a fiduciary duty to remit.

In Stevens v. Rasin Fertilizer Co., 87 Md. 679, 41 A. 116, 117, appears the following: "We have said that the broker in the city of Baltimore who obtained the insurance was the agent of the defendant. But he performed other services in addition to obtaining the consent of the insurance company to its part of the contract. He was intrusted with the possession of the policies for the purpose of delivering them to the defendant, provided it would pay the cash premiums; and he was also intrusted with the collection and transmission of the money. For these services he was paid by the insurance company, and therein he was its agent. He was paid by being allowed to retain a commission out of the premiums received from the defendant. * * * The insurance company surely was not paying the defendant's agent for collecting from the defendant money, and transmitting it to itself at Boston." See, also, Sun Ins. Office, Limited, of London v. Mallick, 160 Md. 71, 153 A. 35.

Two New York cases not only hold that the broker is agent of the insurer to remit the premiums, but also hold that the premiums are "trust funds." Leterman v. Pink, 249 App.Div. 164, 291 N.Y.S. 249, affirmed Ebenstein v. Pink, 275 N.Y. 613, 11 N.E.2d 781; In re Sommer's Estate, Sur., 12 N.Y.S. 2d 47.

The problem is accurately discussed in 16 Appleman, Insurance Law and Practice, starting at p. 151. At p. 164 the author summarizes his conclusions as to the law of the United States as follows: "So far as services are rendered to the insurer, the act of a broker becomes the act of the company. If the broker is entrusted with the delivery of the policy and collection of premiums, many cases hold that he acts in these respects as the agent of the insurer. This result is not prevented by the division of representatives of insurance companies by an insurance code into agents and brokers."

Appellants are correct in stating that some of the other cases cited by respondent, although some utilize language of actual agency, can be explained on an agency by estoppel theory, but the English cases cited and the American authorities above referred to can only be explained upon the theory of an actual agency. Thus it must be held that in the instant case appellants were the agent of Rhode Island to deliver the policy and to collect the premium. Therefore, when the premium was delivered to appellants they owed a fiduciary duty to Rhode Island to transmit it and were the agents of Rhode Island for that purpose.

The only other contention made by appellants is that the trial court lacked jurisdiction of this controversy. In their objections to the order to show cause the appellants pleaded: "That this Court has no jurisdiction to enter the order as prayed for, or at all, for the reason that * * * [appellants] have not now at all in their possession or under their control any property or funds belonging to said conservatorship."

Just what this allegation is intended to mean and what jurisdictional defect is thus sought to be raised is not entirely clear. Appellants argued several jurisdictional theories in their opening brief. Respondent answered these arguments, raised several arguments to support the trial court's jurisdiction, and cited a statute which apparently confers jurisdiction on the trial court. The appellants not only failed to answer these arguments, but, in fact, do not

even mention the jurisdictional question in their reply brief.

[3, 4] So far as jurisdiction generally is concerned, there can be no doubt that the conservatorship court had such jurisdiction. Appellants seem to argue that prior to 1935, when the insurance law was codified, the law was that a receivership court had no jurisdiction of such a controversy, that the conservatorship court has the same jurisdiction as a receivership court, and that this rule was not changed by the codification of 1935. In this connection appellants place their greatest reliance on the case of Anderson v. Great Republic L. Ins. Co., 41 Cal.App.2d 181, 106 P.2d 75. That case held that the conservatorship court has the same equitable discretionary jurisdiction as a receivership court over an award of attorney's fees, that it was required to exercise its discretion by fixing such fees, and could not avoid this responsibility by relegating the claimant to an independent action at law. In the course of its discussion of this point the court noted that the insurance law had been codified in 1935, and stated, by way of dicta, that, as far as the conservatorship court's equity powers are concerned, the new law, since 1935, is not broader than the old law. This statement is much too broad.

When the insurance law was codified in 1935, so far as the jurisdiction of the conservatorship court is concerned, the original enactment did purport to state existing law. Article 14 of the codification relates to "Proceedings Against Insolvent Insurers." As originally adopted in 1935 section 1047 of the Insurance Code, part of Article 14, provided: "Except as otherwise provided by law, in all cases arising under this article the powers and duties of the commissioner with relation to the assets and business of any insurer placed under his control shall be those exercised by and imposed upon receivers of corporations within this State on July 22, 1919." Stats. of 1935 at p. 556—printed in small print to indicate that it was superseded by a later statute passed at the same session. Later in the 1935 session Article 14 was completely revised and section 1047 became section 1058. As then revised the section provided: "In any proceeding pending under the provisions of this article, the court in which such proceeding is pending shall have jurisdiction to summarily hear and determine, in such proceeding, all actions or proceedings then pending or thereafter instituted by or against the person affected by a proceeding under this article." Stats. of 1935 at p. 552. Since then the section has been amended but once—in 1939. In that year, as one of a series of language amendments, section 1058 was amended so as to delete the split infinitive by changing the phrase "to summarily hear and determine" to read "to hear and determine". Stats. of 1939 at p. 2634.

Thus, by statute, the conservatorship court is expressly given jurisdiction to hear and determine controversies such as the one here involved. Prior to 1935 the conservatorship court had no express statutory authority over such controversies. Thus the basic premise of appellants' argument, based upon the dicta in the Anderson case, namely, that as to the powers of the conservatorship court there is no difference between the pre-1935 and post-1935 insurance law, is clearly unsound. All the court held in the Anderson case was that as to the subject under inquiry—equitable discretion over attorney's fees—pre- and post-1935 law was identical.

Thus we must start with the premise that since 1935, by express statutory provision, the conservatorship court has general jurisdiction over even third parties to determine questions relating to the claims of the insolvent insurance company which has been taken over by the insurance commissioner.

[5–7] But that does not entirely determine the issue here presented. In addition to jurisdiction of the conservatorship court over this controversy, which undoubtedly existed, it must be determined whether the commissioner as conservator utilized the correct procedure to enforce his claim. Was he justified in using the summary procedure of an order to show cause, or should he have brought a separate equitable action in the conservator-

ship proceeding to enforce his claim against appellants? That is an interesting question. If appellants were third persons claiming an independent title to the property, then some difficult questions might be presented. There is a substantial body of law to the effect that a receivership court does not have jurisdiction to bring into a pending receivership proceeding by a mere order to show cause persons who are not parties to the receivership and who assert an independent claim of ownership to assets in their possession. Stuparich Mfg. Co. v. Superior Court, 123 Cal. 290, 55 P. 985; Miller v. Superior Court, 63 Cal.App. 1, 217 P. 817; First National Housing Trust Ltd. v. Superior Court, 88 Cal.App. 292, 263 P. 343; Tapscott v. Lyon, 103 Cal. 297, 37 P. 225.

Appellants apparently seek to invoke this rule, contending that they, as holders of the premium, are, in legal effect, asserting the title of the Edison company to the fund, and that, in fact, the Edison company, as the real claimant, should have been made a party in the court below. The point as to non-joinder, where, as here, it was not made in the trial court, cannot be raised for the first time on appeal.

The contention here involved is predicated on the false premise that appellants hold a fund, the title to which is in dispute. This is based on a misconception of the facts. The appellants received the premium on May 10, 1949. It has already been held that they received this premium as agent for Rhode Island. From and after that date they owed to Rhode Island a fiduciary duty to remit the premium. The premium belonged to Rhode Island and appellants held it in trust for that company. On May 17th, and again on June 2, 1949, appellants were informed that the respondent claimed this fund as conservator of Rhode Island. The appellants, however, did not perform their fiduciary duty. In direct violation of the orders of their principal, the respondent, on June 24, 1949, the appellants sent to the Edison company a credit memorandum for the full amount of the unearned premium. In accordance with the business practices of the parties this was tantamount to payment of the unearned premium to the Edison company. (See affidavit of Cox in support of opposition to the order to show cause, particularly at Cl.Tr. p. 19.) Thus the factual situation is not, as claimed by appellants, one where appellants are holding a fund which is in dispute between respondent and the Edison company, the latter being a third party to the conservatorship proceeding, but one where the agent of Rhode Island, with full knowledge of the conservatorship proceeding and of the claims of respondent, has, in violation of its fiduciary duty, paid the money over to the Edison company. The respondent is not seeking to follow the trust fund into the hands of the Edison company, but to hold the appellants liable for breach of their fiduciary duty owed to Rhode Island. The findings, conclusions and judgment do not award a "fund" to respondent. They simply determine that appellants "are indebted" to respondent in a fixed sum, and judgment is entered in that sum. The rights between the Edison company and appellants are not here involved. Undoubtedly the conservatorship court has no power to determine those rights. But it has power over Rhode Island and its agents to determine controversies between Rhode Island and its agents.

This premium when paid to appellants was the property of Rhode Island. It was an asset of Rhode Island. It was, through the medium of appellants' agency, constructively in the possession of Rhode Island. It is elementary that, even a receivership court, has power to proceed summarily to recover assets already constructively within the receiver's possession, or to hold an agent for failure to remit such asset.

As pointed out by Clark on Receivers (p. 798):

> "As to third persons and neither officers of the court, nor parties to the suit, possession or custody by the court seems to be the determining factor as to whether a summary or plenary suit must be brought. Possession need not be physical possession but may be and

sometimes is constructive possession. If the court has such possession then the court can protect its possession by summary process even against their persons.

"Where there is no possession by the receiver but merely a claim or right which belonged to the defendant previous to receivership proceedings and the receiver claims possession against a third party and such third party's claim is a mere pretense or merely colorable, then the receiver will be given the aid of the court of equity in securing such possession by summary process."

This rule is here applicable. The appellants are not independent third party claimants to the unearned premium. They held that premium as agent for Rhode Island and were under a duty to remit it. The fund was constructively the property of Rhode Island. The appellants violated that duty by paying the amount of the unearned premium to the Edison company. The conservatorship court has jurisdiction to hold the agent liable, in a summary proceeding, for disposing of this asset.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

40 Cal.2d 178

COLE et al. v. RUSH et al.

L. A. 22358.

Supreme Court of California, in Bank.

Jan. 20, 1953.

Widow and children of deceased brought action against owners of bar for death of deceased as result of fight in bar after deceased allegedly became intoxicated from liquor sold to him by owners of bar. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered an order sustaining demurrer to amended complaint without leave to amend, and widow and children appealed. The Supreme Court held that order was non-appealable and that Supreme Court was required to dismiss the appeal on its own motion.

Appeal dismissed.

Prior opinion 241 P.2d 601.

Appeal and Error ⇐102, 792

Order sustaining demurrer to amended complaint without leave to amend was a non-appealable order, and Supreme Court was required to dismiss appeal therefrom on its own motion.

John C. Stevenson and Lionel Richman, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee and A. P. G. Steffes, Los Angeles, for respondent.

PER CURIAM.

This is an appeal from an order sustaining a demurrer without leave to amend. Such an order is non-appealable. Evans v. Dabney, 1951, 37 Cal.2d 758, 759, 235 P.2d 604, and authorities there cited; 3 Cal.Jur. 2d 476, and this Court must, therefore, dismiss the appeal of its own motion. Collins v. Corse, 1936, 8 Cal.2d 123, 124, 64 P. 2d 137; Estate of Brady, 1948, 32 Cal.2d 478, 480, 196 P.2d 881; Rosenberg v. Knesboro, 1947, 80 Cal.App.2d 36, 38, 180 P.2d 750, see also 4 Cal.Jur.2d 337, and cases there cited.

The appeal is, therefore, dismissed.

WEST KEY NUMBER SYSTEM

40 Cal.2d 160

PEOPLE v. COSTA.

Cr. 5370.

Supreme Court of California, in Bank.

Jan. 9, 1953.

Rehearing Denied Feb. 5, 1953.

The defendant was convicted in the Superior Court, San Joaquin County, Thomas B. Quinn, J., for manslaughter committed in the driving of an automobile and he appealed. The Supreme Court, Edmonds, J., held that the evidence warranted the conviction.

Affirmed.

Prior opinion, 246 P.2d 1005.

1. Automobiles ⇐344

"Gross negligence" in statute relating to manslaughter committed in the driving of an automobile with "gross negligence" means the want of slight diligence, and an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and want of care raising presumption of conscious indifference to consequences. Pen.Code, § 192, subd. 3(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Negligence".

2. Automobiles ⇐354

In prosecution for manslaughter committed in the driving of an automobile, evidence that officers stopped defendant one half hour before accident and called defendant's attention to conditions of operator's license of defendant and to the dangers of high speed driving was relevant to the issue whether defendant's acts of driving at a high rate of speed after having consumed alcoholic beverages was mere inadvertence or disclosed a conscious indifference to consequences. Pen.Code, § 192, subd. 3(a).

3. Criminal Law ⇐369(2)

In prosecution for manslaughter committed in the driving of automobile, evidence which was relevant to the issue whether defendant's conduct disclosed a conscious indifference to consequences would not be inadmissible merely because such evidence may have tended to show a previous crime. Pen.Code, § 192, subd. 3(a).

4. Criminal Law ⇐369(2)

Except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution or to overcome any material fact sought to be proved by the defense is admissible although it may connect the accused with an offense not included in the charge.

5. Criminal Law ⇐1186(4)

In prosecution for manslaughter committed in the driving of an automobile, admission of evidence concerning defendant's conditional license, even if error, did not result in miscarriage of justice which would justify reversal of judgment, where there was overwhelming evidence of defendant's guilt exclusive of the challenged evidence concerning license. Pen.Code, § 192, subd. 3(a); Const. art. 6, § 4½.

6. Criminal Law ⇐1186(4)

In prosecution for manslaughter committed in the driving of an automobile, state highway patrolman's testimony that he had just "had another violator stopped" when patrolman first observed defendant and stopped defendant approximately one half hour before the collision resulting in the death, was not prejudicial by reason of the quoted words in the common parlance of the police force. Pen.Code, § 192, subd. 3(a); Const. art. 6, § 4½.

7. Criminal Law ⇐363

Declarations to be a part of res gestae are not required to be precisely concurrent in point of time with the principal fact, and if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous and are admissible. Code Civ.Proc. § 1850.

8. Criminal Law ⇐366(6)

In prosecution for manslaughter committed in the driving of an automobile, statement of occupant of vehicle with which defendant collided was voluntary and spontaneous so as to be admissible as part of res gestae, notwithstanding that statement was not made until five to ten minutes after accident and that statement was made in response to officer's question, where occupant was unconscious during the five to ten minute interval, and officer did not engage in any extended interrogation but merely asked, "What happened?". Pen. Code, § 192, subd. 3(a); Code Civ.Proc. § 1850.

9. Criminal Law ⇐1169(3)

In prosecution for manslaughter committed in the driving of an automobile, the admission of statement by occupant of vehicle with which defendant collided, that vehicle was hit in the rear, even if error, was not prejudicial, where defendant admitted that he struck vehicle from the rear. Pen.Code, § 192, subd. 3(a).

10. Automobiles ⇐355(13)

Evidence respecting defendant's gross negligence warranted conviction for manslaughter committed in the driving of an automobile. Pen.Code, § 192, subd. 3(a).

Smith & Zeller and Charles A. Zeller, Stockton, for appellant.

Edmund G. Brown, Atty. Gen. and Gail A. Strader, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Norman Robert Costa was convicted by the court, sitting without a jury, of manslaughter committed in the driving of an automobile.

During early morning hours, Costa was driving a Cadillac automobile around the countryside with three other young men. All of them had been drinking and, at one time during the morning, Costa stopped and purchased a half-case of beer. Earlier, he had consumed three or four whisky highballs. He and his passengers drank some of the beer while they drove, Costa having two cans of beer shortly before the accident. By stipulation of the parties, a chemist's report was admitted into evidence showing that, about two and one-half hours after the collision, Costa's blood had an alcoholic content of .12 per cent.

Over objection, evidence was admitted that Costa's operator's license was conditional, although the conditions had expired prior to the date of the wreck. The conditions were that Costa should not "drive while drinking" and must not speed.

Approximately one-half hour before the collision occurred, Costa was stopped by Wendell Nicol, a state highway patrolman. Objections to most of the officer's testimony were overruled. He stated, "I had just had another violator stopped when I first observed him (Costa)." At that time, he estimated, Costa was driving "[b]etween 50 and 60 miles an hour" along a two-lane side road which intersects the freeway, a divided four-lane highway. The officer pursued Costa for approximately four miles before catching up with him, during a portion of which distance Costa drove on the freeway at a speed of about 70 miles per hour. When Nicol finally was able to come close enough to clock the speed of Costa's automobile it was again on a side road and had slowed to 55 miles per hour.

Costa gave Nicol no explanation for his speed. He "just stated that he realized he was wrong and that he shouldn't have been doing that". The officer noticed that Costa's driver's license "was a probationary license and I didn't want to prosecute the man unfairly by issuing him a citation without being definite as to his speed so I reprimanded him for driving like that and warned him that he had a probationary license and that if he got a citation or was in violation of the law that he would lose his license and he assured me that he would drive more carefully in the future, and I released him on that basis". The odor of Costa's breath indicated that Costa had been drinking, but "not enough * * * to cause him to be examined".

Another witness, who had been driving along the freeway on the morning of the accident, testified over objection that, about six or seven minutes before the collision, he observed the Costa automobile traveling at approximately 85 to 90 miles per hour. Shortly thereafter, Costa passed a state highway patrol car parked, with its motor running, about 100 to 150 feet off the opposite side of the freeway. The two officers in the patrol car estimated the speed of the Costa automobile to be in "excess of 80" miles per hour, "between eighty and eighty-five". They immediately started in pursuit, driving across the freeway and turning left to follow Costa. In chasing him for approximately two miles, the police car reached a top speed of about 92 miles per hour. No signal was given Costa to stop.

Earl Sked, the driver of the police car, testified at the preliminary examination, the transcript of which was admitted into evidence by stipulation. He said that the Costa automobile passed other vehicles to the left in the "passing lane" and then returned each time to the right lane. He kept watching the "large taillights of the Cadillac" for a mile or one and one-half miles, meanwhile following in the passing lane.

When the police car had reached a point approximately one-quarter of a mile behind the Cadillac, he could see "headlights other than the Cadillac up in the near vicinity of the Cadillac; suddenly, he saw a set of taillights divert sharply to the left * * * off the roadway at a very abrupt manner; there was a cloud of dust and for a second our vision was obscured from the dust, a tree in the road". He stated: "I did not see the lights that abruptly turned off prior to the accident; there was an-

other car to the right of the Cadillac." The other automobile was traveling in the right-hand lane, but its lights were not the ones which he saw veer off the highway. He explained that he was concentrating on his driving and his attention was focused on the Cadillac. He saw only two cars, he said, and "didn't know there was any Jeep there".

When he reached the scene of the accident, Officer Sked brought the police car to a stop behind the Cadillac. The automobile which had been traveling in the right-hand lane pulled off on the shoulder of the highway and stopped temporarily. However, according to Officer Sked, "due to the excitement of the moment they got away before we could contact them". He asked Costa for his driver's license and Costa handed it to him "stating that it was a conditional license". Officer Sked stated: "I looked the car over and I noticed some canned beer in the back and I asked him about that and he says yes that he had had a couple of drinks and he guessed that he was driving a little bit too fast."

Lee Marshall, a state highway patrolman riding with Officer Sked, testified: "I could see a triangle of three lights, three taillights. * * * There was a taillight in the right hand lane, one in the center lane and the Cadillac in behind." This was about 10 or 15 seconds before the crash and the Cadillac was traveling in the right-hand lane. Then the Cadillac, according to Officer Marshall, "moved over" and "blotted out the taillights" of the vehicle in the left lane and "all at once a set of taillights went off in a sharp curve". He said that "the Jeep was in the left hand lane and the Cadillac turned into the left hand lane and ran into the Jeep and knocking him off the road". According to him, only two or three seconds elapsed between the time the Costa car turned into the left lane and the collision.

After the accident, the Jeep lay, on its left side, off the highway in the dividing strip. The four occupants were unconscious and tangled in the wreckage. George D. Marino, who, it is stipulated, died as a a result of the accident, was lying along the left side of the Jeep. Between five and ten minutes later, Officer Marshall talked to him. Over objection, Officer Marshall was permitted to testify as to this conversation. Marino said he had been driving the Jeep. In response to the question, "What happened?" Marino said, "The man hit us in the rear."

None of the occupants of the Jeep testified at Costa's trial. One of the passengers in Costa's automobile was asleep when the accident occurred and had no knowledge of how it happened. A second was not called. The testimony of the third passenger, a member of the armed forces, was given by deposition.

Wilbur Elmer Nitschke said that he was sitting on the right-hand side of the back seat. According to him, the Cadillac speedometer register 90 miles per hour shortly before the crash. Nitschke first saw the Jeep about 40 yards ahead of them when the Cadillac was in the left lane beside another automobile to its right. He did not see the Jeep swerve into the left lane, it was there when he first noticed it. He saw "the whole back part of the Jeep" from the spare tire up. Realizing that there would be a crash, he called to his friend in the front seat to duck and threw himself to the floor in the back. He did not see the collision.

Costa, testifying on his own behalf, said that he was driving about 70 or 75 miles per hour immediately prior to the accident. He stated that he pulled over to the left lane to pass a slower moving vehicle ahead of him in the right lane. Before so doing, he saw no other vehicle ahead in the left lane. He glanced to the left and right to be certain that he was clear at an intersection and then momentarily looked to the right to see if he had clearance around the automobile he was passing. According to Costa, "As I was passing it, * * * I looked up and I saw the vehicle I hit." It was entirely within the left lane, about 60 feet in front of his automobile, and "was on an angle". He said: "It was directly in front of me but to me it was at an angle and my left front hit the left rear corner of it." He tried to apply his brakes before the collision, but things hap-

pened so rapidly that he did not recall whether he was successful in so doing.

In support of his appeal from the judgment of conviction, Costa contends that the trial court committed prejudicial error in the admission of evidence concerning the warning given him for speeding earlier in the morning, the conditional license which he held, and the statement by Marino after he regained consciousness. He also claims that the evidence is insufficient to sustain the judgment. The attorney general disputes each of these contentions.

[1] The statute under which Costa was convicted provides: "Manslaughter is the unlawful killing of a human being, without malice. * * * 3. In the driving of a vehicle—(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." Pen.Code, § 192, subd. 3(a). "Gross negligence has been repeatedly defined in the California cases as 'the want of slight diligence,' 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and 'that want of care which would raise a presumption of the conscious indifference to consequences.'" Cooper v. Kellogg, 2 Cal.2d 504, 510–511, 42 P.2d 59, 62; Barkis v. Scott, 34 Cal.2d 116, 123, 208 P.2d 367; Weber v. Pinyan, 9 Cal.2d 226, 232–233, 70 P.2d 183, 112 A.L.R. 407; Kastel v. Stieber, 215 Cal. 37, 46–47, 8 P.2d 474; Krause v. Rarity, 210 Cal. 644, 654–655, 293 P. 62, 77 A.L.R. 1327.

[2] An important question in the prosecution, therefore, was what Costa's actions, as related to the surrounding circumstances, disclosed concerning his state of mind. Was his act of driving at a high rate of speed after having consumed alcoholic beverages mere inadvertence, or did it disclose a conscious indifference to consequences? The fact that, less than one-half hour before the accident, an officer who stopped him called his attention to the conditions of his operator's license and the dangers of high speed driving was relevant to this issue.

[3, 4] Costa concedes that the evidence did not disclose a "previous violation of law". Therefore, there is little merit to his argument that it "must necessarily have had an inflammatory effect upon the mind of the Court". However, even if it tended to show a previous crime, it would not have been inadmissible for the purposes for which it was introduced. "It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981, 984; People v. Dabb, 32 Cal.2d 491, 499–500, 197 P.2d 1; People v. Peete, 28 Cal.2d 306, 314–315, 169 P.2d 924.

[5] According to Costa, "The prosecution offered and there was received in evidence, over the appropriate objection of the defendant, extensive testimony with regard to a conditional license, the conditions of which had expired prior to the date of the accident in question." He points to his own testimony upon cross-examination as having been erroneously admitted over objection. Although thorough, it hardly warrants the use of the adjective "extensive". He admitted, without objection, that his license was conditional. Objection was made, and overruled, to only two questions. The reply to the first established that his conditional license had not been replaced by an unrestricted license at the time of the accident. The second question dealt with the conditions of his license.

If it be assumed that the admission of this evidence was erroneous, it was not prejudicial. A careful examination of the entire record in accordance with article VI, section 4½ of the Constitution, discloses overwhelming evidence of Costa's guilt exclusive of all the challenged testimony. Under the circumstances, it cannot be said that the admission of evidence concerning his conditional license resulted in a miscarriage of justice which would justify a reversal of the judgment. Const. art. VI,

§ 4½; cf. People v. Dabb, supra, 32 Cal. 2d at page 501, 197 P.2d 1.

[6] It is argued that "the volunteer remark of the officer [Nicol], that prior to stopping Costa he had stopped 'another law violator'" was inadmissible. Officer Nicol did not use the expression quoted, but said he "had another violator stopped". No objection was made to the remark, nor did counsel for Costa move to strike it as unresponsive or a conclusion of the witness. In any event, it cannot be said that this chance remark, using the common parlance of the police force, was in any sense prejudicial.

[7, 8] Costa contends that the statement by Marino after he regained consciousness was inadmissible because the lapse of some five to ten minutes removed it from the operation of the *res gestae* rule. However, during this interval Marino was unconscious and could not have been planning his remarks or reconstructing the occurrence in his mind. The situation of itself satisfied the requirements of the *res gestae* rule. "Declarations, to be a part of the *res gestae*, are not required to be precisely concurrent in point of time with the principal fact, if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and are admissible." People v. Vernon, 35 Cal. 49, 51; Code Civ.Proc. § 1850; Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 581–582, 583–584, 160 P.2d 21; Showalter v. Western Pacific R. R. Co., 16 Cal.2d 460, 465–470, 106 P.2d 895, 897.

Upon oral argument, Costa raised, for the first time, the contention that Marino's statement was not spontaneous because it was made in response to a question by Officer Marshall. This argument has no merit. The officer did not engage in any extended interrogation of Marino which might have led the latter to deliberate in an effort to explain what happened or to defend his own actions. He simply made the inquiry which anyone arriving upon the scene might have asked the injured man, "What happened?" The response was voluntary and spontaneous and the circumstances precluded the idea of deliberation.

In Showalter v. Western Pacific R. R. Co., supra, the statement held to be admissible was made in response to the question, "'How in the world did it happen, Joe?'" The reply to a question as to "where the other car came from" was held to be admissible as a part of the *res gestae* in Lane v. Pacific Greyhound Lines, supra [26 Cal.2d 575, 160 P.2d 23]. It would be unreasonable to prohibit evidence concerning spontaneous declarations in every case where they are prompted by a simple inquiry as to what occurred. The natural reaction of anyone arriving upon the scene of an accident is to make such inquiry. The rule for which Costa contends would, in effect, bar resort to the *res gestae* doctrine in virtually every case of accidental injury. If the statement otherwise meets the tests of the *res gestae* rule, it should not be held inadmissible simply because it was prompted by the question of another person.

[9] If it be assumed that the trial court, in its discretion, should not have admitted Marino's statement in evidence, the error was not prejudicial. Costa admits that he struck the jeep from the rear, which is the only import of the remark made by Marino. It does not tend in any manner to refute Costa's argument that he hit the left rear corner of the Jeep, rather than striking it squarely. Marino did not say what portion of the rear of the Jeep was hit.

[10] Costa's final contention that the evidence is insufficient to support the judgment cannot be sustained. The evidence is conflicting, but is amply sufficient to have convinced the trial court that Costa was guilty of gross negligence. It tends to prove that Costa, traveling at a speed approaching 90 miles per hour after having consumed several alcoholic drinks, pulled out into the passing lane directly behind the Jeep which already was occupying that space and traveling at a legal rate of speed. Without noticeably reducing his speed, he rammed the smaller vehicle. Such conduct demonstrates an entire failure to exercise care and a conscious indifference to consequences.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment.

CARTER, Justice.

I concur in the judgment of affirmance and agree generally with the reasoning upon which it is based. I do not, however, agree with that portion of the majority opinion which holds that evidence of other crimes than that with which the defendant is charged may be admitted even though such evidence may tend to connect the defendant with the crime charged. No such evidence was offered in this case and therefore the discussion on this subject is dictum. My position with respect to the admission of evidence of other crimes than that with which a defendant is charged is set forth in my dissents in the following cases: People v. Peete, 28 Cal.2d 306, 169 P.2d 924, and People v. Westek, 31 Cal.2d 469, 190 P.2d 9.



114 Cal.App.2d 167

ORTZMAN v. VAN DER WAAL.

Civ. 19070.

Supreme Court of California.

Jan. 9, 1953.

On petition for hearing.

Hearing denied.

Prior opinion 249 P.2d 846.

Hahn, Ross, Goldstone & Saunders, Los Angeles, for appellant.

Betts, Ely & Loomis, Los Angeles, for respondents.

CARTER, Justice.

In voting for a denial of the petition for hearing in this case I wish to point out that the opinion of the District Court of Appeal is in accord with the views expressed in my dissenting opinions in Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324 and Toshio Hamasaki v. Flotho, 39 Cal. 2d 602, 248 P.2d 910, but is directly contrary to the opinions of the majority of the Supreme Court in said cases. In the case at bar the District Court of Appeal states [249 P.2d 849]: "Moreover the trial judge who had the opportunity of seeing and hearing the witnesses, in denying appellant's motion for a new trial, thereby expressed his approval of this implied finding, [on appellant's injuries] and hence this court is powerless to disturb the same." In the Leipert and Hamasaki cases, supra, the Supreme Court held that in a personal injury case where the award of damages to the plaintiff was less than the special damages proven and there was a conflict in the evidence on liability, it was an abusive discretion to grant a new trial on the issue of damages only because such a verdict must be considered a compromise verdict on the issue of liability.

In my dissents in those cases I endeavored to point out, as the appellate court did in the case at bar, that the question of whether or not the verdict was a result of a compromise or because it disbelieved the evidence as to liability or damages or was a result of prejudice against the plaintiff or some other cause was for the trial judge to determine and that his decision on these matters could not be reversed by an appellate court in the absence of a showing of a gross, manifest and unmistakable abuse of discretion.

In my dissent in the Leipert case, supra, I stated 39 Cal.2d at pages 473 and 474, 247 P.2d at pages 331: "For example, a man with an earning capacity of $300 per month, and a life expectancy of 20 years, who loses a leg in an automobile accident and is thereby incapacitated from pursuing his occupation, is awarded $10,000 by a jury. At the present value of money this would appear to be inadequate. But, would the majority of this court so hold if a trial judge denied a motion for a new trial made by plaintiff on the ground that the award was inadequate? It certainly would not. But, if the trial court would grant such a motion on the issue of damages only, the majority would obviously re-

verse if there was a conflict in the evidence on the issue of liability. *In other words, the majority would hold the award inadequate as a matter of law in the latter instance, but not so if the motion for a new trial were denied or granted on all issues.* The foregoing results are inescapable under the specious reasoning in the majority opinions in these three cases. The only thing that is made clear by these decisions is that the majority does not approve of a trial court granting a motion for a new trial on the issue of damages only in a case where the damages awarded are inadequate and there is a conflict in the evidence on the issue of liability. In such a case, the majority says, there must be a new trial of all the issues or none at all.

"Of course, if a new trial were granted on the issue of damages only in a case where the trial court was of the opinion that the damages awarded were excessive, the majority would not disturb such an order. They would not do so for the reason that they would fear that proof of the facts establishing liability might result in a larger award of damages to the detriment of the defendant. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752." (Emphasis added.)

The holding of the majority in denying appellant's petition for a hearing in the case at bar today demonstrates the unimpeachable truth of the above-quoted statement.

It seems to me that if, as the majority held in the Leipert and Hamasaki cases, supra, that a trial court was guilty of an abuse of discretion in granting a motion for a new trial on the issue of damages only in a case where there is a conflict in the evidence on liability and the award of damages is less than the amount of special damages proven, the rule should be the same where the trial judge denies a motion for a new trial in such a case. It cannot be denied that the verdict in the instant case was a result of compromise. Plaintiff was either entitled to more than $62.85 or no sum whatever for her personal injuries. Under the holding of the majority of the Supreme Court in the Leipert and Hamasaki cases, supra, this compromise must have been the result of doubtful liability and therefore it was an abuse of discretion for the trial court to do anything other than grant a motion for a new trial on all issues. If the trial court had granted plaintiff's motion for a new trial on the issue of damages only, this Court would obviously have reversed such order and directed a new trial on all issues as it did in Toshio Hamasaki v. Flotho, supra. If the position of the majority is sound, why should the rule be different where the trial court denies a motion for a new trial in a case such as this where the verdict is obviously the result of a compromise?



115 Cal.App.2d 288

MONELL v. SABELLA et al.

No. 15189.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1953.

Rehearing Denied Feb. 11, 1953.

Hearing Denied March 12, 1953.

Declaratory judgment action to determine rightful owner of $7500 check drawn by attorney for lessee in favor of attorney for lessors. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for payee, and drawer appealed. The District Court of Appeal, Bray, J., held that the evidence established that the check had been deposited pursuant to the lease, and that return of accompanying receipt was not a condition precedent to acceptance of the deposit, and that since the lease agreement had not been performed, the payee was entitled to the deposit under forfeiture provision of the lease.

Affirmed.

I. Declaratory Judgment ⇐347

In declaratory judgment action after lessee's breach of lease agreement to determine rightful owner of $7500 check drawn by attorney for lessee in favor of attorney for lessors, evidence established that check had been deposited pursuant to the lease, which provided for forfeiture of deposit upon lessee's breach of lease agree-

ment, and that return of accompanying receipt was not a condition precedent to acceptance of the deposit.

2. Landlord and Tenant ⇐184(2)

Even if return of receipt was condition precedent to acceptance of deposit given pursuant to lease to assure lessee's performance, acceptance of executed lease by attorney for lessee without having received the receipt, coupled with occupancy by lessee of premises under the lease, constituted waiver of such condition, and upon lessee's breach of lease agreement, deposit was forfeited under terms of lease.

Roy A. Sharff, San Francisco, for appellant J. W. Ehrlich.

Walter E. Hettman, San Francisco, Julien R. Bauer, San Francisco, for respondent Bank of America, etc.

John F. O'Sullivan and Harry N. Grover, San Francisco, for respondent Sabella.

Theodore M. Monell, San Francisco, for respondent Monell.

BRAY, Justice.

Defendant Ehrlich appeals from the portion of a declaratory judgment determining that his claim to $7500, evidenced by his check, is unfounded.

Question Presented.

Was a certain $7500 check deposited under the terms of the lease?

Evidence.

Plaintiff Monell, an attorney, brought this action to determine who is entitled to a $7500 check drawn by Ehrlich, also an attorney. The facts most strongly in favor of the court's finding that it was so deposited, follow. Monell, together with Meyer, a realtor, represented Antone and Angeline Sabella [1] in negotiations for the leasing of certain property to Nate Stein. The latter was represented in the negotiations by Attorneys Sharff and Ehrlich, who are office associates. Except for the letter written by Ehrlich hereafter mentioned Sharff solely handled the transaction. After preliminary negotiations Monell drew a draft of lease and sent a copy to Sharff. There were then numerous conferences, mostly over the phone. On September 29, 1947, Meyer, Monell, Sabella, Sharff and Stein met in Monell's office. The terms of the lease were gone over and certain modifications made. Paragraph 28 of the lease provided that the lessee, Stein, deposit with the Sabellas, the lessors, a $7500 United States Treasury Bond as security for performance. The lease was not then signed. Further telephone conversations occurred between Monell and Sharff concerning Stein's desire to have inserted a clause releasing him from liability if he assigned the lease to a corporation. Sharff testified that in the last talk prior to Ehrlich's letter Monell said that the lease should be signed and for Sharff to "get that receipt and money over here and we can iron out all the loose ends afterwards"; that Monell would hold both until Sabella agreed to the clause. Monell denied such a conversation. His version was that he told Sharff Sabella wanted the deal closed, and he, Monell, wanted the deposit, otherwise they would call the deal off. Sharff objected to making the deposit but was willing to make it "so long as I promised to hold it and not deliver it until the lease was executed and signed by all parties * * *." Monell claimed that a *receipt* was not to be part of the delivery. Shortly thereafter Ehrlich sent the letter, the $7500 check and form of receipt upon which the controversy is based. Ehrlich testified that he had no interest in the transaction; that the money was his own and he put it up as an accommodation to a New York friend who asked him to do so. On receipt of this letter, Monell phoned Sharff, told him that he was making additional changes in the lease, and was having it retyped. Sharff said that would be all right. Monell sent him the new lease. In this lease paragraph 28, which required the United States Treasury Bond as security, was divided into two paragraphs numbered

1. During the litigation the estate of Antone Sabella, of which the Bank of America was the executor, has been closed, and Antone's interest in the $7500 distributed to Angelina Sabella as trustee.

28 and 29. Important here in view of the fact that Monell then had Ehrlich's letter and check is the latter paragraph which in place of the treasury bond requirement, provided, "Lessee *deposits* with Lessor the sum of $7500 * * * as security for the due, proper and faithful performance" [2] of the lease. Lessor shall pay Lessee 2½ per cent per annum interest on that sum "Upon the expiration or cancellation of this lease" and the surrender of possession. "Lessor shall refund to Lessee said sum of $7500 so deposited as security."

November 5, Sharff "As attorney for Nate Stein" wrote Monell enclosing two copies of the lease as changed by Monell, dated October 30, and executed by Stein. Sharff's letter stated "Heretofore we have delivered to you a trustee account check in the amount of $7500 payable to your order as the deposit under this lease * * *. This amount of money and the lease herewith delivered to you are upon the condition * * *." This condition was that the landlord perform certain acts, in putting the property into proper condition to meet governmental regulations. This same condition was in the Ehrlich letter. Then followed: "The $7500 check is a cash deposit under paragraph 29th of the enclosed lease and said deposit is to be in the name of J. W. Ehrlich. There has heretofore been delivered to you a form of receipt, which we wish signed and returned to this office. Said receipt, however, is to be altered in the respect that the rate of interest is to be two and one-half per cent." The letter finally stated that the lease was delivered on the condition that if the landlord did not place the premises in proper condition by November 30 Stein would have the right to cancel the lease or postpone commencement of rent payment until this was done. This condition was met and on January 29, 1948, Monell wrote Sharff stating that under the lease rent was to commence December 1, 1947; however, rent for December would be waived but the January rent must be paid within five days. He also asked that Stein come in and sign an inventory "so that this matter can be completed at an early date." Sometime in March Stein assigned his interest in the lease to The Terrley Corporation. On March 11, Sharff wrote Monell sending check for $1000 paying rent to February 29 and calling attention to the fact that the lease which he enclosed in his November 25 letter had not been returned nor had the receipt for $7500. He stated that he would appreciate these being taken care of at this time. Replying on March 16 Monell wrote that the lessors had executed the lease but he was holding the executed copies until the preparation of the inventory was completed when he would affix it to the lease and deliver it. "The lease may be considered effective at the present time and I am merely holding the same until we can clear up the loose ends as to the personalty covered. I also am holding as trustee the sum of $7500 paid by Mr. Ehrlich and will obtain proper receipt for this amount upon delivery of the lease to Mr. Sabella."

July 23 Sharff sent Monell an assignment of the lease to The Terrley Corporation signed by Stein, stating that if the form were satisfactory to Monell, Sharff would have it signed by the corporation. July 29 Monell answered stating that a paragraph should be added to the effect that the corporation disclaimed any interest in the $7500 deposited as security and "agrees that lessor may refund said sum or any balance thereof upon any termination of said lease to J. W. Ehrlich, who deposited said sum for the protection of lessor under the terms of said lease." He also asked that Ehrlich execute a deposit agreement which he enclosed. This was an elaborate instrument referring to Ehrlich as "surety," adding certain provisions, broadening the matters which the deposit was to cover but omitting the provision as to attorney's fees which was in the Ehrlich receipt. He also enclosed the original executed lease with inventory attached. In September The Terrley Corporation, then in possession, abandoned the premises. Rent was paid only up to April 30.

Shortly after July 29 Sharff asked Monell if he had paid over the deposit to the lessor,

2. All italics added.

stating there might be some question whether it belonged to Ehrlich, Stein or the lessor. Monell said he had not and would not until the matter was settled. Sharff and Monell and Ehrlich were very friendly and handled the matter very loosely, relying on each other. Subsequent to July 29 many conversations were had between Sharff and Monell in which Sharff asked for the money's return. October 11 Ehrlich wrote asking its return since "The arrangements under which this money was to be held by you were never completed * * *."

The court found that Stein delivered the $7500 transmitted by his attorney, that it was deposited with plaintiff under the provisions of section 29 of the lease "for and on account of Nate Stein and was subject to the provisions of said section 29" and that Ehrlich was not entitled to its return.

Ehrlich's Letter and Receipt.

It is dated October 30, 1947. "As attorney for Nate Stein I enclose herewith two copies of lease * * * and my trustee account check in the amount of $7500 payable to your order. * * * This money and the signing of the lease is on condition * * *." Here follows the same condition concerning putting the premises in order that appears in Sharff's later letter. "The $7500 check is a cash deposit in substitution for the U. S. Treasury Bond mentioned in paragraph 28 of the lease and said deposit is to be in the name of the undersigned. It is our understanding that Mr. Sabella will pay, semi-annually, interest at one and one-half per cent to the undersigned upon said sum of $7500. The undersigned shall have the right to substitute a U. S. Treasury Bearer Bond in place of said amount of $7500 at any time. * * * There is enclosed receipt for said $7500, which please sign and return." A P.S. states that the lease and deposit are delivered upon condition that unless lessor complies with the condition concerning the premises by November 30, Stein may cancel or postpone payment of rent.

The form of receipt enclosed states: "Received from J. W. Ehrlich the sum of $7500 as a deposit in accordance with the provisions of the 28th paragraph * * *." It is understood that lessor will "hold said money in accordance with the provisions of said lease" and will pay Ehrlich 1½ per cent per annum interest upon said sum. Upon termination of the lease the money shall be repaid forthwith to Ehrlich and if it is necessary for Ehrlich to institute legal proceedings against the lessors to recover the money then they will pay him an attorney's fee to be fixed by the court.

Contention of Appellant.

Appellant contends that there is no substantial conflict in the evidence and that the documents when considered together conclusively establish that in sending the deposit, he was merely offering to deposit the money on the conditions expressed in the form of receipt forwarded with his check and on the further condition that the receipt be signed and returned; that such offer was never accepted and was withdrawn by him.

[1, 2] Whether the question is one of law to be taken from the writings alone or is one of mixed fact and law is not too material. If one of law, the most reasonable interpretation of the writings is that found, in effect, by the trial court, namely, that appellant as attorney for Stein sent the money as a deposit pursuant to paragraph 29; that the return of a signed receipt was not a condition of the deposit. If there is a conflict in the evidence, then, of course, the trial court's determination of the facts is binding on us. But even here the facts amply show that at no time was the return of the receipt a condition precedent to the acceptance of the deposit. Appellant's own actions as well as those of his associate Sharff demonstrate that neither considered the return of the receipt as a prerequisite to the deposit of the money. Both appellant and Sharff are lawyers and in their respective letters they definitely set forth what were conditions, which did not include the return of the receipt. Sharff had his client execute the last draft of the lease which stated "Lessee *deposits* with Lessor the sum of $7500" and "said sum of $7500 *so deposited* * * *." Monell agreed to and did hold the $7500 until the inventory was signed and the exe-

cuted lease with inventory attached delivered to the parties. It must be remembered that the lessor under the terms of the lease was entitled to a deposit, not a suretyship. The tenant went into possession under that lease. In his letter of March 16 Monell stated the lease was then effective, that he was merely holding the same until the loose ends *as to the personalty* could be cleared up. He did say that he was holding the money as trustee and would obtain "proper receipt" upon delivery of the lease to the lessor. This, however, did not mean that until such receipt was obtained the money was not a deposit under the lease. The situation was really a very simple one. Appellant sent the money as a deposit under paragraph 29. He attached certain conditions. He also enclosed a receipt which he asked to be returned to him (not as a condition, however, to the deposit of the money). In that receipt he added two conditions which do not appear in the lease: (1) that the interest was to be paid to him, and if and when returnable the money was to go to him; (2) a provision for attorney's fees. The acceptance of the money by the lessors, of course, constituted an acceptance of these conditions. The return of the receipt, however, was not a condition. That it was not is evidenced not only by the delivery of the lease itself but by the fact that in all of the conversations between Monell and Sharff no such suggestion was ever made. As late as July 23, when Sharff sent Monell the form of assignment of the lease from Stein to the corporation, he made no mention of the failure to return the receipt. It was not until after this that appellant first asked for a return of the money. On one occasion Sharff asked Monell to return the Ehrlich receipt, first changing the interest therein to 2½ per cent. Thereafter Monell sent the modified lease stating that the $7500 was deposited. That certainly was notice to Stein and to his attorneys, Sharff and Ehrlich, that lessor and plaintiff were treating the check as a deposit under the terms of the lease. Neither Stein, Sharff nor Ehrlich complained of this action until the lessee had defaulted. Assuming that the return of the receipt was a condition, the acceptance of the executed lease by Sharff as one of the attorneys for Stein, without having received the receipt, coupled with the occupancy by Stein of the premises under the lease, constituted a waiver of such condition. The fact that after the money had been accepted as a deposit, Monell asked appellant to sign a deposit agreement, does not alter the situation. Monell sent this proposed agreement to Sharff together with an executed duplicate lease which, in effect, acknowledged receipt of the $7500. Whether appellant signed this agreement or not was unimportant as the lessors in accepting the money were bound by the conditions which appellant had attached to its delivery. The lessors under the lease were entitled to a deposit as security for its performance. The moment Monell delivered the executed lease to Sharff for Stein the deposit was complete. The whole proceeding was loosely handled by the attorneys representing both lessor and lessee. However, there is nothing in the letters of Sharff or Ehrlich to indicate that the latter was merely offering to act as a surety. On the contrary, they stated that as attorneys for Stein they were enclosing the check as "the deposit" under the lease. Again they referred to it as "a cash deposit under paragraph 29th" and as "a cash deposit in substitution for the U. S. Treasury Bond mentioned in paragraph 28 * * *." The facts that the deposit was to be returned to Ehrlich on fulfillment of the terms of the lease, that he was to receive interest on it, and even that he was to receive attorney's fees if he had to sue, do not change this situation.

This is not a case of a third party acting as a surety or guarantor. It is simply a case where the lessee was required to deposit money to secure the performance of a lease. Appellant as attorney for the lessee deposited his own money for the latter. Had the lease been performed he would have been entitled to its return to him rather than to the lessee and he could have recovered attorney's fees if he had been forced to sue for that return. The terms of the lease were not performed. Therefore, the lessor was entitled to keep

the deposit as provided in the lease. Appellant requested the court to find that the $7500 is the property of appellant. The court properly refused to do so. It did find that the money was transmitted by appellant as a deposit under paragraph 29. Its ownership at time of deposit became unimportant when by reason of the breach of the lease, the lessor became entitled to keep it.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



115 Cal.App.2d 307

PEOPLE v. TERRY.

Cr. 4843.

District Court of Appeal, Second District, Division 3, California.

Jan. 12, 1953.

Prosecution on a charge of burglary and on two charges of assault with a deadly weapon with intent to commit murder. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Affirmed.

Burglary ⇐41(1)

Homicide ⇐257(1)

Evidence sustained conviction of burglary and assault with a deadly weapon with intent to commit murder.

Albert S. Friedlander, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Frank R. Terry appeals from judgment convicting him of one charge of burglary and two of assault with a deadly weapon with intent to commit murder. He was accused of and admitted a felony conviction in Ohio and one in California for the latter of which he served a term in State prison. Upon appellant's request counsel was appointed to represent him. See People v. Dodd, 113 Cal.App.2d 682, 248 P. 2d 965. Appellant's counsel has reported that on an examination of the record he has found no meritorious ground for the appeal. We have made an independent study of the record. There is no merit in the appeal.

Appellant was working for a painting contractor preparing houses for applications of the employer's material. While working on the house of Mr. and Mrs. Bloodgood on a Friday he and Mrs. Bloodgood unfastened the screens and windows Appellant had several knives which he used in his work. At about 3:30 a. m. Saturday Mr. and Mrs. Bloodgood arose and investigated a noise in the house. They turned on the lights and encountered a man who stabbed Mr. Bloodgood seriously with a knife and also stabbed Mrs. Bloodgood in the shoulder. Mrs. Bloodgood wrested the knife from the man and kept it. The man ran from the house to an old car parked in front of the house. Mr. and Mrs. Bloodgood saw the man distinctly and identified appellant as the one who had attacked them. Mr. Bloodgood's wallet, watch and ring were gone from the mantle piece and some Christmas presents were missing. The intruder left a cap behind. He was arrested at his home shortly after 7 a. m. Saturday. His radio was on and appellant was listening to a police broadcast. He remarked to the officers that the police must want him badly and that he was nervous. Later that morning the police found a coat burning in appellant's incinerator. They recovered what was left of it. They exhibited the remains of the coat, the cap and the knife to appellant who admitted they were his. Although no blood was found on the coat an officer asked ap-

pellant how he accounted for blood on the coat and he replied that it came from a man who was cut in a fight in a bar room. He admitted having thrown a coat into the backyard but denied having burned it. He and his wife testified that he was in bed all Friday night and Saturday morning except for a brief time at about 3:30 when he went out into the alley and fought with an unknown man who was trying to break into the house.

The identification of appellant by Mr. and Mrs. Bloodgood was positive. The evidence justified the verdict. There were no errors in the admission or exclusion of evidence. The jury was fully and properly instructed. The appeal has no merit.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



115 Cal.App.2d 206

PITTS et ux. v. HIGHLAND CONST. CO. et al.

No. 15090.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1953.

Suit to enjoin a trustee's sale under a trust deed securing plaintiffs' note to defendants for the amount by which the cost of defendants' construction of a dwelling house for plaintiffs under a cost-plus contract exceeded the amount received by defendants from plaintiffs through a bank loan partly guaranteed by the Veterans' Administration and to cancel the note and trust deed. From a judgment of the Superior Court, Contra Costa County, Harold Jacoby, J., requiring that the note be surrendered for cancellation and the trust deed released of record, defendants appealed. The District Court of Appeal, Goodell, J., held that the cost-plus contract was illegal as violating the policy of the Federal Servicemen's Readjustment Act, but that equity would be satisfied by reducing the obligation of the note to the amount of the reasonable or agreed value of all allowable extras ordered by plaintiff after signing a formal building contract requiring defendants to build the house for the amount of such loan, instead of cancelling the note and trust deed in toto.

Judgment reversed with directions.

1. Contracts ⇐123(1)

A cost-plus building contract, evidenced by contractor's letter to owner on date of their execution of formal contract providing for owner's payment to contractor of specified sum, loaned to owner by bank and partially guaranteed by Veterans' Administration in reliance on such contract, without knowledge of letter, was illegal as violating policy of Servicemen's Readjustment Act, especially in view of provision in letter for payment to owner of any difference between total cost and contract price. Servicemen's Readjustment Act of 1944, § 501(a) (1) (3), 38 U.S.C.A. § 694a(a) (1) (3).

2. Contracts ⇐232(1)

Charging of specified sums for labor-carpentry, including building owner's labor, and building contractor's overhead costs and profit, pursuant to illegal cost-plus contract, as extras to be paid for by owner under contemporaneous formal contract providing for his payment to contractor of specified sum loaned to owner by bank and partially guaranteed by Veterans' Administration, was unjustified. Servicemen's Readjustment Act of 1944, § 501(a) (1) (3), 38 U.S.C.A. § 694a(a) (1) (3).

3. Mortgages ⇐82

Illegality of cost-plus building contract evidenced by contractor's letter to owner on day of their execution of formal building contract, providing for owner's payment to contractor of specified sum loaned to owner by bank and partially guaranteed by Veterans' Administration and for extras ordered by owner after signing contract, did not invalidate entire obligation evidenced by owner's note, secured by trust deed, to contractor for difference between total cost and amount of such loan; provision as to payment for extras being severable from illegal part of transaction.

Civ.Code, § 1599; Servicemen's Readjustment Act of 1944, §§ 1 et seq., 501(a) (1), 38 U.S.C.A. §§ 693 et seq., 694a(a) (1).

4. Contracts ⇐137(1)

When matter void under statute is mixed with entirely independent good matter in contract, good part stands and the rest is void. Civ.Code, § 1599.

5. Cancellation of Instruments ⇐56

A note and trust deed securing it for amount due building contractor from owner under illegal cost-plus contract evidenced by contractor's letter to owner on day of their execution of formal building contract, requiring owner to pay contractor specified sum, loaned to owner by bank and partially guaranteed by Veterans' Administration, and for all extras ordered by owner after signing such contract, need not be cancelled in toto, but equity will be satisfied by reducing obligation of note to amount of reasonable or agreed value of all allowable extras, but not exceeding amount by which maximum building cost, as determined by Veterans' Administration, exceeds amount of loan. Servicemen's Readjustment Act of 1944, §§ 1 et seq., 501(a) (1), 38 U.S.C.A. §§ 693 et seq., 694a(a) (1).

Price, MacDonald & Knox, Oakland, M. F. Hallmark, Oakland, for appellants.

Hoey, Hoey, Hall & Conti, Martinez, for respondents.

GOODELL, Justice.

Respondents sued to enjoin an impending trustee's sale under a deed of trust securing a promissory note for $4304.21 given by respondents to appellants and with the ultimate purpose of effecting the cancellation of both instruments. A temporary injunction issued and after a trial judgment was entered decreeing that the note be delivered up for cancellation and the deed of trust released of record. A new trial was denied and this appeal was taken.

Plaintiff, a World War veteran, owned a parcel of land in Contra Costa County on which he desired to build a 4-room home by availing himself of a "G. I." loan.

He applied to the Walnut Creek Branch of American Trust Company, which agreed after the usual processing to lend him $8,975 on a first deed of trust, $4,000 of which would be insured or guaranteed to the bank by the Veterans' Administration. The $8,975 figure was based on an estimate made by an appraiser designated by the Veterans' Administration fixing the reasonable value of the land plus the proposed dwelling (according to Pitts' plans) at $11,475. As a condition to its loan the bank required a contract between a responsible builder and the owner fixing a definite cost price. Pitts then laid the matter before Osmundsen, by whom he was then employed as foreman carpenter, who agreed to enter into such contract with him. On May 24, 1948, a "builder's contract" was drawn up on a printed form (filled in with typewriting) signed by Pitts as owner, and Highland Construction Co., as contractor, whereby the contractor agreed within the space of 150 days "from and after approval by lending agency and authorization to commence work to supply the necessary labor and materials required, and furnish and supply all necessary tools, implements and appliances, and perform and complete in a workmanlike manner the following described building or other work, to-wit: all the work described in the plans known as plans for residence for Mr. Harry E. Pitts."

The owner agreed therein "in consideration of the performance of this agreement by the contractor, to pay as hereinafter specified, at the times and to the party or parties and in the amounts and manner following, to-wit:

"To the contractor:—A total of * * * $8,975.00 * * * in five (5) equal payments of * * * $1,795.00 * * * each, as follows:

"First—When sub-floor is complete

"Second—When roof is on

"Third—When ready for finish

"Fourth—When complete

"Fifth—When lien period has been accounted for.

Any and all extras ordered by the owner after signing this contract are to be paid for on or before completion."

The difficulty in this case arises from a letter typewritten in Osmundsen's office on Highland stationery, dated May 24, 1948, reading as follows:

"Mr. Harry E. Pitts
Walnut Creek
California

"Dear Mr. Pitts:

"In connection with the contract between yourself and Highland Construction Co. dated May 24, 1948, for the purpose of constructing a residence to be located in the Saranap Area, Contra Costa County, according to the plans drawn and titled 'Residence for Mr. Harry E. Pitts'—

"The following is the understanding. The owner, Mr. Harry E. Pitts, will furnish all the carpentry labor and other labor and all the brick and brickwork necessary to complete the plan. The contractor, Highland Construction Co. will furnish all other work and materials and arrange for all subcontracting work to be completed in good order.

"For this, the contractor will charge the owner the cost of this work plus the usual contractor's profit of ten percent and one and one-half percent for overhead costs. Any difference between the total of these amounts and the contract price will be paid to the owner.

"This agreement is in conjunction with and considered a part of said contract dated May 24, 1948

Highland Construction Co.
O. A. Osmundsen

"Acknowledge—Harry E. Pitts"

During the negotiations there was lodged with the bank a copy of the formal contract. Pitts testified that during the negotiations he told one of the bank's officers in at least two conversations that he was "going to furnish the labor and some of the materials on the house" but when asked at the trial whether he had said "that money [meaning for his services] was not to be paid out of the loan" he answered in the negative. The court found: "It is true that on the same day, May 24 * * * Osmundsen * * * without the knowledge of the bank * * * or of the United States Government, delivered a letter to plaintiff * * * setting out an 'understanding' that by its terms was made a part of the builder's contract dated the same day * * *."

The $4304.21 note and deed of trust were obtained as follows: the dwelling was completed and occupied about Thanksgiving Day, 1948, and by February 7, 1949 appellants had computed the total cost of labor, materials, over-head and profit at $13,127.69. Deducting the $8823.48 received by them from the owner through the bank loan, a difference remained of $4304.21. On February 7, 1949 Osmundsen sent an associate to the home of respondents and had them execute the note and deed of trust. On March 22, 1949 the latter instrument was recorded and became a lien on respondents' property junior to the bank's deed of trust.

The respondents' unquestioned obligation to the bank was $8,975 and on this second note the obligation now in question of $4,304.21, brought the total cost of the building up to $13,279.21.

Section 694a of the Servicemen's Readjustment Act, 38 U.S.C.A. § 694 et seq., prescribes as one of the conditions of the Government guaranty: "(3) That the price paid or to be paid by the veteran for such property or for the cost of construction * * * does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator". Under such appraisal, as already appears, the maximum allowable cost was fixed at $11,475, hence the two obligations exceeded that "ceiling" by $1804.21.

There is no question that the letter of May 24 was not shown to the bank. It follows that the bank made the loan in reliance on the face of the formal contract and that the Veterans' Administration made its guaranty of $4000 to the bank on the same showing. The letter was incompatible with the formal contract since the former called for a "cost-plus" job while the latter bound the contractor to build the house for $8975 and no more.

Appellants argue that the parties anticipated that the total cost would be under $8975, and certainly well under $11,475. However, it turned out otherwise. See Elmers v. Shapiro, 91 Cal.App.2d 741, 752, 205 P.2d 1052.

[1] In our opinion this case is controlled by Young v. Hampton, 36 Cal.2d 799, 228 P.2d 1, 19 A.L.R.2d 830. In that case, as in this, there was a firm, lump-sum contract with a side letter exchanged between owner and contractor calling for a "cost-plus" job which was wholly at variance with the contract upon which the bank made the loan and the V. A. made the guaranty. In the instant case such a letter was a contributing cause to the total cost of construction materially exceeding the maximum under the act, hence that case and the authorities which it cites are in point. In that case the court reversed the judgment in favor of Young based on the cost-plus contract with the direction that she be denied any relief on such contract.

There is a further reason for holding that the letter violated the policy of the law. Sub-section (a) (1) of § 694a of the act provides "That the proceeds of such loan will be used for payment of the property purchased or constructed or improved". The bank lent $8975 on the strength of the "builder's contract" which provided that all thereof should be paid to the contractor in five equal progress installments. The letter, however, provided that the contractor would "charge the owner the cost of this work plus the usual contractor's profit of ten per cent and one and one-half per cent for overhead costs", and added that *"Any difference between the total of these amounts and the contract price will be paid to the owner."* The intent thereof was that part of the money lent would not be applied as the law required but would go into the owner's pocket in case the cost-plus arrangement added up to less than $8975.

This brings us to appellants' contention that in any event the court erred in decreeing the cancellation of the note and deed of trust in their entirety.

The letter provided that the owner, Pitts, would "furnish all the carpentry labor and other labor and all the brick and brickwork necessary to complete the plan." Pitts was then Highland's foreman carpenter. He testified that he put in practically all the time during his off hours, that is, evenings, Saturdays and Sundays, on the building, his labor during those times being without charge to his employer. However it appears that this did not turn out to be a satisfactory or practicable arrangement. It was to be expected that such an arrangement would be unworkable as it would retard other construction work, and this is apparently what happened. Pitts testified that shortly after construction started he was ordered by Osmundsen to concentrate on this job on a regular compensation basis so that he, the contractor, could draw down his progress payments from the bank, which testimony was uncontradicted.

[2] The figure $4304.21 was the result of a compilation by appellants of all the costs of construction (including profit and overhead) entitled "Cost Analysis Breakdown" which is in evidence. This exhibit contains 28 items in 2 columns. The first column, headed "Estimated Cost" which apparently means items concededly chargeable to the performance of the contract proper, totals $7930.70; the second, headed "Extras" totals $3328.04, making $11,258.74. To this were added the items of "Overhead 6% $675.52" and "Profit 10% $1193.43", a grand total of $13,127.69 from which there is deducted $8,823.48 received by appellants from the owner through the bank loan, leaving a difference of $4304.21.

The "Extras" column includes the item "Labor-Carpentry, etc. $1911.43" which is made up of the labor of 8 men aggregating 771 hours at $2.48 per hour. Of these 771 hours, 576 were Pitts' labor, which at $2.48 comes to $1428.48. From this it is clear that no "Labor-Carpentry" was treated as part of appellants' contract obligation. Indeed the "breakdown" exhibit itself removes any doubt on this score since it says "Items listed under extras are those which were to be taken care of by the owner, instead, payment was requested from the contractor". Osmundsen testified to the same effect. The charging of this "Labor-Carpentry" as an extra cannot be justified

without recognizing the legality of the letter.

The "Extras" column also includes the charges of "Overhead 6% $675.52" and "Profit 10% $1193.43". How "profit" can be charged as an "extra" is difficult to follow, but it, too, obviously is based on the letter. Even under the letter the charge "Overhead 6% $675.52" cannot be defended or justified on any ground since the letter fixes overhead at only 1½%. We are satisfied that none of the items $1911.43, $675.52 and $1193.43 is chargeable as an extra.

[3] The formal contract, the terms of which were fully disclosed to the bank, provides that "Any and all extras ordered by the owner after signing this contract are to be paid for on or before completion." It appears that there were extras other than those covered by the items of $1911.43, $675.52 and $1193.43 just discussed. Appellants point out that the cancellation of the note in its entirety results in unjust enrichment since legitimate extras would, in such case, be supplied by appellants without any payment therefor. They invoke the rule that he who seeks equity must do equity and cite 10 Cal.Jur. p. 510; Dool v. First National Bank, 207 Cal. 347, 278 P. 233; Shimpones v. Stickney, 219 Cal. 637, 28 P.2d 673 and Touli v. Santa Cruz County Title Co., 20 Cal.App.2d 495, 67 P.2d 404. This presents the question whether the illegality which taints the letter so taints the transaction *as a whole* that no part of the obligation evidenced by the $4304.21 note can survive.

The provision binding the owner to pay for extras is found in the formal contract, not in the letter, and was independent of the collateral "cost-plus" understanding. See Joy Mfg. Co. v. Julian Petroleum Corporation, 208 Cal. 168, 171, 280 P. 952. In our opinion it was severable from the illegal part of the transaction.

[4] In the early case of Jackson v. Shawl, 29 Cal. 267, 272, the court quoted 2 Kent's Commentaries, 467, as follows: "* * * The general and more liberal principle now is, that when any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand and the rest be held void." That case has been followed in McVicker v. McKenzie, 136 Cal. 656, 660, 69 P. 495; Haines v. Commercial Mortgage Co., 200 Cal. 609, 623, 254 P. 956, 255 P. 805, 53 A.L.R. 725; Webster Mfg. Co. v. Byrnes, 207 Cal. 630, 640, 280 P. 101; Innes v. Goldwater, 30 Cal.App. 101, 104, 105, 157 P. 18; Rossiter v. Thompson, 66 Cal.App. 491, 496, 497, 226 P. 806. See, also, Treadwell v. Davis, 34 Cal. 601, 605–606; Granger v. Original Empire etc. Co., 59 Cal. 678, 682; Mack v. Jastro, 126 Cal. 130, 134, 58 P. 372; Hedges v. Frink, 174 Cal. 552, 554–555, 163 P. 884; Simmons v. California Institute of Technology, 34 Cal.2d 264, 275, 209 P.2d 581; Civ.Code, § 1599; 6 Cal.Jur., p. 149, pp. 322–3.

[5] In our opinion that rule should be applied in this case. While the suit was brought to cancel the $4304.21 note and deed of trust in toto, we believe that instead of such total cancellation, equity will be fully satisfied by an adjustment which will reduce the obligation of the promissory note from $4304.21 to such amount as will allow to appellants the reasonable or agreed value of "all extras ordered by the owner after signing" the formal contract, which are extras *in the true sense* and not merely items classified as extras (as in the "breakdown" exhibit) for accounting purposes. On the present record the validity of such claimed extras and the reasonable or agreed value thereof cannot be determined. Further evidence should be taken for the purpose of making such determination. When the court shall have found the total value of such properly allowable extras, if any, the findings should be amended accordingly and the conclusions of law and judgment amended so as to provide for the reduction and partial cancellation of the obligation of the $4304.21 promissory note as to all amounts in excess of the sum so found and determined. See Webster Mfg. Co. v. Byrnes, 207 Cal. 630, 640, 280 P. 101, supra.

There is this further limitation: the obligation of the respondents' promissory note as finally computed cannot exceed a sum which, when added to the $8975 bank loan,

will not exceed the Veterans' Administration maximum cost of $11,475.

The judgment is reversed with directions to the trial court to proceed in accordance with this opinion, without costs on appeal to either party.

NOURSE, P. J., and DOOLING, J., concur.



115 Cal.App.2d 340

PEOPLE v. MULLEN.

Cr. 2861.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1953.

Defendant was convicted in Superior Court, County of Marin, Thomas F. Keating, J., of malicious assault with deadly weapon and of possession of the deadly weapon while a prisoner of the state undergoing sentence. A new trial was denied and he appealed. The District Court of Appeal, Dooling, J., held that evidence showing that defendant entertained abnormal sexual affection for fellow prisoner and that victim obstructed fulfillment of defendant's desires in that regard was relevant to issue of identity of the assailant.

Judgment and order affirmed.

1. Criminal Law ⇐339

In prosecution for malicious assault with deadly weapon, evidence showing homosexual affection of defendant for fellow prisoner and interference by the victim with defendant's desires in that regard was relevant to issue of identity of the assailant, since it was circumstantial evidence showing motive.

2. Criminal Law ⇐369(13)

In prosecution for malicious assault with deadly weapon, evidence showing homosexual affection of defendant for fellow prisoner and interference by the victim with defendant's desires in that regard did not show another crime, but only a degenerate tendency or character of defendant, and therefore did not violate the rule forbidding evidence of other crimes.

3. Witnesses ⇐287(3)

Where cross-examination showed bias or prejudice on part of witness, he could not be rehabilitated on redirect examination by showing his bias was justified, and rehabilitation should have been limited to evidence showing lack of bias, or less bias.

4. Criminal Law ⇐1169(2)

In prosecution for malicious assault with deadly weapon, even though testimony of state's witness that his dislike for defendant was occasioned by homosexual advances by defendant toward him was improperly admitted, it was not prejudicial, where it had already been properly testified that defendant was a homosexual.

5. Criminal Law ⇐444, 1153(6)

Sufficiency of foundation for admission of photographs into evidence is within trial judge's discretion, and where there is substantial evidence to support his ruling it will be sustained.

6. Criminal Law ⇐351(1)

In prosecution for malicious assault with deadly weapon, evidence that defendant signaled a prospective witness by placing his finger to his lips was relevant to show alleged consciousness of guilt.

7. Criminal Law ⇐720(7)

In prosecution for malicious assault with deadly weapon, prosecutor's statement of motive for the assault was not improper where it concerned evidence already properly admitted.

8. Criminal Law ⇐1037(1)

Objection to prosecutor's argument, not made at trial, need not be considered.

9. Criminal Law ⇐720(1)

In prosecution for malicious assault with deadly weapon, the prosecutor's showing the jury in his argument how knife, introduced into evidence, fitted hole in victim's shirt, introduced into evidence, merely

explained what was already in evidence and was not objectionable as new evidence.

Ernest J. Hill, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Leo J. Vander Lans, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

On this appeal the appellant is represented by counsel appointed by the court at his request. The appeal is from a judgment of conviction on two felony counts and from an order denying a new trial. Appellant was convicted of violating sections 4501 and 4502, Penal Code, consisting of a malicious assault with a deadly weapon and possession of the deadly weapon, a knife, while a prisoner of the State undergoing a sentence of less than life. The case was tried before a jury after a plea of not guilty. The alleged errors sought to be corrected here involve the introduction of certain evidence and alleged misconduct of the prosecuting attorney. Appellant does not complain of the sufficiency of the evidence.

The first two assignments of error involve testimony advanced on the part of the prosecution which tended to prove homosexual tendencies between appellant and a fellow prisoner. This is claimed to be immaterial and also to be prejudicial as violating the rule preventing introduction of evidence of other unrelated crimes. It was the prosecution's theory throughout the case that defendant and his co-prisoner, Caskey, were friendly, or at least that defendant desired such a friendship. This friendship of defendant for Caskey reached the point of unrequited love. The victim of defendant's assault, Hunsaker, was a friend of Caskey's and was obstructing the fulfillment of defendant's desires. This caused enmity in defendant toward Hunsaker, the motive for the stabbing being Hunsaker's interference with defendant's "love" for Caskey. The prosecution introduced this theory in the opening statement. The particular testimony objected to came from Caskey. He stated that he had met defendant in the Sacramento jail and again at San Quentin. He later met Hunsaker and became friendly with him. A number of conversations between Caskey and defendant were related wherein defendant had made homosexual advances toward Caskey and asked that the latter stop "running around" with Hunsaker, that three people were too many. Defendant also had told Caskey there was more than one way to end a friendship.

On the immateriality issue appellant's argument is that although motive may be a proper subject of proof in some cases, the evidence here involved does not, in fact, show a motive, but what appellant terms a "motive for the motive". Appellant conceives that the only motive in a situation such as this is antagonism or enmity existing between defendant and his victim. Therefore, it is claimed, the reason for the real motive, or its basis, the secondary emotion, cannot be shown. It would have been sufficient for the prosecution to show merely the desire on the part of defendant to break up the friendship existing between Caskey and Hunsaker. If this is sufficient then going farther is prejudicial. Appellant cites a case, People v. Lane, 100 Cal. 379, 34 P. 856, which indicates that motive can be shown to prove intention, and is the reason of that intention. It also states that any act of defendant may be admitted if it logically tends to prove some issue in the case, notwithstanding that it has an indirect bearing on an issue not in the case, except in unusual situations where that indirect bearing creates a danger which outweighs the importance of the evidence intending to prove the ultimate issue.

[1] The general situation here is that the ultimate issue is a malicious assault by defendant, the latter's identity as the assailant being crucial. Antagonism of enmity between defendant and the victim of the assault is admittedly relevant to the issue of defendant's identity as the assailant. Evidence of the interference of the assailed party with relationship between defendant and a third person, shown to have been desired by defendant, and known, from experience, to create passions

of desire and of envy or jealousy is relevant to prove the motive of enmity. This is not a "motive for the motive" as appellant states, but the production of circumstantial evidence to show the motive. Those circumstantial facts are two, (1) defendant's affection for the third person; (2) the victim's interference with this affection. The only remaining problem is whether the affection in (1) can be proved by showing an abnormal sexual tendency in defendant. If the third person in this case had been a woman there is no doubt that the attraction of defendant for the third person would be relevant and admissible. This is so even if that relationship were an illicit one. Such was the holding in People v. Santos, 134 Cal.App. 736, 746, 26 P.2d 522 and People v. Weston, 169 Cal. 393, 396, 146 P. 871. The latter case is squarely in point. Does the fact that the third person was a male and the attraction of defendant for him is abnormal make a difference? As far as the relevancy is concerned there is no logical difference.

With this out of the way the only question remaining is whether the abnormality of the relation was too highly prejudicial. In People v. Hall, 27 Cal.App.2d 440, 81 P.2d 248, 251, a homicide case, where the plea was self defense, it was held that motive is always material in such a case and any evidence having direct bearing on that motive is admissible however discreditably it may reflect upon defendant. In that case the decedent and defendant had been engaged in a homosexual relationship and this was the basis (not the motive itself) for the killing, the motive for which, properly speaking, was antagonism between the two parties growing out of their relationship. The court said: "(A)ppellant's voluntary declarations disclosing the prior immoral relationship not only served as competent evidence tending directly to prove motive and thus refute his claim of self-defense, but that the matter of said immoral relationship became an important factor in the case to be considered by the jury in determining * * * malice * * * and that being admissible for the purposes mentioned, the fact that said evidence reflected prejudicially upon appellant's moral character did not, under the authorities cited, constitute legal grounds for its exclusion." The fact that the relationship in appellant's case does not go to an issue of self defense, but instead to the issue of identity of the assailant would seem to be an immaterial difference.

[2] As to appellant's second point on this same evidence, that it violates the rule forbidding evidence of other crimes, it is enough to say that no other crime was shown, but only a degenerate tendency or character. The rules in the above cited cases are sufficient to cover this point as well as the first.

[3, 4] The second general objection is that certain redirect examination of prosecution witness Inman went beyond the scope of cross-examination, and that that excessive evidence was not relevant. This witness was merely a witness to the assault and was not involved therein at all. The evidence complained of is similar to that above: it indicated a homosexual tendency in defendant, this time towards witness Inman. The theory for letting this in was that on cross-examination it had been advanced that this witness had had an argument with appellant and was not friendly toward him, and it was sought then to explain the nature of the argument and the unfriendliness. The court ruled "He has testified he didn't like the defendant and that affected the value of his testimony so I will allow it for the purpose of ascertaining why he didn't like him." The result was that the prosecution was allowed to show why its own witness was biased.

Where cross-examination has shown bias or prejudice on the part of the witness he cannot be rehabilitated by showing his bias to be justified. The causes for his bias are not material to the issue at hand, i. e., whether his testimony is colored, for the bias is admitted. Wigmore recognizes this limitation (III Wigmore on Evidence, 3d Ed., p. 511) and his view has been expressly followed in this state in People v. Zemavasky, 20 Cal.2d 56, 123 P.2d 478. Appellant's case falls squarely within this rule, for the prosecution here did not try to show lack of bias, or less bias, but merely attempted to show that it was justified,

thereby admitting the bias. However the error was not prejudicial. It had already been properly testified to that appellant was a homosexual, and thus this evidence was nothing new.

[5] The next assignment of error is that two photographs supposed to depict appellant's cell after the assault were not admitted upon a proper foundation. One picture was identified as follows: "Is that photograph, including the bars of the cell, the cot, the floor, and the blood on the floor in conformance exactly with what you saw on that day? The Witness: A. Yes." The identification of the other was similar. The trial judge has discretion in this matter and if there is any substantial evidence to support his ruling it will be upheld. People v. Bundte, 87 Cal.App.2d 735, 197 P.2d 823.

[6-9] The last assignment of error concerns alleged misconduct of the district attorney occurring in five places. The first two involve the evidence of homosexuality and are adequately dealt with above. The third relates to evidence offered of defendant's alleged consciousness of guilt. But no objection was made on the ground of misconduct but only to relevancy, and the appellant's signaling a prospective witness by placing his finger to his lips was relevant. The fourth was a statement of the motive for the assault made by the prosecutor in his argument. No objection was made to this either. Besides, it concerned properly admitted evidence. People v. Codina, 30 Cal.2d 356, 181 P.2d 881; People v. Temple, 102 Cal.App.2d 270, 227 P.2d 500. Lastly, at argument the prosecutor showed the jury how the knife (introduced into evidence) fitted the hole in the victim's shirt (introduced into evidence). This is said to be new evidence and misconduct. No objection was made to this. It was merely explaining what was already in evidence.

Judgment and order affirmed.

GOODELL, Acting P. J., and JONES, J. pro tem., concur.

115 Cal.App.2d 309

DALE v. RAINES et al.

Civ. 4487.

District Court of Appeal, Fourth District, California.

Jan. 12, 1953.

Action to recover a commission for sale of realty. The Superior Court, Orange County, Ronald W. Crookshank, Judge assigned, entered judgment, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where escrow instructions which were approved by real estate broker provided for settlement for purchase price of vendors' realty by purchasers at closing of escrow agreement on condition that vendors perfect legal title by date specified, and vendors failed to perfect title and escrow was never closed, payment of broker's commission was conditioned on the closing of the escrow, and broker was not entitled to recover commission from vendors.

Affirmed.

1. Brokers ⇐39

The right of a broker to recover his commission must be measured primarily by terms of his employment, and by special agreement broker may make his compensation depend upon a contingency or the happening of a condition precedent, and unless such contingency occurs broker has no right of recovery.

2. Brokers ⇐61(1)

Where escrow instructions which were approved by real estate broker provided for settlement for purchase price of vendors' realty by purchasers at closing of escrow agreement on condition that vendors perfect legal title by date specified, but vendors failed to perfect title and escrow was never closed, payment of broker's commission was conditioned on the closing of the escrow, and broker was not entitled to recover commission from vendors.

Marshall Beach, Laguna Beach, for appellant.

William Crum and Thomas N. Butterworth, Hollywood, for respondents.

MUSSELL, Justice.

Plaintiff, a real estate broker, appeals from a judgment for the defendants in an action to recover a commission for the sale of real property in Orange County.

On July 28, 1950, defendant Katherine Raines signed a general listing agreement, authorizing plaintiff to sell the property described as "102 Del Mar, San Clemente, for cash or terms, $28,500". On August 7, 1950, plaintiff obtained a purchaser (Opal F. Cole) who offered to buy the property for $27,500, with terms of $7,500 cash. Escrow instructions were prepared by the Coast Escrow Company from information furnished by plaintiff Dale and defendant Katherine Raines. These instructions contained the terms of the sale and a provision for the payment of five per cent commission to plaintiff Dale. On July 7, 1950, defendant Raines obtained a preliminary title report showing title to the property then in George D. Finch, subject, among other things, to the effect of deeds from Finch to Raines and Finch to Huber, both deeds having been executed by Raines under power of attorney from Finch. It was stated in the report that by virtue of the last mentioned deed the title had since passed to and was now vested in Joseph E. Huber. Defendant Raines discussed this condition of title with the escrow holder and told him that her lawyer had requested her to have a contingency clause in the escrow instructions. Accordingly, the following provision was embodied therein: "Completion of this transaction is contingent upon sellers ability to perfect title and close escrow by August 30, 1950". The escrow agreement was then signed by Huber in the presence of defendant Raines and at her request and by the purchaser Opal Cole. The copies of the escrow instructions in evidence apparently were not signed by plaintiff. However, he testified that he signed the escrow instructions and there is testimony that he prepared and delivered written instructions to Mr. Anderson (the escrow agent), which instructions contain a provision that the "escrow must be closed by August 30th". The title to the property was not cleared on August 30th and the escrow was not closed. On September 21, 1950, defendants gave notice of cancellation of the escrow and this action was filed on March 5, 1951.

Appellant argues that under the circumstances shown by the record he was entitled to recover a commission since he had a valid listing agreement and within the life of that agreement, had obtained a purchaser ready, willing and able to purchase on terms acceptable to the sellers, and a valid and binding agreement to purchase and sell had been executed. However, the contract to purchase and sell was expressly made contingent upon the closing of the escrow by August 30, 1950, and the seller's ability to perfect title by that date.

[1, 2] As was said in Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 245 P.2d 650, 653:

> "The right of a broker to recover his commission must be measured primarily by the terms of his employment. Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 893, 894, 202 P.2d 365. The broker may, by special agreement, make his compensation depend upon a contingency or the happening of a condition precedent, and unless such contingency occurs, he has no right of recovery. Peterson v. Montgomery Holding Co., supra; Leventritt v. Cowell, 21 Cal.App. 597, 132 P. 627; McGill v. Fleming, 32 Cal. App.2d 601, 90 P.2d 341; Hirschberg v. Rose, 136 Cal.App. 653, 29 P.2d 785; Edgecomb v. Callahan, 132 Cal. App. 248, 22 P.2d 521; Hollingsworth [W. I.] & Co. v. Haas, 6 Cal. App.2d 519, 45 P.2d 360."

The record shows that plaintiff, who had a general listing for the property involved, procured a purchaser who made an offer at a price less than that quoted in the listing. Defendant Raines was not required to accept this counter offer. She did, however, by escrow instructions, set forth the terms upon which the counter offer would be accepted and a commission paid. This transaction was made dependent upon the happening of a condition. The instructions became a special contract between the parties, which contract was approved by plaintiff. Under the circum-

stances shown, plaintiff's claim for commission must be based upon the escrow instructions and where, as here, his commission is dependent upon an unfulfilled condition, he cannot recover. Wilson v. Security-First Nat. Bank, 84 Cal.App.2d 427, 433, 190 P.2d 975.

In the fourth count of the complaint plaintiff alleges that by reason of misrepresentations made by defendant Raines that she was the owner of the property involved, plaintiff was damaged in the sum of $1,375. However, the record does not contain evidence of any such representations as to the ownership of the property, or otherwise, and plaintiff failed to prove fraud.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



115 Cal.App.2d 221

BAKER v. B. F. GOODRICH CO.

Civ. 19085.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1953.

Rehearing Denied Jan. 26, 1953.

Hearing Denied March 5, 1953.

Action by mechanic against tire manufacturer for injuries received when tire which mechanic was mounting and inflating exploded. The Superior Court of Los Angeles County, Ben. R. Ragain, J., entered judgment on the verdict for defendant, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that evidence was sufficient to warrant giving of instruction on doctrine of res ipsa loquitur.

Judgment reversed and cause remanded for new trial.

1. Negligence ⇐121(2)

For the doctrine of res ipsa loquitur to be applicable, the accident must be of a kind which ordinarily does not occur in absence of some one's negligence, it must be caused by an agency or instrumentality within the exclusive control of the defendant, and it must not have been due to any voluntary action or contribution on part of plaintiff.

2. Negligence ⇐121(2)

Requirement that instrumentality in question must be shown to have been within exclusive control of defendant before doctrine of res ipsa loquitur is applicable does not require proof of such control by defendant at time of accident but control at time of negligent act is sufficient under certain circumstances.

3. Automobiles ⇐16

Fact that plaintiff, who was injured when tire exploded, was engaged in mounting the tire at the time of injury and, in accomplishment of such mounting, exerted various forces on the tire, would not necessarily prevent the doctrine of res ipsa loquitur from being applicable in action for such injuries against tire manufacturer, unless, as a matter of law, the evidence did not exclude plaintiff's conduct as a responsible cause.

4. Negligence ⇐136(6)

In a res ipsa loquitur case, where evidence is conflicting or subject to different inferences, it is for jury, under proper instructions, to determine whether conditions necessary to make doctrine applicable are present.

5. Automobiles ⇐16

In action by mechanic against tire manufacturer for injuries received when tire, which mechanic was inflating, exploded, the court was not to draw, or refuse to draw, conclusion that it is more probable that the tire exploded as result of mechanic's negligence in mounting and inflating it than from an inherent defect in the tire as long as evidence upon such issue was sufficient for jury.

6. Negligence ⇐121(2)

It is not an indispensable prerequisite to the application of the doctrine of res ipsa loquitur that it be made to appear that defendant has superior knowledge concerning cause of the accident.

7. Automobiles ⇐16

In action by mechanic against tire manufacturer for injuries received when tire, which mechanic was inflating, exploded, question whether manufacturer's evidence was sufficient to rebut inference of negligence arising from application of doctrine of res ipsa loquitur was for jury, and the District Court of Appeals would not undertake to make such determination.

8. Negligence ⇐121(2)

The doctrine of res ipsa loquitur is not rendered inapplicable by reason of fact that defendant pleads defense of contributory negligence.

9. Automobiles ⇐16

In action by mechanic against tire manufacturer for injuries received when tire, which mechanic was inflating, exploded, evidence was sufficient to warrant giving of instruction on doctrine of res ipsa loquitur.

Edwin C. Boehler, Francis R. Dwyer and Jerrell Babb, Los Angeles, for appellant.

Crider, Runkle & Tilson, Clarence B. Runkle, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Plaintiff instituted this action to recover damages for personal injuries alleged to have been sustained as a result of defendant's negligence. From a judgment in favor of the defendant entered upon the verdict of the jury plaintiff appeals, contending that the trial court erred in refusing to instruct upon the doctrine of *res ipsa loquitur,* the applicability of which under the circumstances is the sole question presented.

Appellant was engaged in mounting and inflating a new tire of respondent's manufacture and while so doing a violent explosion occurred throwing the appellant, as well as the tire and wheel, with great force into the air, as a result of which appellant sustained serious and permanent injuries rendering him mentally incompetent, with loss of memory, as a result of which he was incapable of testifying upon the trial.

The evidence discloses that appellant at the time of the accident and for more than a year prior thereto, was employed as a service mechanic by an automobile agency. The tire in question was one of a number purchased from respondent by appellant's employer approximately a year prior to the accident. This shipment of tires was delivered from the respondent's place of business located in the City of Los Angeles to the premises of appellant's employer in the City of Burbank by a truck carrier employed for that purpose and paid for by the respondent. While in the course of transportation the tires were handled in the usual and customary manner, being laid flat in the truck and stacked one upon the other. No heavy objects were placed upon the tires and apparently no untoward incident occurred during the course of the journey. Upon arrival at the employer's premises the tires were placed in a rack or cradle located about eight or ten feet above the floor of the garage "where it is cool and shady" and the particular tire in question remained in this rack until delivered to appellant for mounting on the day of the accident.

The tire in question was being mounted by the appellant upon a so-called Chrysler safety rim which, because of a small ridge or hump designed to cause the bead of the tire to rest in the groove on each side of the flange, makes the mounting of a tire thereon somewhat more difficult than on an ordinary rim. Immediately prior to the explosion the appellant was observed by a fellow workman in the act of mounting the tire. At the time the wheel and tire were lying flat upon the ground and when first observed by the witness in question the tube was in the tire and the first bead was already on the rim. Appellant then proceeded to push the tire down on one side, getting it started by the use of a tire iron and then "finished up" with a rubber mallet. He then introduced air into the tube when a little thud or pop was heard, indicating to the witness that the tire was then in place. During the operation appellant was observed checking the air pressure with a gauge "several times". The source of the air used in inflating the tire was a compres-

sor having a maximum capacity of 150 pounds pressure and so constructed as to automatically shut off when this pressure was attained.

The tire was designed to withstand a maximum pressure of from 168 to 170 pounds and to customarily carry approximately 30 pounds. After the accident an examination of the tire disclosed that one of the beads was entirely broken, presenting the appearance of having "been cut right through". "The break was about an inch and a half on the radius line of the tire and all that was holding the bead was a little fabric on the tire". The tire, however, bore no evidence of scuffs or scars or any marks thereon which could have been caused by the use of a tire iron in mounting it. Within the bead there are 20 cold drawn steel wires each somewhat larger than a 32nd of an inch in diameter and all of these were completely broken. The tire was produced upon the trial and introduced in evidence, as were also X-ray films thereof.

In addition to the foregoing, qualified expert witnesses were produced by the appellant who testified that the bead wires at the point of the break were kinked and that this could have been caused in the process of manufacture when the tire was taken out of the mold by the hydraulic extractor or by the stripper when pulling the air bag out of the tire. A bead, if it breaks at all, will break at the kink, and all of the wires can be broken in the course of manufacture without showing on the outside of the tire. In the opinion of one of the expert witnesses it would be impossible to break a bead which was not otherwise defective by the use of a tire iron; he having observed attempts to break a bead with a 6-foot bar without success. A broken wire in a bead can be detected without cutting into the tire or bead by manipulating the bead, and the presence of a broken or kinked bead can be determined by inspection by feeling around the inside of the tire. Upon inspecting the tire in question an expert testified that he found evidence of a kinked bead at the point where the break occurred; also that in his opinion enough air could not be put into a tire to break a good bead, as the sidewalls of the tire would give way first and also that the pressure "would pull the flange off of the rim before it would even break the wires." In the opinion of this expert the bead was "defective to start, and in the process of pulling it out of the mold and curing, those wires were not in place where they should be, and that has a lot of tendency to bend a lot easier and break."

As opposed to the foregoing, evidence was produced upon behalf of the respondent to the effect that the plaintiff did not use the proper method or procedure in mounting the tire in that after the mounting was completed plaintiff did not pick up the tire and wheel off the ground and look at the lower side or examine the bottom bead to see that it was in proper place before fully inflating the tire; and that the tube was one that had been previously used and was old, rim-chafed and stretched. In the opinion of defendant's witnesses by reason of the manner in which the tire was mounted by appellant the tube was pinched between the bead and the rim, causing the air to escape from the tube and the resultant explosion; also that all of the wires in a bead could be broken in the process of mounting the tire; one of the witnesses having observed beads broken while the tire was in the process of being mounted. An expert also expressed the opinion that the pinching of the tube and the resulting increased pressure and strain on the bead could have caused the bead to break. Other witnesses testified that they had never seen a broken bead in a tire at the conclusion of the manufacturing process. Still another witness testified that during a period of years while he was employed by the Goodyear Tire and Rubber Company he had seen only two tires with beads broken in the manufacturing process and that in both instances the carcass or fabric of the tire was badly torn and the break in the bead wires was readily observable. In addition there was testimony in considerable detail as to the process employed by respondent in the manufacture of its tires, and the jury were taken to the respondent's plant and observed it in operation.

We have necessarily condensed the evidence introduced upon behalf of the respec-

tive parties for the record is a voluminous one. However, enough has been set forth to indicate the factual background against which the question presented is to be determined.

Much has been written upon the so-called doctrine of *res ipsa loquitur* and it has recently been the subject of an elaborate opinion by the Chief Justice in Zentz v. Coca Cola Bottling Company, Cal., 247 P.2d 344, in the course of which substantially all of the authorities in this state dealing with the question are reviewed and wherein he undertakes to clarify the conflicting statements to be found therein. In the light of this comprehensive exposition of the subject it would be a work of supererogation for us to here undertake to again review the many authorities therein discussed and to which our attention is directed by the parties.

[1] In Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 689, 162 A.L.R. 1258, the requisites for the application of the doctrine of *res ipsa loquitur* are set forth as follows:

> "The doctrine of *res ipsa loquitur* has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' "

With the foregoing as a standard we proceed to consider the evidence with the view of determining whether or not it is sufficient to meet each of the specified conditions.

As to the first requirement, no extended discussion is necessary for we hardly believe that it can be doubted that the accident here is of a kind which ordinarily does not occur in the absence of someone's negligence. Automobile tires properly constructed do not explode when inflated in the process of being mounted in the usual and customary manner upon a wheel designed to receive them.

[2] The second prerequisite, namely, that it be made to appear that the instrumentality in question was within the exclusive control of the defendant does not in every instance require proof of such control by the defendant at the time of the accident; control at the time of the negligent act being sufficient to satisfy this requirement under certain circumstances. Speaking of this the Supreme Court in Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436, 438, says: "Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. See cases collected in Honea v. City Dairy, Inc., 22 Cal.2d 614, 617, 618, 140 P. 2d [360] 369".

We do not doubt that the evidence here is sufficient to give rise to a reasonable inference that at least up to the time when appellant undertook to mount the tire upon the day of the accident the condition thereof had not been changed. As disclosed by our statement of the evidence, the tire was transported from the respondent's place of business to that of the appellant's employer by an agency selected by respondent and there is nothing to suggest that any damage was occasioned thereto while in the course of transportation. When received at the purchaser's place of business it was stored in a suitable place and manner, and the manager of the tire and tube construction department at the Los Angeles plant of the respondent testified that when stored in the manner described no deterioration would occur in the tire between the date of its manufacture and the day of the accident. Also, aside from the broken bead, the tire after the accident bore no outward evidence of having been subjected to any rough or unusual treatment. As was further said in Escola v. Coca Cola Bottling Co., supra,

24 Cal.2d at page 458, 150 P.2d at page 439: "It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it. Cf. Prosser, supra, p. 300. If such evidence is presented, the question becomes one for the trier of fact (see, e.g., MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868, 869), and, accordingly, the issue should be submitted to the jury under proper instructions."

In the light of the foregoing we conclude that the evidence here was sufficient to require the submission to the jury of the question as to whether or not the tire was, at the time appellant undertook to mount it, in the same condition as when it left respondent's premises. Cf. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 518, 203 P.2d 522.

Thus, we are brought to a consideration of the third requirement, namely, that the accident "must not have been due to any voluntary action or contribution on the part of the plaintiff." In further explanation of this statement the court in Zentz v. Coca Cola Bottling Co., Cal., 247 P.2d at page 348, says: "Some cases have stated that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. See Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Raber v. Tumin, 36 Cal.2d 654, 659, 226 P.2d 574; Cavero v. Franklin, etc., Benev. Soc., 36 Cal.2d 301, 309, 223 P.2d 471; Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53; 9 Wigmore on Evidence (3d Ed., 1940), § 2509. This is allied to the condition of control by the defendant and has also been employed as a means of showing that the defendant, rather than the plaintiff, had control and was responsible for the injury. See Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436. It should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof, and its purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident. As recently held by the Supreme Court of Oregon in a well reasoned opinion, a plaintiff may properly rely upon res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Gow v. Multnomah Hotel, 191 Or. 45, 224 P.2d 552, 555–560, 228 P.2d 791."

[3] The foregoing quotation would seem to dispose of respondent's contention that simply because the accident occurred while appellant was engaged in mounting the tire, in the accomplishment of which it was necessary to exert various forces thereon, the doctrine of *res ipsa loquitur* is necessarily rendered inapplicable. In support of their contention in this regard counsel quote the following from Escola v. Coca Cola Bottling Co., supra: "Allied to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as that of the defendant, and *res ipsa loquitur* will not apply until he has accounted for his own conduct." In commenting upon the foregoing counsel say that the situation here "is an exact parallel to the case of the locomotive engineer referred to". With this we readily agree, but the question remains as to whether or not the appellant here "has accounted for his own conduct". As said in the Zentz case the appellant, like the engineer in the example referred to, "may properly rely upon *res ipsa loquitur* even though he has participated in the events leading to the accident *if the evidence excludes his conduct as the responsible cause*".

The language quoted from the Escola case by counsel for respondent, as a reading of the opinion readily discloses, was taken from Prosser on Torts, p. 300. How

and to what extent plaintiff must account for his own conduct is explained by the same learned authority in his oft-cited article "Res Ipsa Loquitur in California", 37 Cal.Law Rev., 183, 201, as follows:

> "(T)he plaintiff's mere possession of a chattel which injures him does not prevent a res ipsa case where it is made clear that he has done nothing abnormal *and has used the thing only for the purpose for which it was intended.*
>
> "The plaintiff need only tell enough of what he did and how the accident happened to permit the conclusion that the fault was not his. Again he has the burden of proof by a mere preponderance of the evidence, *and even though the question of his own contribution is left in doubt, res ipsa loquitur may still be applied under proper instructions to the jury".* (Emphasis added.)

[4] Therefore, unless it can be said that the evidence here, as a matter of law, does not exclude "his (appellant's) conduct as a responsible cause", the fact that the accident occurred while he was engaged in the act of mounting and inflating the tire would not deprive him of the benefit of *res ipsa loquitur.* Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* are present. Roberts v. Bank of America, 97 Cal.App.2d 133, 137, 217 P. 2d 129.

A strikingly similar situation was present in Jesionowski v. Boston & Maine R. Co., 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416. That was an action to recover damages for the death of plaintiff's intestate alleged to have been occasioned by a derailment of cars of the defendant railroad. The accident occurred while the cars were being switched, and on behalf of plaintiff there was evidence tending to prove that the derailment was occasioned by a defective switch but in opposition to this defendant produced evidence tending to establish that the derailment was due solely to the negligent manner in which the deceased, a brakeman in the employ of the defendant, operated the switch upon the occasion in question. The trial court in submitting the cause to the jury gave appropriate instructions upon *res ipsa loquitur,* but upon appeal the Circuit Court of Appeals reversed upon the ground that, inasmuch as "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault," Boston & Maine R. R. v. Jesionowski, 1 Cir., 154 F.2d 703, 705, the doctrine was not available to the plaintiff. The Supreme Court in setting aside the decision of the Circuit Court of Appeals and affirming the judgment of the trial court said, 329 U.S. 452, 67 S.Ct. 401, 404, 91 L.Ed. 416, 420:

> "We cannot agree. Res ipsa loquitur, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact, and in this case the jury's right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are Federal questions. A conceptualistic interpretation of res ipsa loquitur has never been used by this Court to reduce the jury's power to draw inferences from facts. Such an interpretation unduly narrows the doctrine as this Court has applied it."

We are of the view that the evidence in the case at bar which we have set forth at some length may reasonably be said to justify an inference (if drawn by the jury) that the defective condition of the bead was the cause of the explosion and that appellant's conduct did not contribute thereto. At the outset appellant, by reason of his incompetency and loss of memory, was entitled to the benefit of the presumption that in mounting and inflating the tire he was exercising due care. Scott v. Burke, Cal., 247 P.2d 313. Aside from this there was testimony, as already noted, that the tire bore no evidence of rough usage and was

devoid of any marks that could have been made by the use of the tools which appellant employed in mounting it; that it would be impossible to break a good bead with a tire iron such as that used by appellant; that the break in the bead could not have been occasioned by the pressure of the air introduced into the tire which was designed to withstand a pressure considerably greater than that of which the compressor used for this purpose was capable of producing, and that the break occurred at a place where an inspection of the tire disclosed that the wires were kinked. With this evidence before it, the jury could reasonably conclude that appellant was not negligent, or, if so, that such negligence did not contribute to cause the accident. True, there was evidence to the contrary from which the jury might reasonably infer that the tire was not defective and that the explosion and resultant injuries to the appellant were caused by the improper manner in which he undertook to mount and inflate the tire. This, however, but created a conflict which it was within the province of the jury to resolve and did not in and of itself remove *res ipsa loquitur* from the case.

Counsel for respondent also earnestly contend that the doctrine is inapplicable here because "it cannot be said that this accident was more likely caused by respondent's than by appellant's negligence" and "the probability that the accident was caused by appellant's negligence is equally as great as that it was caused by any negligence of the respondent." In commenting upon this the court in Zentz v. Coca Cola Bottling Co., supra, uses the following language, 247 P.2d at page 349: "In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses".

[5] Common knowledge does not tell us that it is more probable that a tire will explode while in the process of being mounted and inflated as a result of negligence upon the part of the person engaged in doing so than from an inherent defect in the tire itself. In the absence of expert testimony we would therefore find ourselves in the same position that the Supreme Court did in Honea v. City Dairy, Inc., 22 Cal.2d 614, 140 P.2d 369, where it refused to take judicial notice of the technical practices of the bottling industry and therefore could not determine whether it could reasonably be concluded that a defect in a bottle was more probable than not the result of negligence. In such a situation we would be constrained to agree with counsel for respondent that the doctrine was inapplicable. Here, however, as in the Escola case, there is expert testimony as to the cause of the accident in question, but this is in sharp conflict. Upon the one hand it is made to appear that the explosion occurred because of the breaking of a defective bead and that the bead could not have been broken by the use of any of the tools employed by the appellant in mounting the tire or inflating it. On the other hand there is evidence that the bead could not have been broken during the process of manufacture, and that the only reasonable explanation is that the bead was broken by the appellant in the process of mounting the tire either by pressure exerted upon it or that the breaking of the bead was occasioned by the negligent manner in which the appellant mounted the tire as a result of which the tube was pinched between the tire and the rim resulting in pressure being exerted against the bead. We cannot undertake to say that either of these views is inherently improbable or unworthy of belief nor may we usurp the function of the trier of fact and undertake to weigh the testimony with the view of determining which is entitled to the greater weight. "That conclusion is not for the court to draw, or to refuse to draw so long as there is enough to permit the jury to draw it; and even though the court would not infer negligence, it must still leave the question to the jury where reasonable men may differ as to the balance of probabilities." Prosser op. cit. 38 Cal.Law Review, 194.

[6] Nor is it an indispensable prerequisite to the application of *res ipsa loquitur* that it be made to appear that the defendant has superior knowledge as to the cause of the accident. "(T)he doctrine may be

applied even though the defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of defendant." Zentz v. Coca Cola Bottling Co., supra, 247 P.2d at page 349.

[7] Neither may we undertake to determine, as respondent invites us to do, whether the evidence adduced by respondent upon the trial was sufficient to rebut the inference of negligence arising from the application of the doctrine of *res ipsa loquitur* for this is purely a factual question for the determination of the jury. Holt v. Henry, 58 Cal.App.2d 168, 171, 136 P.2d 97.

[8] Finally respondent contends that the doctrine of *res ipsa loquitur* is rendered inapplicable by reason of the fact that respondent pleaded the defense of contributory negligence. No authority is cited in support of this statement and we believe it apparent from what has already been said that it is without foundation.

[9] From the foregoing it necessarily follows that the trial court erred in refusing to instruct on the doctrine of *res ipsa loquitur* and the judgment is accordingly reversed, and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; EDMONDS, J., dissenting.



115 Cal.App.2d 395

METZENBAUM v. METZENBAUM * et al.

Civ. 19045.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1953.

Hearing Denied March 16, 1953.

Petition by liquidating partner to determine attorney's fees for services rendered in various proceedings and for leave to pay such fees. The Superior Court, Los Angeles County, Arnold Praeger, J., entered an order disallowing such fees, and petitioner appealed. The District Court of Appeal, Patrosso, J. pro tem., held, inter alia, that liquidating partner was entitled to reimbursement for such fees for services rendered in successful defense against adverse claims to partnership assets.

Affirmed in part and reversed in part and remanded.

1. Partnership ⇐244, 280

A surviving or liquidating partner, if not a trustee in the strict sense, is at least a quasi trustee for the interested persons.

2. Partnership ⇐280

Right of liquidating partner to recover from partnership fees for attorney's services rendered in various proceedings concerning ownership of property claimed for the partnership would be determined in light of legal and equitable principles governing trust relationship.

3. Trusts ⇐277

Where litigation is necessary for preservation of trust, it is both the right and duty of the trustee to employ counsel in prosecution or defense thereof, and trustee is entitled to reimbursement for his expenditures out of trust fund so long as litigation is for the benefit of the trust estate. Civ.Code, § 2273.

4. Trusts ⇐171

A duty rests upon trustee to defend against adverse claims to trust assets, and failure to do so without sufficient justification subjects trustee to liability for any loss resulting from such failure.

5. Partnership ⇐280

Liquidating partner was entitled to reimbursement for attorney's fees in a reasonable amount incurred by him in defense of suit wherein plaintiff claimed title to certain property as against the partnership, though the liquidating partner derived some personal benefit from successfully defending against the suit in that his proportionate share of the net assets remaining after payment of debts was increased. Civ.Code, § 2273.

6. Partnership ⇐280

Liquidating partner was under impelling necessity of securing adjudication of

* For subsequent opinion see 252 P.2d 966.

adverse claims to partnership assets, and, therefore, was entitled to reimbursement for attorney's fees incurred in trial of issues raised by his cross-complaint in action by partner, who was in connivance with the third party claimant, for dissolution and accounting, the complaint in which, while purporting to set forth assets of partnership, omitted any reference to property in question, in so far as such services related to the establishment of the dissolved partnership's title to the property. Civ.Code, § 2273.

7. Partnership ⇐280

Liquidating partner was not entitled to reimbursement for attorney's fees for services rendered in proceeding wherein liquidating partner was surcharged for excess payment of attorney's fees for services rendered in action defending claim to partnership assets.

8. Partnership ⇐280

Liquidating partner was not entitled to reimbursement for attorney's fees for services rendered in proceeding to determine attorney's fees for services rendered in protecting partnership assets in other proceedings.

9. Attorney and Client ⇐130

Where counsel for liquidating partner stated that he did not anticipate making any claim for attorney's fees in hearing on petition to determine amount of attorney's fees for services rendered in protecting partnership assets in other proceedings, such statement was a waiver of any such fees to which counsel would be entitled.

Milton A. Krug, Los Angeles, for appellants.

Newell & Chester, Robert M. Newell, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by Murray Metzenbaum as liquidating partner of two dissolved partnerships (with only one of which we are concerned here) from an order denying him reimbursement for attorneys fees alleged to have been incurred by him in behalf of said dissolved firm.

All of the parties involved are members of the same family. The respondent, Walter Metzenbaum and Rose Metzenbaum are the parents of the appellant Murray Metzenbaum and Fanchon Metzenbaum, and they will sometimes hereinafter be referred to by their given names.

In May, 1943, respondent and appellant entered into an oral agreement of partnership for an indefinite period for the purpose of acquiring and selling oil and gas royalties and leases. This firm was dissolved by written notice from appellant to respondent in September, 1943, and by agreement appellant was appointed and became the liquidating partner of the dissolved firm on or about November 5, 1944. Among the assets of the dissolved firm were two land owners royalties, one known as the Oulton royalty and the other as the Rozier or Surfluh royalty. In the course of liquidation, with the consent and authorization of respondent, the appellant sold a portion of the Surfluh royalty and pledged the remaining partnership interest therein to the Bank of America as security for a loan of approximately $6,000. The money realized from the sale and loan was used to discharge debts of the dissolved firm.

Subsequently and during the course of liquidation Rose and Fanchon, individually, and through respondent as trustee for Fanchon and as attorney for both Rose and Fanchon, asserted that neither the Surfluh nor the Oulton royalties was an asset of the dissolved firm but that the former was owned one-half by Fanchon and one-half by appellant, individually, and that the Oulton royalty was owned one-fourth by Fanchon, one-fourth by Rose, and one-half by appellant, individually. In April, 1947, respondent, as trustee for Fanchon and as her attorney, filed an action against the appellant and others in the Superior Court in and for the County of Los Angeles alleging that one-half of the Surfluh royalty belonged to her (Fanchon) and that the sale of a portion thereof to pay obligations of the dissolved firm was wrongful. In the original and first amended complaint in this action respondent was the sole plaintiff, but in the second amended complaint both respondent and Fanchon were named as plain-

tiffs. A demurrer to the second amended complaint was sustained with leave to amend and upon failure of the plaintiffs to so amend, judgment was entered dismissing the action. From this judgment an appeal was taken and the judgment was affirmed. Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 195 P.2d 492. This action will hereinafter be referred to as the Fanchon suit.

Prior to the filing of the Fanchon suit last mentioned, respondent instituted the present action wherein he sought a dissolution of the partnership and an accounting. On July 25, 1947, following the filing of the Fanchon suit, the appellant filed a cross-complaint naming as defendants, among others, Rose and Fanchon and seeking therein to quiet title to the Oulton and Surfluh royalties in the dissolved firm. On the trial of the issues raised by the cross-complaint Fanchon, Rose and respondent claimed and contended that said royalties were not assets of the dissolved firm, but that one-half of the Surfluh royalty was owned by Fanchon and that one-half of the Oulton royalty was owned equally by Rose and Fanchon. Judgment was entered in favor of the appellant, finding that both of said royalties were properties of the dissolved firm; that the firm had been dissolved, and confirmed appellant as liquidating partner to complete the winding up of the firm. Upon appeal this judgment too was affirmed, Metzenbaum v. Metzenbaum, 96 Cal.App.2d 197, 214 P.2d 603, and appellant has since continued to discharge his duties as liquidating partner subject to the continuing supervision of the superior court.

Following the affirmance of the judgment last mentioned, appellant as such liquidating partner, filed what is entitled "Petition to determine attorneys fees and for leave to pay same" wherein he requested the court to fix and make an allowance to him for the attorneys fees which he incurred (1) in the defense of the Fanchon suit; (2) in the trial of the issues raised by his cross-complaint in the instant case with respect to the title to the Oulton and Surfluh royalties, and (3) upon a previous hearing of the report of appellant as liquidating partner and respondent's objections thereto insofar as such hearing related to the allowance to appellant of attorneys fees incurred by him in the defense of a certain action instituted by Wood and Callahan against the dissolved firm, to which detailed reference will hereafter be made. Upon the hearing of the petition the trial court refused to make any allowance to appellant for attorneys fees incurred in any of the matters mentioned, and it is from this order that the present appeal is taken.

The trial court was seemingly of the view that the services rendered by counsel for the appellant in each of the foregoing matters were for his sole benefit and hence should not be charged against the assets of the dissolved firm. We first direct our attention to the first two matters mentioned above with the view of determining whether the trial court's conclusion with respect thereto was correct.

[1] At the outset it is necessary to consider the relationship which a liquidating partner bears to his former partner, and his duties with respect to the assets of the firm committed to his care. The prevailing, if not unanimous view, appears to be that a surviving or liquidating partner, if not a trustee in the strict sense, is at least a quasi trustee for the interested persons, 68 C.J.S., Partnership, § 271, p. 767; Adams v. Carmony, 44 Ind.App. 291, 87 N.E. 708, 709, 89 N.E. 327; Gilmore v. Ham, 142 N.Y. 1, 36 N.E. 826, 827; King v. Leighton, 100 N.Y. 386, 3 N.E. 594, 597; Stephens v. Orman, 10 Fla. 9, 101. Our own Supreme Court has so referred to a surviving partner, Smith v. Walker, 38 Cal. 385, 389.

In 68 C.J.S., Partnership, § 355, p. 864, it is said:

> "It is competent for partners to provide, either in their partnership agreement or in the agreement for dissolution, that one or more of the members shall have the sole right of administering the firm's affairs. When such power has been conferred, partners other than the members so authorized have no right to participate in the settlement of affairs, and third persons who, with notice of the arrangement, deal with partners not intrusted with the administration do so subject to the rights of other partners. According to some

cases the partner so designated to administer the firm affairs holds a position analogous to that of a surviving partner.

"*Nature of relation between former partners and duties of liquidating partner.* While partners engaged in administering the affairs of the dissolved firm are not regarded as trustees for each other in the strict sense, there are elements of trust in the relationship, and such relationship is frequently regarded, or referred to, as a trust or fiduciary one, at least in respect of firm property which is in the possession of a former partner, as discussed infra § 363. A partner charged with the duty of liquidating the business of the firm is required to act in such a manner as to conserve the interests of all of the members and is obliged to exercise good faith. Hence he must be diligent in the performance of his tasks and must settle the firm's affairs within a reasonable time."

[2, 3] By analogy, therefore, the questions here presented are to be determined in the light of the legal and equitable principles governing the trust relationship. It is axiomatic that where litigation is necessary for the preservation of the trust, it is both the right and duty of the trustee to employ counsel in the prosecution or defense thereof, and the trustee is entitled to reimbursement for his expenditures out of the trust fund. This, of course, necessarily assumes that the litigation is for the benefit of the trust estate, for, if not, the rule is otherwise. Estate of Duffill, 188 Cal. 536, 554, 206 P. 42; Dingwell v. Seymour, 91 Cal. App. 483, 513, 267 P. 327; Civil Code, § 2273; Pomeroy's Equity Jurisprudence (5th ed.) sec. 1085.

[4, 5] We can conceive of no higher duty resting upon a trustee than that of defending against adverse claims to trust assets. Indeed, failure to do so without sufficient justification would subject the trustee to liability for any loss resulting from such failure upon his part. True, the appellant as liquidating partner, like a trustee who is also a beneficiary of the trust, derived some personal benefit in successfully defending against the adverse claims to the partnership assets in question, as thereby his proportionate share of the net assets remaining after the payment of debts was increased. This, however, is but a fortuitous circumstance resulting from the performance of a fiduciary duty which he owed to the trust, and whereby valuable assets were preserved for the benefit of all persons interested therein, including the respondent. While respondent protests vigorously against any allowance to appellant in reimbursement of the attorneys fees incurred in the defense of the dissolved firm's title to the royalties in question, we have no doubt that, if such a claim had been advanced by persons other than members of his own family with his consent and active cooperation, he would have been the first to complain of appellant's failure to defend against the same. Hence, we conclude that the trial court erred in its ruling that appellant was not entitled to reimbursement for attorneys fees in a reasonable amount incurred by him in the defense of the Fanchon suit.

[6] We believe that the same is true with respect to attorneys fees incurred in the trial of the issues raised by the appellants cross-complaint in the present action insofar as they related to the title to the two royalties in question. Respondent having instituted the present action for a dissolution of the partnership and an accounting by the filing of a complaint in which, while purporting to set forth the assets of the partnership, he omitted any reference to the two royalties in question, the appellant, having been previously advised by respondent that an interest therein was claimed by others, namely Rose and Fanchon, was under the impelling necessity of securing an adjudication of such adverse claims, not only for his own protection as liquidating partner but in order to discharge his duty to protect and preserve the partnership assets in his possession and under his control. Indeed, failure to do so might have resulted in a judgment which would have constituted an adjudication that one-half of each of said royalties did not constitute assets of the dissolved partnership. Contrary to the claim of respondent, the

present action was something "more than a suit between partners." It was one wherein the respondent in effect asserted that the royalties in question or some interest therein, were not partnership assets but that title to a portion thereof was vested in others. This claim on behalf of Fanchon and Rose was no less adverse to the interests of the dissolved firm because of the fact that it was asserted through and with the connivance and cooperation of a former partner, nor would this operate to constitute the controversy one between partners. The case of Salmina v. Juri, 96 Cal. 418, 31 P. 365, upon which respondent places principal if not sole reliance did not, as here, involve the assertion of an adverse claim to assets of a dissolved partnership by *third persons* but rather a controversy between a surviving partner and the personal representative of his deceased partner as to whether a particular parcel of land constituted an asset of the former partnership. Hence it is without application here.

In order to avoid any misunderstanding, however, it must be understood that the allowance to be made to appellant for attorneys fees in the instant case is confined to the services rendered therein only in so far as they are related to the establishment of the dissolved firm's title to the Oulton and Surfluh royalties.

[7] Different considerations, however, are applicable to appellant's claim to reimbursement for attorneys fees incurred by him upon the previous hearing involving the attorneys fees incurred in defense of the action instituted by Wood and Calahan. That action was brought against the partnership attacking its title to the Oulton royalty. The action was successfully defended by appellant, and thereafter appellant, in a current account, claimed credits in the sum of $11,000 as and for attorneys fees paid by him in the defense thereof. Objections to the account were interposed by respondent, and upon the hearing thereof before Judge Palmer the latter made an allowance to appellant therefor in the sum of $7,500, resulting in surcharging appellant's account in the sum of $3,500. In the instant proceeding, appellant sought an additional allowance for attorneys fees incurred by him in connection with the hearing before Judge Palmer upon the matter of the attorneys fees in the Wood and Calahan case. As previously indicated, the trial court denied any allowance therefor, and with this action we are in accord.

Appellant has cited no authority in support of his claim in this regard and we have found none. Perhaps no better answer can be made thereto than that returned by the Supreme Court of Minnesota to a similar contention, as follows, Re Drake, 195 Minn. 464, 263 N.W. 439, 442, 101 A.L.R. 801, 805: "To say to a trust beneficiary that, even if he succeeds in having his trustee's account surcharged to the amount of $2,500, he must nevertheless pay the trustee's attorneys' fees and the trustee's fees for contesting the allowance of such a surcharge, is unreasonable. In effect it amounts to this: That a beneficiary, who has cause to have the account of his trustee surcharged in a substantial amount, can be called upon by the trustee to face the prospect that, if he wants to litigate the question of the trustee's liability, he will have to pay not only his own but the trustee's attorneys' fees and the trustee's fees for contesting the claim, even if the beneficiary succeeds in the action. The $600 allowed for the services of the trustee and his attorneys for conducting the defense against the surcharge should not be allowed.

"The plaintiff beneficiary had the right to appear and be heard in opposition to the allowance of the trustee's account. The trustee, not the beneficiary, was the proponent and brought the matter into court. The beneficiary had the right to have the account examined and surcharged as to any item or items therein improperly charged to the trust estate. His efforts in that direction were for the benefit of the trust estate."

[8, 9] The foregoing also serves to dispose in part of appellant's final complaint of the trial court's refusal to allow attorneys fees for services rendered by his counsel upon the hearing of the present application for attorneys fees. An additional reason, however, is that during the early stages of the hearing the trial judge inquired of counsel for appellant while testifying as a witness: "You do not anticipate making any

claim for attorneys fees in this hearing?" to which counsel replied in the negative. However, counsel now undertakes to say that this statement was made because at an earlier time the trial court had stated that the hearing was to be confined to the matters set forth in the appellant's petition. The subsequent statement of counsel, however, that attorneys fees were not being requested in connection with the hearing which resulted in the order appealed from was unequivocal, and the trial court was justified in treating the same as a waiver of any such fees if it be assumed that appellant was otherwise entitled thereto.

For the reasons stated, the order appealed from is reversed insofar as it denies any allowance for attorneys fees incurred in the defense of the Fanchon suit and in connection with the trial of the issues raised by the cross-complaint herein with respect to the title to the two royalties in question, and the cause is remanded for a further hearing with respect thereto. In other particulars the order is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER and SHENK, JJ., dissenting.



115 Cal.App.2d 312

PEOPLE v. MORRIS.

Cr. 4855.

District Court of Appeal, Second District, Division 1, California.

Jan. 13, 1953.

Prosecution for forgery and grand theft after three prior convictions of felonies. From a judgment of conviction in the Superior Court of Los Angeles County, William B. Neeley, J., defendant appealed. The District Court of Appeal, Drapeau, J., held that a handwriting expert's testimony sufficiently corroborated defendant's accomplice's testimony as to defendant's forgery of signatures to checks cashed by such accomplice.

Judgment affirmed.

1. Criminal Law ⇐260(11)

It is trial court's, not appellate court's, function to resolve inconsistencies and contradictions in witness' testimony.

2. Criminal Law ⇐553

The trier of facts may believe and accept portion of witness' testimony and disbelieve remainder thereof.

3. Criminal Law ⇐1144(13)

On appeal from judgment of conviction, portion of witness' testimony which supports judgment, not inconsistent or contradictory portion which would defeat or tend to defeat judgment, must be accepted.

4. Criminal Law ⇐1159(2)

A judgment of conviction cannot be set aside on appeal, unless it clearly appears that there is no sufficient substantial evidence to sustain judgment on any hypothesis.

5. Criminal Law ⇐511(4)

In prosecution for forgery and grand theft, city police department handwriting expert's testimony that signatures to checks involved were written by same person who wrote various admitted exemplars of defendant's handwriting sufficiently corroborated defendant's accomplice's testimony as to defendant's forgery of signatures to such checks, which accomplice cashed.

6. Criminal Law ⇐511(2)

Though evidence corroborating defendant's accomplice's testimony must raise more than conjecture or suspicion of defendant's guilt of crime charged, such evidence is sufficient, if it connects defendant with commission of crime in such a way as reasonably to satisfy fact finding body that accomplice is telling truth.

7. Criminal Law ⇐511(2, 3)

To corroborate defendant's accomplice's testimony, evidence of defendant's inculpatory participation in crime charged need not be direct nor extend to every fact and detail, but may be circumstantial, and is sufficient, though slight, if it tends to connect defendant with commission of crime.

8. Criminal Law ⇐511(2)

The appellate court's function to determine sufficiency of evidence to support

judgment of conviction is performed on discovery of testimony aside from that of defendant's accomplice tending to connect defendant with commission of crime.

9. Criminal Law ⇐260(11)

Questions of weight of evidence and witnesses' credibility are for trial court, not appellate court.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

By an information containing twelve counts, defendant was charged with the crimes of forgery and grand theft; also with three prior convictions of felonies for which he had served terms of imprisonment in state prisons.

Defendant pleaded not guilty to the charge; admitted the priors, waived a jury trial, and submitted his case in part on the transcript of the preliminary hearing, subject to the introduction of further evidence.

The trial court found defendant "not guilty" as to count 12, and found him "guilty" as charged in counts 1 to 11, inclusive. Thereafter, his motion for new trial and his application for probation were denied. And he was sentenced to state prison, the sentences on the several counts to run concurrently with each other and with the unexpired portion of the sentence from which he was on parole.

This appeal is from the order denying the motion for new trial, and from the judgment of conviction of the crime of forgery, as charged in counts 1, 3, 5, 7, 9, and 11, and of the crime of grand theft, as charged in counts 2, 4, 6, 8 and 10 of the information.

It is here contended that the evidence is insufficient to support the judgment, it being particularly urged that there is insufficient corroboration of the testimony of the accomplice Presson.

By means of six checks, appellant and his alleged accomplice Presson abstracted $3100 from the account of one Saul Sugar in the Bank of America, and $100 from the account of Frank C. Holscher in the same bank.

These two men knew each other in San Quentin. Presson had completed his term of imprisonment, and appellant was on parole when they met in Los Angeles during the summer of 1951.

Mr. Presson was subpoenaed as a witness herein, having previously pleaded guilty to one count of forgery in a prosecution against him. He testified that sometime in August, 1951, he saw appellant who spoke to him about forging some checks. The plan was that appellant should do the writing and Presson should pass the checks. The proceeds were to be split 75% to appellant and 25% to Presson. Presson operated under the name of Clyde E. Thomas. He "bought" general identification, which included a driver's license, a draft card and a social security card bearing that name. All of the checks in question were drawn to the order of Clyde E. Thomas and Presson endorsed that name on the back of each. He identified all six checks at the trial, and testified that he received them from appellant, cashed them at the bank and split the proceeds with appellant.

He also testified that he had a conversation with appellant at the latter's apartment in September, 1951, when they discussed the signature "Saul Sugar". At that time, appellant told him he had seen a man in the bank deposit a lot of money; that when this man made out his deposit slip the writing left an impression on the next sheet which appellant tore off. This witness further testified that he saw appellant write three of the checks in the latter's apartment by using a glass off a picture frame and a cord with a light in it; that he would hold the paper with the impression on it up to the light, look at it a minute and then write. Around September 4th, appellant told Presson that he got the signature of Frank C. Holscher off an ink blotter in the bank.

It was stipulated that Mr. Donn E. Mire, examiner of questioned documents for the Los Angeles Police Department, was qualified to testify as a handwriting expert. He testified that he examined the six checks

and also several exemplars of the appellant's handwriting. Among the exemplars were three finger print records dated 1945 and 1947. On October 16, 1951, in Room 30 of the City Hall, he showed these records to appellant, who acknowledged they were in his handwriting. On that date at the request of Mr. Mire, appellant wrote on five pieces of white paper and on six blank checks. In addition Mr. Mire showed appellant a piece of paper and eleven checks which Mr. Mire first saw in 1947 or 1948, all of which appellant acknowledged were in his handwriting.

Mr. Mire gave as his opinion that the writing on the six checks here under consideration was done by the same person who wrote the various exemplars. Also, that the endorser of the checks was not the person who made the exemplars. The writing was examined minutely by this witness and compared with the exemplars and also with the true signature of Mr. Sugar. He believed that "Saul Sugar", "Clyde E. Thomas" and "Sept." on two of the checks were tracings; also that the person who made the tracings had an exemplar of Mr. Sugar's signature. He also stated that there was close to 50% of dissimilarities in the writings he examined, and that "In some instances as to the signatures there was more than that, because there was no similarity; but in other parts of the check I would say definitely that it was written by the same person who wrote the exemplars." He noticed that appellant was very excited at the time he wrote the exemplars at the City Hall; and in comparing the writing therein with that in the finger print records made in 1945 and 1947, he "found many various variations in the writing."

Appellant took the stand in his own defense and denied having written the checks or that he had any arrangement with Mr. Presson for uttering them. When asked if he recognized the checks he replied: "Though I haven't seen the checks very closely, I will look at them, though, inasmuch as I think Mr. Donn Mire could verify the fact that I have a certain competency at handwriting myself."

With respect to the insufficiency of the corroborating evidence, appellant urges that the testimony of the accomplice is unworthy of belief and that, in analyzing it, two major inconsistencies are evident. One concerns count 12, as to which appellant was found "not guilty". This check was for $100 drawn upon the account of Frank C. Holscher. Police records were introduced to show that Presson was detained in Lincoln Heights Jail at the time he said he passed this check. It was Mr. Mire's opinion that the endorsement of the name Clyde E. Thomas on this check was not written by the endorser of the other checks; that it was better writing.

This witness showed some uncertainty as to places and dates in his testimony. Hence, the court may have believed that he had a lapse of memory as to this particular check but not with respect to the others.

The second inconsistency relates to Presson's statement that "he did not talk to anyone in regard to his testimony other than Mr. Black of the District Attorney's office. Upon examination, however, by the court, Presson admitted that two police officers who had questioned him in the county jail did talk to him in regard to his testimony against appellant."

[1–4] An examination of the record with respect to this point reveals that the witness was confused as to just what was sought from him. And, as said in People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836, 838: "It was the function of the trial court, not this court, to resolve inconsistencies and contradictions * * *. The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. * * * A judgment cannot be set aside on appeal unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to sustain it."

[5] The testimony of the handwriting expert Mire directly connected appellant through his handwriting to the checks upon which this prosecution was predicated, and

sufficiently corroborated the testimony of the witness Presson.

[6, 7] As stated in People v. Henderson, 34 Cal.2d 340, 343, 346, 209 P.2d 785, 786: "Although the corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connect the defendant with the commission of the crime in such a way as reasonably to satisfy the fact finding body that the accomplice is telling the truth. People v. Trujillo, 32 Cal.2d 105, 110–111, 194 P.2d 681. The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. People v. Negra, 208 Cal. 64, 69–70, 280 P. 354; People v. Yeager, 194 Cal. 452, 473, 229 P. 40. * * *

[8, 9] "When * * * it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed. Questions of the weight of the evidence and the credibility of the witnesses are for the trial court".

For the reasons stated, the judgment and the order appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.



115 Cal.App.2d 369

STONE v. WALSWORTH.

Civ. 4469.

District Court of Appeal, Fourth District, California.

Jan. 14, 1953.

Hearing Denied March 12, 1953.

Action to cancel deed and to quiet title to real property. The Superior Court, Orange County, Raymond Thompson, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence indicated lack of intent to pass title to property by deed in question, and sustained finding that deed was null and void.

Judgment affirmed.

1. Appeal and Error ⇐996
Husband and Wife ⇐264

True situation, in rebuttal of statutory presumption that property conveyed to a married woman by written instrument is her separate property, can be shown by circumstantial as well as by direct evidence, and the inferences to be drawn from such evidence are for the trier of fact to determine, so long as those inferences find reasonable support in the evidence given. Civ.Code, § 164.

2. Appeal and Error ⇐1008(1)

Whether evidence is sufficient to overcome statutory presumption that property conveyed to married woman by written instrument is her separate property, is for trier of facts. Civ.Code, § 164.

3. Husband and Wife ⇐264

Evidence sustained finding that property conveyed to wife by written instrument was community property. Civ.Code, § 164.

4. Appeal and Error ⇐1010(1)

A determination by a trial court that the statutory presumption that property acquired by a married woman by written instrument is her separate property, has been rebutted, is conclusive unless it is manifestly without sufficient support in the evidence. Civ.Code, § 164.

5. Deeds ⇐66

Delivery or nondelivery of a deed is a question of fact to be determined from the surrounding circumstances of the transaction.

6. Deeds ⇐56(2)

The act of delivery of a deed must be accomplished with the intent that it shall become presently operative as such, and presently pass title, and to establish a valid effective delivery, it must be shown that grantor intended to divest himself of title.

7. Deeds ⇐66

Whether requisite intent of grantor to divest himself of title accompanied delivery of deed, is question of fact for determination by trial court or jury.

8. Deeds ⇐208(1)

In action to cancel deed and to quiet title to real property, evidence indicated lack of intent to pass title to property by deed in question, and sustained finding that deed was null and void.

David A. Fall, San Pedro, for appellant.

McCabe & Schumacher, Fullerton, for respondent.

MUSSELL, Justice.

In this action to cancel a deed and to quiet title to real property in Brea, Orange County, it is alleged that the property was purchased and paid for by the joint efforts of plaintiff and his wife, Lillie Stone; that the title to said property was taken in the name of Lillie Stone for the purpose of convenience only but with no intention of making a gift to her or releasing any right, title or interest of plaintiff therein; that on or about July 2, 1947, the said Lillie Stone importuned the plaintiff to sign a deed to said property naming Lillie Walsworth (a daughter of Lillie Stone) as grantee, upon the representation that the deed would not be delivered but would be held jointly and the survivor could "do what he pleased with it"; that the plaintiff executed the deed, relying upon said representation; that there was no consideration for said deed; and that defendant claims an interest in the property adverse to plaintiff.

The trial court found that the property was community property of plaintiff and his deceased wife, Lillie Stone; that the deed to Lillie Walsworth was null and void; and that plaintiff did not intend that it should be delivered to defendant Lillie Walsworth. Judgment was rendered quieting plaintiff's title in fee simple absolute. Defendant appeals on the grounds that the evidence is insufficient as a matter of law to support the findings and judgment; that the court erred in finding that the real estate was community property; and that the attempt to reserve a life estate in a party foreign to the title was void.

Plaintiff and Lillie Stone were married on July 15, 1939, at the ages of 66 and 62, respectively. Plaintiff was then a recipient of an old age pension in the sum of $40 per month, which was increased periodically thereafter to $75 per month. Lillie Stone was operating a small restaurant which she sold in December, 1939, for the sum of $250. Plaintiff had no other funds aside from his pension. On April 26, 1940, plaintiff and his wife purchased real property in Long Beach, California, the title to which was taken in the name of Lillie C. Stone, a married woman. Plaintiff testified that the reason for taking the title in this manner was because he had been told he could not have any title to any real property while drawing a pension. On November 6, 1940, Lillie C. Stone received a pension of $65 per month and the monthly payments on the Long Beach property were made out of the proceeds of the pension checks, which were cashed by plaintiff and comingled. In 1946 the Long Beach property was sold and the proceeds therefrom were used to make the down payment on a parcel of real property in Brea, the subject of this litigation. The balance of $1,500 owing on the Brea property after the downpayment was being paid off out of the proceeds of the pension checks of the parties. The title to the Brea property was also taken in the name of Lillie C. Stone, a married woman.

On July 2, 1947, the Stones went to the office of Mr. Highley, a notary public, and there, at Mrs. Stone's request, both parties signed a deed to the Brea property naming the appellant Lillie K. Walsworth as grantee, the deed "reserving unto said grantors a life estate in and to the property herein described for and during the life of said grantors".

Plaintiff testified in this connection that when they went to the notary's office Lillie Stone said "I want a deed for our daughter on our place"; that "Mr. Highley looked at me and said, 'Will you sign the deed?'

and I said, 'No.' That is the first I knew about it, looking for a deed. I said 'No.' * * * Well then I said, 'No, I won't sign that deed,' then he said 'See here,' he says, 'That deed ain't to go to your daughter; that deed is to be kept for the last survivor and the last survivor can do as they like about it, sell it or do anything they wanted to do with it,' and I said 'On them grounds I will sign the deed. That deed is to be kept.' So he made the deed and we both signed it on that agreement."

The notary testified as follows:

"Both of these people were on the old age assistance and at the time of the property settlement, discussion of real property, the question was brought up, and I am an authority on social welfare—it was brought up as to what could be done with their property. I stated that under the Welfare and Institutions Code, that a person recipient of old age assistance could deed their property to anyone as long as they retained life estate and the income and pleasure thereof. After that she said, 'That is what I want to do.' She said, 'I want to take this property so that we will have a life estate in it,' and this is being done many times by recipients of old age assistance, and at the time I said, 'Well, I will be glad to help you,' as being both of them was members of my Cooperative Club, and I told them that I would be glad to assist them as I was a Notary Public; I would fix it up, and I made the deed, and when I got through I handed it to her, and she said that she wanted to take the deed home and in case of her death, it would then be up to Mr. Stone, and that was done."

Appellant testified that on July 2, 1947, plaintiff and his wife came to her house and stated that they had been to Mr. Highley's office in Los Angeles and had made out a deed to the property in Brea; that her mother stated that she wanted to be sure that "John had a home for life"; that the deed had been made out to her and that she turned to "John" and asked him if that was his wish too and he said "Yes"; that at that time the deed was given to appellant; that she put it in her desk and it remained in her possession until her mother's death on March 22, 1949, on which date it was recorded.

There is evidence in the record that the plaintiff and his wife made statements to the welfare department to the effect that they were buying the Brea property and evidence that they were trying to sell it in June of 1948.

Appellant argues that the evidence was insufficient to overcome the presumption set forth in Section 164 of the Civil Code, which provides as follows:

"* * * whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, * *."

[1] In Bales v. Farley, 107 Cal.App. 2d 642, 646, 647, 237 P.2d 686, 689, this court held that:

"The true situation in rebuttal of the presumption created by sec. 164 of the Civil Code can be shown by circumstantial as well as by direct evidence, and the inferences to be drawn from the evidence are for the trier of facts to determine so long as those inferences find reasonable support in the evidence given. Nichols v. Mitchell, 32 Cal.2d 598, 609, 197 P.2d 550."

In Re Estate of Piatt, 81 Cal.App.2d 348, 352, 183 P.2d 919, where property was purchased entirely on credit with joint notes of husband and wife, where no portion of the purchase price was paid at the time of transfer and where the parties kept their earnings in separate bank accounts but otherwise used them for their common needs, the evidence was held sufficient to support an implied finding that the presumption mentioned in Civil Code section 164 that the property conveyed in the name of a married woman is her separate property was rebutted and that the question relating to the character of the property was one of fact only.

[2] In Attebury v. Wayland, 73 Cal. App.2d 1, 5, 165 P.2d 524, it is held that it is for the trier of facts to determine

whether the evidence is sufficient to overcome the presumption.

[3] Viewing the evidence in the light of these rules, we are unable to say as a matter of law that there was no evidence to support the trial court's finding as to the community character of the property involved.

[4] As was said in Re Estate of Baer, 81 Cal.App.2d 830, 833, 185 P.2d 412, 414:

> "A determination by a trial court that the presumption raised by section 164 of the Civil Code (that property conveyed to the wife is her separate property) has been rebutted is conclusive upon an appellate court unless it is manifestly without sufficient support in the evidence. Williamson v. Kinney, 52 Cal. App.2d 98, 102, 125 P.2d 920, and cases therein cited."

[5–8] The question of delivery or nondelivery of the deed to appellant is a question of fact to be determined from the surrounding circumstances of the transaction and to constitute a valid, effective delivery, it must be shown that the grantor intended to divest himself of title. The act of the delivery of the deed must be accomplished with the intent that it shall become presently operative as such and presently pass title. Whether or not the requisite intent exists is a question of fact for the trial court or jury. Kelly v. Bank of America, 112 Cal.App.2d 388, 246 P.2d 92. In the instant case the testimony of the plaintiff indicates a lack of intent to pass title to the property by the deed in question and this testimony is corroborated to some extent by that of the notary who acknowledged the deed and by other evidence. Under these circumstances, we cannot say that there is no substantial evidence to support the trial court's finding that the deed was null and void.

In view of what we have here said, it is unnecessary to pass upon the question of whether the attempt to reserve a life estate in the property was void.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

DA VALL v. CARY.

Civ. 4463.

District Court of Appeal, Fourth District, California.

Jan. 15, 1953.

Rehearing Denied Feb. 6, 1953.

Hearing Denied March 12, 1953.

Action for personal injuries arising out of automobile collision. The Superior Court, Riverside County, O. K. Morton, J., entered judgment against plaintiff, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that where driver pulled out of line and attempted to pass preceding truck and collided with oncoming automobile resulting in injuries to occupant, evidence relating to visibility, approaching traffic and the sudden pulling out of the oncoming automobile from its lane of traffic presented question for jury as to whether driver was guilty of negligence which was proximate cause of accident and occupant's resulting injuries.

Affirmed.

1. Automobiles ⇐245(24, 50)

In action by occupant against driver of automobile for injuries sustained when driver pulled out of line and attempted to pass preceding truck and collided with oncoming automobile, evidence relating to visibility, approaching traffic, and the sudden pulling out of the oncoming automobile from its lane of traffic, presented question for jury as to whether driver was guilty of negligence which was proximate cause of accident.

2. Automobiles ⇐245(24)

In action by occupant of automobile against driver for injuries sustained in an accident, evidence relating to the relationship existing between occupant and driver and to nature and purpose of trip raised a question for jury as to whether occupant was a guest or a passenger.

3. Appeal and Error ⇐1002

Where nothing more than a conflict in the evidence appeared and testimony of plaintiff appealing from adverse judgment was discredited in several particulars, jury's finding in favor of defendant on the factual questions presented would not be disturbed.

Alva D. McGuire, William W. Shaw, Riverside, for appellant.

H. Thomas Ellerby, Henry F. Walker, Los Angeles, for respondent.

BARNARD, Presiding Justice.

The appellant was injured on February 18, 1950, while riding in an automobile owned and driven by the respondent. She alleged in her complaint that she was a passenger in this car, having been requested by the respondent to assist her in closing a sale of real estate. She also alleged that her injury was proximately caused by the concurrent negligence of the respondent and another defendant, Robert Logue. Respondent's answer denied these allegations, and alleged that appellant was riding as a guest in this car. A jury returned a verdict in favor of both defendants, a motion for a new trial was denied, and this appeal was taken from that part of the judgment which is in favor of this respondent. The appellant contends that the evidence is not sufficient to support the judgment; that respondent's negligence conclusively appears; and that it conclusively appears that the appellant was a passenger and not a guest.

These parties were elderly ladies and had been friends for many years. The appellant operated a real estate office and the respondent had a license as a salesman in connection therewith, but was not active and had never made a sale. On this occasion they left Riverside at about 8:00 A. M. on their way to Huntington Beach, where the respondent was going to sign some escrow papers in the sale of a parcel of real estate which she owned. The accident happened about 8:30 A.M. as they were proceeding westerly through the Santa Ana canyon. It was foggy, and all cars on the road were proceeding slowly and with lights on. At the point of the accident the road was 21 feet wide with a white line along the middle, there was a 6-foot shoulder at the north, a 9-foot "paved" shoulder at the south, and beyond that an 18-foot dirt shoulder. The respondent came up behind a truck and trailer and turned to her left to pass it, straddling the white line. As she did this, she saw the lights of about seven cars approaching from the opposite direction. Some of these cars passed to her left but one, operated by the defendant Logue, suddenly pulled out of the line of approaching traffic and came toward her, striking her car near the left rear fender. Her car zigzagged, hit the front of the truck ahead of her, went through a guard rail and down an embankment. A little later, other transportation was secured and both ladies went on to Huntington Beach where the respondent signed her escrow papers at a bank before it closed about noon.

[1] The evidence is conflicting with respect to negligence on the part of the respondent. While an officer, who arrived some half hour later, testified that the visibility was then approximately 100 feet, there was evidence that the visibility at the time of the accident was from 200 to 300 feet. There was evidence that the respondent saw the lights of the approaching vehicles "but they seemed far away. I thought I had plenty of time to get around the truck." The question of negligence under such circumstances is one of fact. Spendlove v. Pacific Electric Ry. Co., 30 Cal.2d 632, 184 P.2d 873; Watkins v. Nutting, 17 Cal.2d 490, 110 P.2d 384. There was also evidence that another truck, coming easterly, had just drawn off onto the shoulder at the south side of the road for the purpose of letting the line of cars behind it pass, that some of those cars had passed that truck without interfering with the respondent, and that the car driven by Logue suddenly pulled out of the line in front of the respondent. In view of this and other evidence, the question of negligence and proximate cause was clearly one of fact for determination by the jury. Williams v. Kawanami, 53 Cal.App.2d 14, 127 P.2d 58, 996.

[2] The question of passenger or guest was also one of fact and it cannot be held, as a matter of law, that the appellant was not a guest. She testified that she knew that the respondent was trying to sell this property at Huntington Beach; that in January, 1950, the respondent told her that respondent's brother had spoiled a previous

sale of the property and she would not have her relatives help her with an escrow again; that respondent then asked her to go to Huntington Beach with her and advise her about listing the property; that she went in January, 1950, and gave this advice, and was introduced to Mr. and Mrs. Furr, real estate brokers; that on one trip in January she looked up the taxes and found some were delinquent, which the respondent paid; that respondent then listed the property with Mr. and Mrs. Furr; that on February 17, 1950, the respondent showed her a letter from the Furrs asking the respondent to come and enter into the escrow; that respondent told her she wanted her to go with her as she wanted to be sure the sale would go through this time; that she agreed to do this; that the respondent promised to pay her $50 for this service; that she closed her office and went with the respondent; that after the escrow papers were prepared she went over them with the respondent advising her as to their meaning and effect; and that sometime after the accident the respondent paid her $5 and promised to pay the rest of the $50 later.

The respondent testified that she and the appellant were friends and frequently went places together; that she did not ask the appellant to go with her on this occasion, but the appellant requested permission to make the trip; that the appellant went "just to be going along", and had nothing to do with the escrow matter; that she did not promise to pay the appellant anything for going with her; and that she did not pay her any money at any time. Respondent's brother testified that in June, 1949, he and the respondent went to the court house in Santa Ana, found the taxes in question were delinquent, and the respondent paid them. A receipt and title insurance policy showing that these taxes were paid in June, 1949, were introduced in evidence. The Furrs testified that the respondent listed the property with them in September, 1949; that they telephoned to the respondent on February 17, asking her to come down and close the deal; that no letter was written to her; and that they never had met the appellant until the day of the accident, February 18. There is also evidence contradicting appellant's testimony as to what occurred at the bank when the escrow papers were signed, and evidence that on the day after the accident the appellant, in talking to respondent's brother about the escrow, told him "I didn't have anything to do with it."

[3] Nothing more than a conflict in the evidence appears, and the appellant's testimony was discredited in several particulars. The jury's finding on the factual questions presented cannot be disturbed. Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47.

The portion of the judgment appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



115 Cal.App.2d 375

GEARHART et ux. v. SACRAMENTO CITY LINES.

Civ. 8059.

District Court of Appeal, Third District, California.

Jan. 15, 1953.

Action by husband and wife for wife's injuries and their consequential damages arising when wife fell from defendant's bus when bus door was allegedly closed upon her foot. The Superior Court, Sacramento County, John Quincy Brown, J., following verdict for plaintiffs in exact amount of their special damages, denied plaintiffs' motion for trial after the defendant had consented to allow judgment to be increased by $1,000, and entered judgment for the increased amount without consent of plaintiffs, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that trial court's action constituted reversible error.

Judgment reversed.

New Trial ⇐161(1)

In action by husband and wife for wife's injury and their consequential damages when wife fell when bus door was allegedly closed upon her foot, where verdict was for plaintiffs in amount of special damages proved, trial court's denial of husband's and wife's motion for new trial upon defendant's consent to allow judgment to be increased by $1,000 and entry of judgment for the increased amount, without consent of husband and wife, was error.

Hoberg & Finger, San Francisco, and McAllister & Johnson, Sacramento, for appellants.

Gerald M. Desmond, Sacramento, for respondent.

SCHOTTKY, Justice.

Plaintiffs, husband and wife, brought an action for personal injuries to the wife and consequential damages to both of them as the result of the negligence of defendant bus company in closing the rear door of one of their buses while plaintiff Beatrice M. Gearhart was alighting therefrom, catching her foot in the door and causing her to fall to the street. The verdict of the jury was for plaintiffs, and assessed damages against defendant in the sum of $973.30, which was the exact amount of special damages which plaintiffs had proved. Plaintiffs moved for a new trial, as did defendant, these motions presenting the matter of the jury's verdict having failed to provide for any general damages. The trial court entered an order denying plaintiffs' motion for a new trial provided defendant consented to modification of the judgment by increasing it by $1,000. Defendant filed that consent, whereupon plaintiffs' motion for new trial was denied and judgment was entered against defendant in the amount of $1,973.30. Plaintiffs did not consent to the additur, and they have appealed, presenting for determination the matter of whether the trial court has the power to increase a jury verdict by a conditional order of the type here involved with the consent of the defendant but against the will and without the consent of the plaintiffs.

At the time the trial court made its order there was a conflict of authority in California as to the power of the trial court to make such an order, but since the entry of the judgment appealed from our Supreme Court, in the case of Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604, has laid down the rule that the trial court has no power to make such an order. In that case plaintiffs brought suit for personal injury, and the jury returned verdicts in their favor against defendant Vincent Barba, and judgment was entered on said verdicts. Thereafter, pursuant to a conditional order made on plaintiffs' motion for a new trial, the court, with Vincent's consent, modified the judgment against him by increasing the amount of damages awarded. Plaintiffs, who did not consent to the increase, appealed from the modified judgment against Vincent, and the Supreme Court, in reversing the judgment, said 38 Cal.2d at page 358, 240 P.2d at page 608:

> "In support of the practice of denying a new trial over the plaintiffs' objection on condition that defendant consent to pay an increased amount, it has been said that the constitutional guarantee is satisfied when the plaintiff has had one jury trial and that the court's exercise of its power to grant or deny new trials will not be disturbed in the absence of an abuse of discretion. See dissenting opinion Dimick v. Schiedt, 293 U.S. [474] at pages 492-498, 55 S.Ct. [296] at pages 303-305 [79 L.Ed. 603]. However, it is not the mere form of a jury trial to which one is entitled under the Constitution, but the fundamental right to have a jury determination of a question of fact. It is, of course, clear that there has been no denial of such right if a verdict is set aside and motion for new trial granted. Estate of Bainbridge, 169 Cal. 166, 146 P. 427; Ingraham v. Weidler, 139 Cal. 588, 73 P. 415. But it does not follow that, in lieu of ordering a new trial, the court may itself assess damages on conflicting or un-

certain evidence and modify the judgment with the assent of only one party. Neither can such procedure be justified as a proper exercise of the court's authority to prescribe terms in granting or denying motions for new trials. A court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate, and the defendant's waiver of his right to jury trial by consenting to modification of the judgment cannot be treated as binding on the plaintiff.

"It is true that a court has power to require *reduction* of a jury's award over the defendant's objection as a condition to denying his motion for a new trial in cases where damages are uncertain and speculative. Draper v. Hellman Commercial T. & S. Bank, 203 Cal. 26, 42–43, 263 P. 240; Morris v. Standard Oil Co., 192 Cal. 343, 219 P. 998, 30 A.L.R. 1103; Zibbell v. Southern Pac. Co., 160 Cal. 237, 254, 116 P. 513. There is considerable doubt whether this power was recognized at common law, but, as stated by this court in 1893, the practice is 'too firmly established in this state by a long line of decisions to be now questioned.' Davis v. Southern Pac. Co., 98 Cal. 13, 17, 18, 32 P. 646. There may be no real distinction between the powers to increase and decrease an award of damages, but it does not follow that because the practice of remitting damages over the defendant's objection has been approved through what appears to have been a misconception of common law procedure, we must now allow the court to assess increased damages over the plaintiff's objection, a practice which has even less basis in the common law. Like the United States Supreme Court in the Dimick case, we are reluctant to extend the precedent of the remittitur cases, by analogy or otherwise, to the present situation, since it would result in impairment of the right to jury trial.

"Arguments to the effect that courts should be permitted to increase awards without the plaintiff's consent because such procedure is more expeditious and would constitute an improvement over established practice might be persuasive if addressed to the people in support of a constitutional amendment, but they are not appropriate here."

In view of the foregoing decision of the Supreme Court it follows that the trial court erred in entering judgment for the increased amount without the consent of plaintiffs and that the judgment should be and the same is reversed.

PEEK, J., and VAN DYKE, P. J., concur.



HARDIN v. SAN JOSE CITY LINES, Inc. *

Civ. 15357.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1953.

As Amended on Denial of Rehearing Feb. 11, 1953.

Hearing Granted March 12, 1953.

Passenger's action for injury allegedly sustained by sudden stopping of defendant's bus in which she was riding. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., rendered judgment in favor of plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that the trial court's instructions on res ipsa loquitur and speed were not subject to the infirmities claimed by defendant, and that the failure of the court to instruct upon

* Subsequent opinion 260 P.2d 63.

the issue of contributory negligence could not be raised, since the theory of contributory negligence had not been before the trial court.

Affirmed.

1. Trial ⇐296(9)

Res ipsa loquitur instruction, while not commendable, was nevertheless, when considered with other instructions not subject to claimed infirmities of violating defendant's right to jury trial in assuming that accident had occurred, of directing rather than permitting jury to infer negligence, and of improperly directing jury's consideration of question of third party's fault.

2. Carriers ⇐316(1)

Mere fact that third person is involved in accident will not prevent application of doctrine of res ipsa loquitur in a carrier case.

3. Trial ⇐296(9)

Speed instruction, when considered in connection with other instructions in carrier case, was not subject to claimed infirmities of invading the province of the jury by instructing that a violation of the basic speed law was negligence; of assuming occurrence of injury; and of failing to give tangible measure of care of speed and leaving it to whim of jury to determine what was reasonable or prudent. Vehicle Code, §§ 510, 513.

4. Automobiles ⇐146

The term "reasonable care" means the amount of care exacted of motorist under the circumstances detailed by the evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Care".

5. Carriers ⇐321(9)

The term "reasonable", used in speed instruction in carrier case, was not calculated to mislead jury, since word "reasonable" is an ordinary word and in common use and is familiar to average person.

6. Carriers ⇐321(23)

Contention that, because plaintiff in carrier case had testified that bus was going "approximately 30 miles an hour", there was no foundation for giving instruction, that speed in excess of 25 miles per hour in residential district is prima facie unlawful, because "25 is about 30" was captious.

Campbell, Hayes & Custer, San Jose, W. R. Dunn, Burlingame, for appellant.

Rettig & Dunn, San Francisco, for respondent.

BRAY, Justice.

From a judgment entered on a $7500 verdict in favor of plaintiff in a personal injury action, defendant appeals.

Questions Presented.

Instructions. (1) Res ipsa loquitur. (2) Speed. (3) Contributory negligence.

Facts.

As defendant is not challenging the sufficiency of the evidence to show negligence on the part of defendant (other than as affected by the application of the alleged improper instructions), or to support the amount of damages awarded, it is not necessary to detail the evidence. Plaintiff testified that she was injured by the sudden stopping of defendant's bus in which she was riding. Defendant's position in the trial court was (1) that it was not negligent; (2) that no accident occurred at all; and (3) that plaintiff's injuries were the result of a prior accident or another occurrence.

Plaintiff testified that about half a block from the street where she desired to alight she rang for a stop and got up. She stood at the top of the stairwell on the right side of the driver holding on to a vertical bar with her left hand and more or less facing the side of the bus. She had her right arm around a large shopping bag containing several packages. The bus was going approximately 30 miles per hour. In that vicinity the posted signs say 25 miles per hour. About 100 to 150 feet from the regular bus stop the bus suddenly stopped. Plaintiff was thrown forward, and her lower back struck the front of the bus. She thought that she struck the front horizontal rail. The driver said,

"That darned fool will kill himself and someone else, too." In answer to the driver's inquiry she said she did not think she was hurt. However, she went straight home and to bed as she was suffering a great deal of pain. Defendant introduced evidence which had it been believed by the jury would have supported a finding that there was no such accident and that plaintiff's condition was otherwise caused.

(1) Res Ipsa Loquitur.

[1, 2] Defendant concedes that it was proper for the court to instruct on the doctrine of res ipsa, but contends that the instruction given was erroneous. "Now, *from the happening of an accident such as involved here, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant.* That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contradictory evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it, in fact, exercised the utmost care and diligence, or that the accident occurred without being proximately caused by any failure of duty upon it, the bus' part. As applied to a common carrier, such as the defendant San Jose City Lines, Inc., the word 'negligence' whenever hereafter used in the instructions, means any breach of duty towards a passenger, evidence of which has been received in this trial." [1]

Defendant contends, first, that the italicized portion of said instruction denied defendant due process of law since it violated defendant's right to a jury trial in assuming that an accident had occurred. This instruction has been considered by courts in several cases and upheld, even though criticized in some of them. In Prunty v. Allred, 73 Cal.App.2d 67, 165 P.2d 935, it was held that under the facts of the case it was not prejudicially erroneous. This instruction is taken from B.A.J.I.[2] It is almost identical with the one upheld in Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 239 P.2d 671, 677, a case where, as in ours, it was contended no accident had occurred. There, after the words "From the happening of the accident involved in this case" appeared "*as established by the evidence*, there arises an inference * * *." The instruction here was the same except that it left out "as established by the evidence". The omission of these words makes no substantial difference between the two instructions. In the Freitas case the same objection was made as defendant makes here, namely, that the instruction takes from the jury "the question of whether or not the accident to respondent occurred at all, but improperly assumed the existence of such an accident." 108 Cal.App.2d at page 757, 239 P.2d at page 676. As to this contention, the court said, 108 Cal.App.2d at page 757, 239 P.2d at page 676: "While the instructions complained of could undoubtedly have been clearer, the difficulty is that appellant failed to request that the instruction he now claims it was error to omit should have been given to the jury. In the absence of a request for clarification, appellant is in no position to complain." Practically the same instruction was approved in Dieterle v. Yellow Cab Co., 53 Cal.App.2d 691, 128 P.2d 132, and in Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313, although this particular point was not raised against it. As said in the Freitas case, supra, the instruction could have been clearer. However, a reading of all the instructions demonstrates that the jury could not have been misled into believing that by the instruction the court was telling them an accident had occurred or that it was taking that issue away from the jury. For example, after stating that defendant had denied that plaintiff was injured while riding in the bus the court said, "This case therefore presents an issue as to whether or not an accident alleged by the plaintiff occurred" and "the burden is on the plaintiff to prove by a preponderance of the evidence that an accident occurred as she claimed. If plaintiff in this case has failed to prove by a preponderance of the evidence that an accident occurred as she

1. All italics added unless otherwise noted.

2. B.A.J.I. Instruction 206B, California Jury Instructions Civil, 3d Ed., 1943, p. 321.

claimed, then of course it would be your duty to return a verdict for the defendant." In Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344, it was contended that instructions on res ipsa misled the jury away from the defenses that the plaintiff was injured by a bottle of different brand than defendant's. The court held, in effect, that the instructions as a whole show that the jury could not have been misled.

The second contention is that the instruction *directed* rather than *permitted* the jury to infer negligence. In Dieterle v. Yellow Cab Co., supra, 53 Cal.App.2d 691, 128 P.2d 132, 134, almost the reverse of this contention was made concerning the same instruction. There the plaintiffs contended that the words "warrants a verdict for the plaintiffs" emasculated the instruction by making the drawing of the inference permissive rather than mandatory. The court considered the instruction along with other instructions and held, in effect, that the drawing of the inference is mandatory, saying, 53 Cal.App.2d at page 698, 128 P.2d at page 135: "It thus appears from the whole context of the instructions above referred to, that the direction to the jury, relative to the inference, was that the verdict should be for plaintiffs if the inference of negligence to which plaintiffs were entitled under the doctrine of *res ipsa loquitur* was not rebutted or overcome by defendants." (Italics not added.)

The editors of B.A.J.I.1950 Supp. take the position in their comments on page 244 that the instruction on res ipsa should be given only when the judge can hold as a matter of law that "the thing does speak for itself" and that the inference of negligence ought to be drawn. The cases dealing with the instruction, other than the Dieterle case, supra, do not agree with this statement. Among others holding that the inference is permissible rather than mandatory are Zentz v. Coca Cola Bottling Co., supra, 39 Cal.2d 436, 247 P.2d 344; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335.

In Freitas v. Peerless Stages, Inc., supra, 108 Cal.App.2d 749, 239 P.2d 671, this court, considering the same instruction, held that while the words "there arises an inference" might be interpreted to mean that the inference is compulsory, yet taken with the other instructions its more reasonable construction was that the inference was permissive and not mandatory. In Scott v. Burke, supra, 39 Cal.2d 388, 247 P.2d 313, this instruction was impliedly approved, although not discussed.

Defendant attacks the instruction upon the ground that the portion of the instruction to the effect that the jury "should weigh any evidence tending to overcome that inference" etc., told the jury that they should consider other evidence *only* for the purpose of determining its weight against "the court made inference" and not in connection with the initial question as to whether the sudden stop might have been due to the fault of a third person. This is based upon plaintiff's testimony that the bus driver made a remark which indicated that his sudden stopping of the bus might have been due to whomever he meant when he said, "That darned fool will kill himself and someone else, too." For the reasons above stated, the instruction did not do so. Moreover, the fact that a third person was involved in the accident, if any one was, would not prevent the application of the doctrine of res ipsa in a carrier case. Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Sloan v. Original Stage Line, Inc., 124 Cal.App. 317, 12 P.2d 465.

William L. Prosser in his illuminating article "Res Ipsa Loquitur in California," 37 Cal.Law Rev., p. 183, points out that in the earlier common carrier cases in California the doctrine of res ipsa was not mentioned. They simply held that the carrier had the burden of proving by a preponderance of the evidence that the injury was not caused by its fault. The first mention of the doctrine in a carrier case was in 1898, in McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 P. 324.[3]

3. For discussion of the early rule and citation of both early and late cases including a number of carrier cases see Zentz v. Coca Cola Bottling Co., supra,

In Moeller v. Market Street Ry. Co., 27 Cal.App.2d 562, 81 P.2d 475, a carrier case, it was held that a res ipsa loquitur instruction which stated that a *presumption* instead of an *inference* of negligence arose, while erroneous, was not prejudicially so. Waite v. Pacific Gas & Elec. Co., 56 Cal. App.2d 191, 132 P.2d 311, was also a carrier case. Pezzoni v. City & County of S. F., 101 Cal.App.2d 123, 225 P.2d 14, was a case where the accident was substantially the same as that testified to by the plaintiff here. The giving of instructions on res ipsa loquitur was approved although there was no discussion of the form of the instructions.

As we said in the Freitas case, the instruction could have been clearer. While here, for the reasons aforesaid, we find no prejudice in the giving of this instruction, it nevertheless is a dangerous one to give, particularly in a case where, different than here, a common carrier is not involved. It does leave open the possibility that it might be contrued to mean that the court is stating that an accident happened and that the inference is compulsory. Moreover, the phrase "that it is incumbent upon the defendant to rebut the inference", etc., is uncertain. The instruction should not be used. As said by Prosser, p. 231, the type of instruction on this subject in Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886, is "simple and comprehensible to the ordinary citizen; it appears to say everything that is needed and avoids baffling the jury with the procedural complications."

(2) Speed.

[3–6] After instructing that the speed of a vehicle on the highway, considered as an isolated fact and simply in so many miles an hour is not proof of negligence nor of the exercise of ordinary care, and that whether that rate of speed is a negligent one is a question of fact depending upon all the surrounding circumstances, the court gave the basic speed law, Veh. Code, § 510: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." It also instructed that in a residence district a speed in excess of 25 miles per hour would be prima facie unlawful but that a violation of law was of no consequence unless it was the proximate cause of an injury found to be suffered by plaintiff. Defendant contends that instructing that a violation of the basic speed law is negligence invades the province of the jury and violates section 513, Vehicle Code. Section 513 merely declares that a violation of any prima facie speed limit declared in section 511 does not establish negligence as a matter of law, but requires that it be established as a fact that the operation of the vehicle at such excess speed constitutes negligence. It is obvious that there is no conflict between the two sections. Read together they establish that speed in excess of any prima facie speed limit is not negligence per se but if the speed, whether greater or lower than such limit, is greater than reasonable or prudent under the conditions then existing it then constitutes negligence. We fail to see how this issue was taken away from the jury by these instructions. See Rednall v. Thompson, 108 Cal.App.2d 62, 239 P.2d 693; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 587, 177 P.2d 279; Jones v. Fat, 86 Cal.App.2d 823, 826, 195 P.2d 933. The statement "if it is the proximate cause of the injury complained of" in view of all the instructions given does not assume the occurrence of the injury.

Defendant attacks section 510 on the ground that stating "a speed greater than is reasonable or prudent" gives no tangible measure of care of speed and leaves it to the whim of the jury to determine what is reasonable or prudent. In view of the years of defining negligence as relating to what a *prudent* person would or would not do, in instructing that guilt in a criminal case must be beyond a *reasonable* doubt and that due care is based upon what an ordinarily *prudent* or *reasonable* person would

39 Cal.2d 436, 247 P.2d 344. That case also contains an excellent summation of the rules applicable to the res ipsa doctrine and an exhaustive correlation of authorities.

do on not do, it is rather late now to attack the measure of speed set forth in section 510. As said in Reed v. Stroh, 54 Cal. App.2d 183, 188, 128 P.2d 829, 832: "The term 'reasonable care' was not calculated to mislead the jury. The word 'reasonable' is an ordinary word and in common use, and is familiar to the average person. It occurs frequently in statutes that were intended for the daily guidance of laymen. Vehicle Code, § 510 * * *. In any event, it means the amount of care exacted of the motorist under the circumstances detailed by the evidence." The contention that because plaintiff testified that the bus was going "approximately 30 miles an hour" there was no foundation for giving the 25 mile an hour instruction because "25 is about 30" is captious.

(3) Contributory Negligence.

The court did not err in refusing instructions on contributory negligence. There were no facts which would have justified such instructions.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



115 Cal.App.2d 333

PALPAR, Inc. v. THAYER et al.

MILLER v. PALPAR, Inc. et al.

Civ. No. 14934.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1953.

Action for partition of a tractor which was originally purchased by tenants in common. A cross-complaint was filed. The Superior Court, County of San Mateo, John D. Foley, J., entered interlocutory decree, from which plaintiff appealed. The District Court of Appeal, Dooling, J., held that plaintiff's equitable lien upon share of its cotenant to secure payment by cotenant to plaintiff of any rents or profits which cotenant might be found to owe plaintiff upon an accounting of cotenant's use of tractor, would not be enforced against cotenant's share which had been transferred to an innocent purchaser for value.

Decree affirmed, with directions.

1. Appeal and Error ⇐907(3)

Where appeal was on the judgment roll alone, trial court's finding that allegation of cross-complaint was true, was conclusive.

2. Tenancy In Common ⇐44

Equitable lien of tenant in common of tractor upon the share of his cotenant, to secure payment by cotenant to tenant of any rents or profits which cotenant might be found to owe to tenant upon an accounting of cotenant's use of tractor, would not be enforced against cotenant's share which had been transferred to an innocent purchaser for value.

3. Appeal and Error ⇐1096(3)

Where case was tried, appealed, and retried on the pleadings as framed, without objection to such pleadings, technical objection thereto, raised for first time on appeal from retrial, was too late.

Alfred J. Harwood, San Francisco, for appellants.

Burt W. Busch, Lakeport, for respondent Miller.

Elizabeth Cassidy, San Francisco, for respondent W. H. Thayer, Jr.

DOOLING, Justice.

Phases of this litigation, which involves an action for the partition of a tractor originally purchased in 1941 and which counsel on oral argument admitted has now very little value by reason of the ravages of time, have been twice previously before this court on appeal. Palpar, Inc. v. Thayer, 82 Cal.App.2d 578, 186 P.2d 748; Id., 91 Cal.App.2d 176, 204 P.2d 654. The tractor was originally purchased by Thayer and Morton as tenants in common. Palpar, Inc. has succeeded to Morton's interest and

Miller has acquired Thayer's. While Thayer was in exclusive possession of the tractor Thayer and Miller executed a promissory note to a bank for $2319 and Thayer executed a chattel mortgage on the tractor to secure the payment of this note. Miller afterwards paid the note and received a bill of sale from Thayer purporting to transfer full title in the tractor to Miller. Thereafter, pursuant to the judgment later reversed as to Palpar, Inc. by this court in the opinion reported in 82 Cal.App.2d 578, 186 P.2d 748 but which became final as to Thayer because of his failure to appeal, Miller purchased Thayer's interest at a foreclosure sale.

This appeal by Palpar, Inc. and Morton is from portions of an interlocutory decree of partition in which the court has decreed that Palpar, Inc. and Miller each owns an undivided one-half of the tractor. The appeal is on the judgment roll alone.

The interlocutory decree determined that appellant Palpar, Inc. is entitled to an accounting from Thayer of one-half of any profits made by Thayer while he had exclusive possession of the tractor. The court determined that appellant Palpar, Inc. did not have a lien on Miller's interest in the tractor to secure the amount which may be found due from Thayer on this accounting. This is the main target of appellants' attack.

[1] Preliminarily we may dispose summarily of appellants' contention that Miller was not an innocent purchaser of Thayer's interest in the tractor. The court found to be true an allegation in Miller's cross-complaint that at the time that he received the bill of sale from Thayer Miller "had no knowledge of any claim or interest in and to said equipment by anyone whomsoever other than said defendant, W. A. Thayer, Jr., and said bank." This appeal being on the judgment roll alone this finding is conclusive that Miller acquired title to Thayer's interest in the tractor without knowledge of any equities existing in favor of Palpar, Inc. or its predecessor Morton.

Appellants' main contention is that cotenant A has an equitable lien upon the share of his cotenant B to secure the payment by B to A of any rents or profits which B may be found to owe to A upon an accounting of B's use of the common property: and that this lien may be enforced against B's share even though B may have transferred his interest to an innocent purchaser for value. It is conceded that this is a question of first impression in this state.

There appear to be three rules on the subject in the various jurisdictions of this country: 1. That one cotenant has no lien on the share of his cotenant for rents and profits, although in a partition action a court of equity having the parties and the property before it may impose such a lien by its decree on the debtor cotenant's interest; 2. That one cotenant has an equitable lien on the interest of his cotenant for rents and profits, but that this lien will not be enforced where that interest has passed to an innocent purchaser; and 3. That such a lien exists and may be enforced even where the interest has been acquired by an innocent purchaser. (See the note in 27 A.L.R. 235–239 where the cases in support of these several views are collected.)

The California courts have never been compelled to face up to the question whether a lien in favor of one cotenant upon the interest of the other cotenant exists independently of decree or whether it is only imposed by the court in its decree as a remedy. In Willmon v. Koyer, 168 Cal. 369, 375, 143 P. 694, 696, L.R.A.1915B, 961, the court said:

> "On the claim that the court should not have charged the portion of the property assigned to defendant on partition with the lien for the payment of the amount found to be due plaintiff from defendant: There is no merit in this claim.
>
> "It was an appropriate judgment to enter under the pleadings. In fact, it is always appropriate to do so in partition as the only effectual way to secure a cotenant making advances and obtaining judgment therefor."

This seems to be the language of a court approving the creation of a lien by the decree to make the award effective rather than language holding that there was a preexisting lien which the court by its decree enforced.

The same may be said of Garcia v. Venegas, 106 Cal.App.2d 364, 369, 235 P.2d 89, 92, where the court said:

> "It is meet, in equity, when declaring the interest and quieting the title of one co-tenant against another, to *declare* a lien against the interest so declared, for a due proportion of proper expenditures made by the other co-tenant in preserving and protecting the common property." (Emphasis ours.)

Cases such as Middlecoff v. Cronise, 155 Cal. 185, 100 P. 232, and Huntington v. Perrin, 65 Cal.App. 20, 223 P. 94 while they have general language that appellants appeal to as supporting their contention were not directed to the question before us and are of no help in its solution.

The rule contended for by appellants, that such lien may be enforced against the interest of an innocent purchaser is in force in very few jurisdictions in this country. Appellants cite the following cases as being in point: Beck v. Kallmeyer, 42 Mo.App. 563, 569; Hines v. Munnerlyn, 57 Ga. 32, 33; McArthur v. Scott, C.C., 31 F. 521; and Foltz v. Wert, 103 Ind. 404, 2 N.E. 950.

The subsequent fate of Beck v. Kallmeyer, supra, upon which appellants most strongly rely, as traced through Shepard's Missouri Citations, has not been particularly happy. On the point in question it has been cited four times by other courts, and never in its home state of Missouri. By two courts it was expressly disapproved. Vaughn v. Lanford, 81 S.C. 282, 62 S.E. 316, 318; Aylward v. Lally, 147 Wash. 29, 264 P. 983, 987. In one case it was distinguished. Flach v. Zanderson, Tex.Civ. App., 91 S.W. 348, 351. In one case it was cited in support of the rule that as *between the original cotenants* such a lien will be enforced. Pitman v. Smith, 135 App.Div. 904, 120 N.Y.S. 193, 194. It is apparent that the impress of this decision on the law on this subject in the 62 years since it was decided has been minimal. The only two courts to which it was cited which had squarely before them the question of lien or no upon the cotenant's interest where that interest had passed to an innocent purchaser held that it was wrongly decided and refused to follow it. The Indiana case was cited by the Missouri court as support for its conclusion. The federal court case is described by the writer of the note in 27 A.L.R. 239 as "obscurely reported." The rule adopted by the Georgia courts is peculiar to that state and if followed would be of no comfort to appellant in this case. The Georgia courts hold that no lien can be enforced where title has been conveyed by the debtor cotenant to a third person even as security (our case on its facts) but that a lien will be enforced as against a third party lien-holder. Carmichael v. Citizens' & Southern Bank, 162 Ga. 735, 134 S.E. 771.

It is clear that the cases cited by appellants represent a minority view and that in the preponderance of jurisdictions which have considered the question the courts have held that no lien of this character will be impressed upon the interest of a former cotenant which has been transferred to an innocent purchaser. 14 Am.Jur., Cotenancy, § 40 pp. 107–108; 27 A.L.R., supra, and cases cited on p. 237; 4 Thompson on Real Property, Perm.Ed., § 1910, p. 434; Aylward v. Lally, supra, 264 P. 983, 987; Vaughn v. Lanford, supra, 62 S.E. 316, 318–319; Kirby Lumber Co. v. Temple Lumber Co., 125 Tex. 284, 83 S.W.2d 638, 642 et seq.; 27 Harv.L.Rev. 397.

The reason given by the court for this rule in Vaughn v. Lanford, supra, 62 S.E. 316, 318 is:

> "Such liens would be indefinite in amount, and undisclosed by public records, upon which third parties, in dealing with the owners of property, ordinarily have a right to rely. They would greatly injure tenants in common by impairing the market value of their shares and interests, because of the apprehension, on the part of those contemplating purchasing such interests or otherwise dealing with them, that claims for rents might be established as superior liens."

[2] Similar language is quoted from 7 R.C.L. 836 in Aylward v. Lally, supra,

264 P. at page 987. Appellants seize on the reference to public records and attempt a distinction between real and personal property on that basis. But omitting all reference to public records it is still true of personal as it is of real property that "Such liens would be indefinite in amount" and "would greatly injure tenants in common by impairing the market value of their [shares and] interests". We feel fully justified in holding that no such lien may be enforced against the interest of a former cotenant in the hands of an innocent third person.

[3] Appellants point to an allegation in Miller's cross-complaint that Thayer gave him a bill of sale of the tractor in question and a "Cletrac Tractor Bulldozer, Model 35" and argue that under Code Civ. Proc. sec. 758 Miller was required to allege the "nature and extent" of this additional security. We need not decide, as appellants claim, whether the word "extent" in this section means "value". The case has been twice tried on this complaint in intervention, on the first appeal this technical objection to the pleading was not raised, and this court sent the case back for a retrial on the pleadings as framed. Palpar, Inc. v. Thayer, supra, 82 Cal.App.2d 578, 186 P.2d 748. We do not hesitate to hold that appellants' present attack on this allegation of the cross-complaint comes too late.

In our opinion in Palpar, Inc. v. Thayer, 91 Cal.App.2d 176, 178, 204 P.2d 654, 655, we said of the motion for a money judgment against Miller as a part of the motion for restitution: "The right of Palpar, Inc. to any recovery from Miller for the value of use of its interest in the tractor, if any, depends upon the determination of the merits of the action and properly should await the final judgment." By its interlocutory decree the court has ordered that that motion "be considered and determined by the Court after final judgment herein." It should more properly be decided at the same time. This will not require a reversal.

The interlocutory decree is affirmed with directions to the trial court to hear the motion for restitution and decide it as a part of or contemporaneously with the final judgment. Respondents to have costs on appeal.

GOODELL, Acting P. J., and JONES, J. pro tem., concur.



115 Cal.App.2d 394

Ex parte TANNENBAUM.

Ex parte BROWN.

TANNENBAUM v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO.

BROWN v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO.

Cr. 2900, 2901; 15673 and 15674.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1953.

Petitions for writs of habeas corpus and writs of prohibition. The District Court of Appeal, Peters, P. J., held that the testimony of an accomplice was sufficient upon which to hold defendant to answer.

Writ denied.

Criminal Law ⇐238

Testimony of accomplice was sufficient upon which to hold defendant to answer.

John R. Golden, San Francisco, for petitioner Joseph Tannenbaum.

Leslie C. Gillen, San Francisco, Sol. A. Abrams, San Francisco, for petitioner Carl E. Brown.

PETERS, Presiding Justice.

The petitions for writs of habeas corpus are denied.

The court is of the opinion that the rule of People v. Talle, 111 Cal.App.2d 650, 245 P.2d 633, applying Stats. of 1871, p. 319,

was not here violated. See generally In re Lemon, 15 Cal.App.2d 82, 59 P.2d 213; United States v. Price, C.C., 163 F. 904. We are further of the view that the testimony of an accomplice is sufficient upon which to indict as it is to hold to answer. People v. McRae, 31 Cal.2d 184, 187 P.2d 741. The other points raised do not necessitate discussion. The petitions for writs of prohibition are denied.



114 Cal.App.2d 772

SANCHA v. ARNOLD.

Civ. 8191.

Sac. 6276.

District Court of Appeal, Third District, California.

Jan. 16, 1953.

Hearing Denied Feb. 11, 1953.

Action against administrator of estate of deceased putative husband for specific performance of oral contract that plaintiff and defendant's decedent would become and live together as common-law husband and wife and upon death of either, their property would belong to survivor. The Superior Court, Lassen County, Ben V. Curler, J., entered judgment for plaintiff, and defendant appealed. The judgment was affirmed by the District Court of Appeal, 251 P.2d 67. On petition for rehearing, the District Court of Appeal, Per Curiam, held that the record supported findings of fact upon which judgment for plaintiff was based.

Petition for rehearing denied.

Specific Performance ⇐121(3)

In action against estate of deceased putative husband for specific performance of oral contract that plaintiff and putative husband would become and live together as husband and wife and that upon death of either all their property should belong to survivor, record supported findings of fact upon which judgment for plaintiff was based.

Stanley Arnold, Susanville, Louis Ferrari, Sylvester Andriano and Theodore Cicoletti, San Francisco, of counsel, for appellant.

Arthur J. Anderson and Hardin Barry, Susanville, for respondent.

PER CURIAM.

Appellant asks a rehearing on the ground that the recital of facts relied on by this Court to support its judgment is erroneous in material respects. Other grounds are stated which we think we need not specially refer to. Petitioner states that the most serious error was committed when this Court stated "that during all of that period she (respondent) believed herself to be his (Sancha's) common-law wife and that she was married to him." Says petitioner: "There is no evidence to support this statement. Neither respondent nor anyone on her behalf testified that she believed herself to be the wife of Sancha." On page 45 of the reporter's transcript the following questions were asked of respondent and the following answers given:

"Q. I think you said this morning that Sancha wanted you to live with him as his wife? A. That's right.

"Q. Over in Reno, was it? A. That's right.

"Q. When was that? A. In 1926.

"Q. From that time on what was the relationship between you and Sancha, the personal relationship? A. Man and wife.

"Q. In every respect? A. That's right.

"Q. What was your honest belief in regard to it? A. That we were really married.

"Q. That continued to the date of his death? A. That's right."

The petition continues with other assertions contrary to the record, but it is not necessary, we think, to do more than by the foregoing to illustrate the petitioner's carelessness in making these assertions. We have examined the record in the light of the charges made and think there is no foundation in the record for those charges.

The petition for rehearing is denied.

Hearing denied; SCHAUER, J., dissenting.



115 Cal.App.2d 382

CITY OF CORONA v. CORONA DAILY INDEPENDENT.

Civ. 4486.

District Court of Appeal, Fourth District, California.

Jan. 15, 1953.

Rehearing Denied Feb. 6, 1953.

Hearing Denied March 12, 1953.

Action by municipality against newspaper publisher, to collect a business license tax. The Superior Court, Riverside County, R. Bruce Findlay, J., assigned, entered judgment for the publisher and the municipality appealed. The District Court of Appeals, Griffin, J., held that a nondiscriminatory tax, imposed by ordinance upon the doing of business within the city, including that of publishing a newspaper, for the sole purpose of maintaining the municipal government, was not void as a violation of freedom of the press.

Judgment reversed.

1. Municipal Corporations ⇐122(2)

Where no fundamental right is involved or presented, every presumption is in favor of the validity, constitutionality, and reasonableness of a municipal ordinance, and the burden is upon the one who attacks an ordinance valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.

2. Constitutional Law ⇐206(1)

Newspapers and the business of newspaper publication are not made exempt from the ordinary forms of taxes for the support of local government by the provisions of the First and Fourteenth Amendments to the United States Constitution. Government Code, § 37101; U.S.C.A.Const. Amends. 1, 14.

3. Constitutional Law ⇐206(1)

A nondiscriminatory tax, imposed by ordinance upon the doing of business within the city, including the business of newspaper publication, for the sole purpose of maintaining the municipal government, was not void as a violation of freedom of the press. Government Code, § 37101; U.S.C.A.Const. Amend. 1.

John T. Ganahl, City Atty., Corona, Alphonse E. Ganahl, of Ganahl & Ganahl, Corona, of counsel, for appellant.

Wilson, Selig & Cotter, Los Angeles, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant City of Corona, a municipal corporation of the sixth class, brought this action to collect a business license tax in the sum of $24. The tax was levied upon defendant and appellant Corona Daily Independent, a partnership doing a newspaper publishing business within said city. Defendant had previously paid the tax up to April 1, 1951, but refused to pay it thereafter. The ordinance in question applies to all businesses, as therein defined, conducted in said city, including the business of "newspaper publication". The trial court found in favor of defendant and entered judgment accordingly. Plaintiff appealed.

The ordinance in question provides that a license fee shall be paid to the city by any person, firm or corporation commencing, transacting, or engaging in any business, show, exhibition, or lawful game in said city. Then follows a list of businesses

totaling about 100 in number, and the required fee payable for the privilege of conducting said businesses. Other sections provide for the manner in which application shall be made for such a license, the manner of granting it, and a penalty for operating such a business without first having obtained a license so to do. The license fees thus levied are payable into the general fund of the city.

As agreed by the parties, the only question involved is: Does the ordinance, insofar as it levies a business tax of $8 per quarter upon the business of newspaper publications within said city abridge the freedom of the press in violation of the First and Fourteenth Amendments to the Constitution of the United States.

In support of the judgment defendant relies principally on the First Amendment to the Constitution, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; * *." And argues that these fundamental rights and liberties are likewise safeguarded against abridgment by state legislation by the operation of the Fourteenth Amendment, which provides, in part: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"; and that municipal ordinances adopted under State authority constitute State action and are subject to the requirements of the Fourteenth Amendment, citing such cases as Winters v. People of the State of New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Schneider v. State of New Jersey, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155; Grosjean v. American Press Co., 297 U.S. 233, 243, 56 S.Ct. 444, 446, 80 L.Ed. 660; Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949; and In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675.

It is also argued by defendant that the normal presumption of constitutionality does not exist where legislation on its face involves the guaranties of the First Amendment to the Constitution, citing such cases as Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115, 63 S.Ct. 870, 876, 87 L.Ed. 1292; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed 1628; and In re Porterfield, supra.

[1] There is authority to the effect that the normal presumption of constitutionality does not exist if the legislation, on its face, is repugnant to the guaranties of the First Amendment to the Constitution. However, it also appears that where no right of free speech or any other fundamental right is involved or presented, every presumption is in favor of the validity, constitutionality, and reasonableness of a municipal ordinance, and the burden is upon the one who attacks an ordinance valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; In re Porterfield, supra; Pacific Gas & Electric Co. v. Police Court of the City of Sacramento, 28 Cal.App. 412, 421, 152 P. 928; 6 McQuillan, Municipal Corporations, Third Ed. p. 18, sec. 20.08; 18 Cal. Jur. p. 931, sec. 217; 16 C.J.S., Constitutional Law, p. 234, sec. 98.

Upon the contention that the ordinance is invalid on its face and unconstitutional because it is an attack upon the exercise of freedoms and privileges secured by the Constitution, defendant relies principally upon Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938; Murdock v. Commonwealth of Pennsylvania, supra; Jones v. City of Opelika, 319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292; Busey v. District of Columbia, 319 U.S. 579, 63 S.Ct. 1277, 87 L.Ed. 1598, and (on remand) 78 U.S.App.D.C. 189, 138 F.2d 592; Grosjean v. American Press Co., supra; and People on Complaint of Mullaly v. Banks, 168 Misc. 515, 6 N.Y.S.2d 41.

The Follett, Murdock, Jones and Busey cases hold that distribution of religious literature in return for money, when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment, and is im-

mune from interference by the requirement of a license. The Murdock case and companion cases involve ordinances imposing a license tax for the privilege of canvassing or soliciting within a municipality, and the tax was endeavored to be enforced against Jehovah's Witnesses who were selling religious books, etc., by house to house canvassing. Mr. Justice Douglas delivered the majority opinion of the court, and defendant here points out some comforting language used in that case to support his contention in reference to freedom of the press. It was there held that the ordinance was unconstitutional as being an invasion of the rights of freedom of religion, speech and press, predicated mainly upon the theory that the activities of the solicitors were purely religious and not commercial, and held that the ordinance requiring a tax for the purpose of regulating their religious activities was in derogation of the First Amendment to the Constitution. In an equally strong dissenting opinion delivered by Mr. Justice Reed, and concurred in by Mr. Justices Roberts, Frankfurter, and Jackson, it was succinctly stated that in the First Amendment to the Constitution, where it provides that the Congress shall make no law prohibiting the *free* exercise of speech or press, it was not intended that by the use of the word "*free*" it was to be without cost, but meant a privilege to print or pray without permission and without accounting to authority for one's actions; that the draftsmen of the amendments had in mind the *practice* of religion and the right to be heard, rather than any abridgment or interference with either, by taxation in any form; that in no provision in the Federal Constitution was general taxation of church or the press interdicted; that religious societies depend for their exemptions from taxation upon State Constitutions or general statutes, and not on the provisions of the Federal Constitution; that no decision holds that by virtue of any Federal Constitutional provision any church or press is free from the financial burden of government. Therein many cases relied upon by defendant, and particularly Grosjean v. American Press Co., supra [297 U.S. 233, 56 S.Ct. 449], are distinguished. In the latter case a gross receipt tax was imposed upon advertisements in newspapers with a circulation of more than 20,000. The court held it was a calculated and deliberate device in the guise of a tax to limit the circulation, and held it unconstitutional, but added that: "*It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.*" And it was also argued that the tax there imposed might be used readily to restrict the dissemination of ideas. The author agreed, but stated that the possibility of misuse does not make a tax unconstitutional for, as here, no abuse was claimed. It was then stated that if the tax is used oppressively, the law will protect the victims of such action. Mr. Justice Frankfurter, in his dissenting opinion in Jones v. City of Opelika, supra [319 U.S. 105, 63 S.Ct. 900], said that: "The power to tax, like all powers of government, * * can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have power can misuse it." And he quoted Mr. Justice Holmes as saying: "The power to tax is not the power to destroy while this Court sits", and stated:

> "Just so long as an occupation tax is not used as a cover for discrimination against a constitutionally protected right or as an unjustifiable burden upon it, from the point of view of the Constitution of the United States it can make no difference whether such a money exaction for governmental benefits is labeled a regulatory fee or a revenue measure."

In Watchtower Bible & Tract Society v. County of Los Angeles, 30 Cal.2d 426, 182 P.2d 178, the Supreme Court of this State recognized the cases here cited by defendant. However, it held the tax imposed in that case was not a license tax but an *ad valorem* tax for general revenue purposes. The point here involved was not decided.

The Banks case, decided in 1938, involved an ordinance prohibiting the sale of merchandise on city streets without the payment of a license fee. The court held it unconstitutional.

It now appears, in 1951, in the case of Breard v. City of Alexandria, La., 341 U.S. 622, 71 S.Ct. 920, 923, 95 L.Ed. 1233, involving an ordinance prohibiting peddlers from calling upon the occupants of private residences without having been requested or invited to do so, six members of the Supreme Court, in an opinion delivered by Mr. Justice Reed, held that there was no violation of the due process clause, or any unconstitutional abridgment of freedom of speech and press by virtue of the terms of the ordinance. He said:

> "This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all. * * *
>
> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. * * * We see no abridgment of the principles of the First Amendment in this ordinance."

In a dissenting opinion by Mr. Justice Black, he states that:

> "On May 3, 1943, this court held that cities and states could not enforce laws which impose flat taxes on the privilege of door-to-door sales of religious literature. (citing the Jones and Murdock cases.)
>
> "* * * Over strong dissents, these laws were held to invade liberty of speech, press and religion in violation of the First and Fourteenth Amendments. Today a new majority adopts the position of the former dissenters and sustains a city ordinance forbidding door-to-door solicitation of subscriptions to the Saturday Evening Post, * * *. Since this decision cannot be reconciled with the Jones, Murdock and Martin v. Struthers [319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313] cases, it seems to me that good judicial practice calls for their forthright overruling. * * *"

[2] As will be noted, none of the cases cited by defendant deals with a business license imposed upon the press. Plaintiff has cited authority directly dealing with that subject. Section 37101 of the Government Code provides:

> "The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city, including shows, exhibitions, and games. * * *"

There is ample authority to the effect that newspapers and the business of newspaper publication are not made exempt from the ordinary forms of taxes for the support of local government by the provisions of the First and Fourteenth Amendments to the Constitution of the United States. Grosjean v. American Press Co., supra; Tampa Times Co. v. City of Tampa, Fla., 29 So.2d 368, Id., 332 U.S. 749, 68 S.Ct. 69, 92 L.Ed. 336.

The principal question here involved appears to be of first impression in the State of California. However, license taxes similar to the tax here in question and imposed upon the press have been upheld by the courts of other states as not in violation of the constitutional guarantee of freedom of the press. Among the cases decided are In re Jager, 1888, 29 S.C. 438, 7 S.E. 605, 609, wherein a criminal action was brought against one John McElree, charged with publishing a newspaper without having first procured a license, in violation of the municipal business license tax ordinance. The defendant was found guilty and appealed. The Supreme Court of South Carolina sustained the conviction and said:

> "But we cannot see that a tax on the business of publishing a newspaper is any more an abridgement of the liberty of the press than a tax on the office, type, and other material used in the business."

In City of Norfolk v. Norfolk Landmark Publishing Co., 1898, 95 Va. 564, 28 S.E.

959, the court had before it a municipal ordinance imposing a business license tax upon every person engaged in the publication of a newspaper. The amount of the tax was not stated. The court held the ordinance valid, not an abridgment of the freedom of the press, and said, 28 S.E. at page 960:

"The guaranties of the constitution and bill of rights in favor of the freedom of the press, freedom of speech, and personal liberty, were never intended to restrict the right of taxation for the support of the government. If these guaranties did restrict the power of taxation, the government would soon be insolvent, and powerless to furnish the protection claimed."

In Giragi v. Moore, 48 Ariz. 33, 64 P.2d 819, 110 A.L.R. 314, appeal dismissed in 301 U.S. 670, 57 S.Ct. 946, 81 L.Ed. 1334, plaintiffs brought suit for declaratory relief as to the Arizona Excise Revenue Act of 1935, and challenged the constitutionality of the act upon the grounds here mentioned. The court held that the tax was a general sales tax law levying a one percent tax upon the sales or gross income of practically every business or concern engaged in selling merchandise or services in the State of Arizona, including newspaper publications. The court held the act constitutional and the tax valid. See, also, Arizona Pub. Co. v. O'Neil, D.C., 22 F.Supp. 117, affirmed 1938, 304 U.S. 543, 58 S.Ct. 950, 82 L.Ed. 1518.

In Associated Press v. National Labor Relations Board, 1937, 301 U.S. 103, 57 S.Ct. 650, at page 656, 81 L.Ed. 953, the court said:

"The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. * * * Like others he must pay equitable and non-discriminatory taxes on his business."

In Reuben H. Donnelley Corporation v. City of Bellevue, 1940, 283 Ky. 152, 140 S.W.2d 1024, at page 1026, the court said:

"The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission but as descriptive of the tax and the document evidencing its payment." And further said:

"If the right of the state or a municipal subdivision merely to exact a reasonable license tax for the privilege of carrying on the business of distributing advertising matter, or even of publishing a newspaper, for private profit, be denied as an abridgment of freedom of speech or press, then there is a clash with the fundamental social and political philosophy and constitutional mandate of equality of right and equality of burden. * * * The business of advertising possesses no virtue justifying immunity from the ordinary license or other taxes. Freedom of speech or publication does not authorize it."

In Tampa Times Co. v. City of Tampa, supra, an ordinance imposed an annual business license tax upon newspapers, magazines and other periodicals or publications, based upon gross receipts, with a minimum tax of $10 per annum upon receipts from all sales and advertising, both wholesale and retail. The tax applied equally to all lines of business. There was no claim that the ordinance was arbitrary or harsh in nature. There the court held that the ordinance was one for revenue; that the question was one of whether or not a newspaper was immune from the burden of taxation to maintain government; and declared that it had no knowledge of any case where a newspaper had been held immune from all forms of taxation. The court stated that a tax in any form is a burden, yet that alone does not impair freedom of the press any more than an *ad valorem* tax will destroy freedom of speech. On appeal to the Supreme Court of the United States, the action was dismissed for want of a substantial Federal question.

[3] The phrase "power to tax is the power to destroy" is without application to the issue here presented. There is no allegation or showing by defendant that the amount levied was arbitrary or harsh in nature, or oppressive or confiscatory, or that defendant's freedom to disseminate news and comment has been actually cur-

tailed or abridged by the requirement that it shall pay a tax of $8 per quarter for publishing its newspaper. Nor is there any showing that the imposition of the tax was for the purpose of regulating defendant's business.

While the ordinary business tax here in issue is levied in form upon the privilege of engaging in or transacting business, it is, on its face and in fact, a tax for revenue purposes only, and does not grant or take away any right to do business, does not subject business to withdrawal or control by the city, is not regulatory in any manner, and in substance has been recognized and upheld by the weight of authority.

We conclude that a nondiscriminatory tax, levied upon the doing of business, for the sole purpose of maintaining the municipal government, without whose municipal services and protection the press could neither exist nor function, must be sustained as being within the purview and necessary implications of the Constitution and its amendments.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.



115 Cal.App.2d 466

PRESCOTT v. RALPHS GROCERY CO.

Civ. 19377.

District Court of Appeal, Second District, Division 1, California.

Jan. 22, 1953.

Proceedings on application for correction of reporter's transcript. The District Court of Appeal, held that when application had been referred to trial judge with directions to certify a true copy of the instruction as actually given by him to the jury at trial of the cause, certificate of trial judge as to what actually was said would be accepted as substitute for what reporter had allegedly erroneously stated in transcript.

Application granted.

Appeal and Error ⇐651

Where application was made for correction of claimed omission in reporter's transcript on appeal, and same was referred to trial judge with directions to certify to Appellate Court a true copy of the instruction involved as actually given by him, certificate of trial judge as to what he actually said to jury would be accepted as substitute for that which reporter had allegedly erroneously stated had been said, and correction would be granted. Rules on Appeal, rules 8(a), 12.

Kenny & Morris and Eleanor V. Jackson, Los Angeles, for appellant.

Moss, Lyon & Dunn and Richard B. Coyle, Los Angeles, for respondent.

PER CURIAM.

Pursuant to Rule 12 of Rules on Appeal, respondent makes application for correction of a claimed omission in the reporter's transcript on appeal.

For a statement of the factual background and the reasons upon which this application is predicated, see Prescott v. Ralphs Grocery Company, 114 Cal.App. 2d 655, 250 P.2d 690, 691, wherein this court referred the application, together with the opposition thereto, and all affidavits in connection therewith, to Hon. Otto J. Emme, Judge of the Superior Court in and for the County of Los Angeles, who presided at the trial, with directions to certify to this court "a true copy of the instruction as actually given by him to the jury at the trial of this cause."

Pursuant to the foregoing reference, the trial judge in his certificate to this court states:

> "I do hereby certify that I have no present recollection of the instruction in question, but to the best of my ability and recollection I am satisfied that I read the instruction B.A.J.I. No. 149 as said instruction appears in the files

of the County Clerk of Los Angeles County, a certified copy of which is contained in the application filed in your Court for correction of an alleged omission in the reporter's transcript (Rule No. 12, Rules on Appeal).

"I do further certify that when I read the instruction in question I had before me the aforesaid B.A.J.I. instruction and read it as it appears in the printed form.

"For the foregoing reasons, I hereby certify that to my best recollection the aforesaid certified B.A.J.I. instruction No. 149 is the instruction I gave to the jury in the above entitled cause."

Since the reporter's transcript here involved was not certified by the trial judge, no request for correction of the transcript on appeal having been filed within the time allowed therefor, and the same having been certified to by the County Clerk of Los Angeles County pursuant to Rule 8(a) of Rules on Appeal, we are satisfied that the certificate of the trial judge as to what he actually said to the jury should be accepted as a substitute for what the reporter has allegedly erroneously stated was said to the jury.

It is therefore ordered that the application for correction of the reporter's transcript be granted, to show that the instruction in question as given to the jury was as follows:

"Conduct which is in violation of Sec. 56–08–(e) Los Angeles Municipal Code just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he or she was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."



115 Cal.App.2d 405

SHIVELL et ux. v. HURD et ux.

Civ. 19208.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1953.

Judgment creditors filed a petition for appointment of appraisers pursuant to Code Civ.Proc. § 1246, to appraise homestead property upon which writ of execution had been levied. From an order of the Superior Court of Los Angeles County refusing to appoint appraisers, judgment creditors appealed. The District Court of Appeal, Patrosso, J. pro tem., held that judgment creditors were entitled to proceed with enforcement of writ of execution, though one of the judgment creditors had been adjudicated a bankrupt, where trustee in bankruptcy declined to participate in the matter.

Order reversed with directions.

See also, 252 P.2d 65.

1. Bankruptcy ⊂=156

While all rights of action in favor of a bankrupt on contract vest in trustee in bankruptcy by virtue of Bankruptcy Act, such trustee is not obligated to intervene in pending actions by or against the bankrupt, but he may allow them to proceed without intervention and accept the fruits if successful.

2. Bankruptcy ⊂=390

Where judgment creditor was adjudicated a bankrupt pending appeal from order directing issuance of writ of execution upon the judgment, judgment was listed as an asset in schedules filed in bankruptcy

proceeding, and trustee in bankruptcy advised bankrupt that he might proceed with enforcement of judgment as trustee was not interested in participating in the matter, bankrupt and wife as judgment creditors were entitled to proceed in the matter without intervention or substitution of trustee in bankruptcy. Code Civ.Proc. § 685.

3. Bankruptcy ⇐390

That one of two judgment creditors had been adjudicated a bankrupt pending appeal from order directing issuance of a writ of execution on the judgment did not justify denial of petition by judgment creditors for appointment of appraisers to appraise homestead property upon which execution had been levied, where trustee in bankruptcy declined to participate in proceedings to enforce judgment. Code Civ. Proc. §§ 685, 1246.

Arthur Shivell, in pro. per.

S. V. O. Prichard, Beverly Hills, for respondents.

PATROSSO, Justice pro tem.

Plaintiffs in 1940 obtained a judgment against defendants in the sum of $1,250. In March, 1950 plaintiffs moved the court for a writ of execution upon this judgment pursuant to the provisions of section 685, Code of Civil Procedure, which motion was granted and an order was entered directing that such writ issue. From this order, an appeal is taken by the defendants resulting in an affirmance thereof by this court. Shivell v. Hurd, 104 Cal.App.2d 291, 231 P.2d 595. Following the filing of the remittitur in the Superior Court a writ of execution was issued and levied upon a parcel of real property of the defendants which was subject to a declaration of homestead. Thereafter, plaintiffs filed their petition for the appointment of appraisers, which was resisted by the defendants upon the ground that the plaintiff Arthur Shivell, pending the appeal from the order directing the issuance of the writ of execution, had been adjudicated a bankrupt, and hence had no longer any right, title or interest in or to the cause of action, as the sole right to proceed further thereunder was vested in the trustee in bankruptcy. In sustaining defendants' contention in this regard and in refusing to appoint appraisers the trial court fell into error.

[1] While it is true that all rights of action in favor of the bankrupt on contract vest in the trustee by virtue of the bankruptcy act, it is well settled that a trustee is not obligated to intervene in pending actions by or against the bankrupt. He may allow them to proceed without intervention and accept the fruits if successful. Johnson v. Collier, 222 U.S. 538, 32 S.Ct. 104, 56 L.Ed. 306; Tucker v. Western Union Tel. Co., 94 Misc. 364, 157 N.Y.S. 873, 876; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S.E. 870, 871; Kessler v. Herklotz, 132 App.Div. 278, 117 N.Y.S. 45, 47; 8 C.J.S., Bankruptcy, § 212, p. 695.

In Johnson v. Collier, supra, 222 U.S. 538, 32 S.Ct. 104, 105, 56 L.Ed. 306, 307, following the institution of the action, plaintiff was adjudicated a bankrupt, and defendant thereupon moved that the suit be dismissed upon the ground that his adjudication precluded him from further maintaining the same. The trial court denied the motion and subsequently upon the trial rendered judgment in favor of the plaintiff which was affirmed upon appeal by the Supreme Court of Alabama. 161 Ala. 204, 49 So. 761. In affirming the decision of the latter court, the Supreme Court of the United States said: "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. * * * If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of

the bankrupt court, be amply protected against any danger of being made to pay twice."

In Griffin v. Mutual Life Ins. Co., supra, 119 Ga. 664, 46 S.E. 870, 871, the court says: "Under the act * * * the trustee may intervene, but is not bound to do so; but, on his failure to have himself substituted as plaintiff, the suit does not abate. It may still be prosecuted by the bankrupt. See Thatcher v. Rockwell, 105 U.S. 467, 26 L.Ed. 949; Reed v. Paul, 131 Mass. 129; Herring v. Downing, 146 Mass. 10, 15 N.E. 116".

The only authorities cited by respondent in support of the trial court's action are Heffron v. Rosenberg, 51 Cal.App.2d 156, 124 P.2d 74, and Manter v. Howard, 94 Cal.App.2d 404, 409, 210 P.2d 880, from the opinions in which counsel quotes general language which, disassociated from the facts of the case, appear to support their position. Both of the cited cases, however, are clearly distinguishable. In the Heffron case the trustee had instituted an action against the bankrupt and one Vaughn "on the theory that the bankrupt was an undisclosed partner of Vaughn and that the latter held valuable assets in his own name, half of which should go to the trustee as assets of the bankrupt". 51 Cal.App.2d at page 157, 124 P.2d at page 75. The bankrupt filed an answer admitting all of the allegations of the complaint, and at the same time "filed a cross complaint pleading substantially the same matters alleged in the trustee's complaint". Defendant Vaughn interposed a demurrer to the cross complaint which was overruled by the trial court. It was in holding this action to be erroneous that the District Court of Appeal used the language quoted in respondent's brief to the effect that after an adjudication of bankruptcy and the appointment of a trustee the bankrupt is without right to institute or prosecute an action except by the cause of action not passing to the trustee. However, counsel for respondents fails to quote the language immediately following this paragraph which readily discloses its inapplicability to the case at bar. The court there said, 51 Cal.App.2d at page 159, 124 P.2d at page 77: "Respondents cite passages from 8 C.J.S., Bankruptcy, § 489, pp. 1362, 1363, giving the bankrupt authority to sue in his own name 'where the trustee renounces the claim *or fails or declines to take it up and proceed with it,* or the court of bankruptcy will not permit him to commence or prosecute the action.' *This is not the situation presented here. The trustee did not renounce the claim or fail to prosecute the action, and the bankruptcy court did not prevent the prosecution of it. To the contrary, the action was commenced by the trustee and was alive and pending at the time the bankrupt sought to inject herself as a party.*" (Emphasis added.)

In Manter v. Howard, plaintiff had instituted an action to recover money alleged to be due on the purchase of lumber in which defendant had filed a counter claim. Four days before the date set for the trial of the action defendant was adjudicated a bankrupt, and the bankruptcy court had issued a restraining order against the plaintiff and his attorneys restraining them from proceeding with the action until the further order of the court. Although advised of this order, the trial judge insisted upon proceeding with the trial in the absence of any representative of the defendant and entered judgment in favor of the plaintiff. Thereafter, both defendant and the trustee moved to vacate the judgment and for relief therefrom under section 473 of the Code of Civil Procedure, which motions were denied by the trial court. In reversing this action the appellate court held that the trustee was entitled to continue and participate in the litigation without the necessity of being substituted as a party therein. No question was there involved as to the right of bankrupt to proceed with a pending action to which he is a party where the trustee fails or refuses to intervene or participate therein.

[2, 3] Here, unlike the situation presented in the cases cited by respondents, it appears without contradiction that the judgment sought to be enforced by the writ of execution was listed as an asset in the schedules filed in the bankruptcy proceeding, and although the attorney for the trustee was informed by the bankrupt of his

intention and desire to undertake to enforce the judgment, he was advised by the attorney that he might proceed with the matter as the trustee was not interested in participating therein. Under the circumstances and authorities hereinbefore cited, appellants were entitled to proceed in the matter without the intervention or substitution of the trustee. It did not lie in the mouths of the respondents to insist that the trustee intervene or be substituted therein without his consent.

The order appealed from is reversed with directions to the trial court to proceed to hear the petition for the appointment of appraisers.

DORAN and DRAPEAU, JJ., concur.



115 Cal.App.2d 409

SHIVELL v. HURD et al.

Civ. 19192, 19210.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1953.

Judgment creditor filed a petition for appointment of appraisers to appraise homestead property upon which writ of execution issued upon judgment had been levied and after making of order denying such petition, trustee in bankruptcy of judgment creditor caused himself to be substituted as plaintiff and made a motion for issuance of writ of execution on the judgment. From minute order and formal order of Superior Court of Los Angeles County, Frank G. Swain, J., directing issuance of a writ of execution in favor of trustee in bankruptcy, the judgment debtors appealed. The District Court of Appeal, Patrosso, J. pro tem., held that entry of order directing issuance of writ of execution in favor of trustee in bankruptcy pending appeal by judgment creditor from order erroneously denying his petition for appointment of appraisers was error.

Order reversed.

See also, 252 P.2d 66.

Bankruptcy ⇐390

Where judgment creditor's petition for appointment of appraisers to appraise homestead property upon which writ of execution issued upon judgment had been levied was erroneously denied on ground that judgment creditor had been adjudicated a bankrupt, though trustee in bankruptcy declined to participate in enforcement of writ, entry of order, pending appeal by judgment creditor from order refusing to appoint appraisers, directing issuance of writ of execution in favor of trustee in bankruptcy, was error.

S. V. O. Prichard, Beverly Hills, for appellants.

Arthur Shivell, in pro. per.

PATROSSO, Justice pro tem.

These two appeals by the defendants are from an order directing the issuance of a writ of execution in favor of O. T. Gilbank, the trustee in bankruptcy of the plaintiff Arthur Shivell, one being taken from the minute order and the other from a subsequent formal order signed by the trial judge. This is the same action as that involved in Shivell v. Hurd, Cal.App., 252 P.2d 62, 2nd Civil 19208. Subsequent to the making of the order involved in the appeal last mentioned, the trustee in bankruptcy caused himself to be substituted as plaintiff in the place of Arthur Shivell and made a motion for the issuance of a writ of execution on the judgment in said action which was granted by the court. Since these appeals were taken the bankruptcy court authorized the abandonment by the trustee of all interest in and to the judgment in question, and pursuant thereto the trustee has executed an assignment of all his right, title and interest in and to said judgment to Arthur Shivell, the original plaintiff, who has now been substituted as plaintiff herein in the place and stead of the trustee.

Inasmuch as we have in 2nd Civil 19208 reversed the order of the trial court refusing to appoint the appraisers upon the application of the plaintiff Arthur Shivell, it follows that the trial court erred in making the order here appealed from pending the appeal by plaintiff Arthur Shivell from the previous order. Accordingly, the order is reversed, the parties to bear their own costs of appeal.

DORAN and DRAPEAU, JJ., concur.



115 Cal.App.2d 873

SHIVELL v. HURD et ux.

Civ. 19209.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1953.

Proceeding on application by trustee in bankruptcy of judgment creditor for appointment of appraisers to appraise homestead property upon which writ of execution in favor of trustee issued upon the judgment had been levied, wherein judgment creditor was substituted for trustee in bankruptcy as plaintiff. The Superior Court of Los Angeles County, Frank G. Swain, J., entered an order granting motion to quash writ of execution and denying application for appointment of appraisers, and the substituted plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that reversal of previous order denying judgment creditor's petition for appointment of appraisers rendered moot the questions sought to be presented by appeal from order denying application by trustee in bankruptcy for appointment of appraisers.

Appeal dismissed.

Appeal and Error ⊂781(4)

Reversal of order denying judgment creditor's petition for appointment of appraisers to appraise homestead property upon which writ of execution issued upon judgment had been levied on ground that fact that judgment creditor had been adjudicated a bankrupt did not prevent him from enforcing writ of execution where trustee in bankruptcy declined to participate in the matter rendered moot questions sought to be presented by appeal by judgment creditor, as substituted plaintiff from order granting judgment debtors' motion to quash writ of execution issued upon judgment in favor of trustee in bankruptcy and denying trustee's petition for appointment of appraisers.

Arthur Shivell, in pro. per.

S. V. O. Prichard, Beverly Hills, for respondents.

PATROSSO, Justice pro tem.

This is a companion appeal to Shivell v. Hurd, Cal.App., 252 P.2d 65, 2nd Civil 19192 and 19210.

Subsequent to the making of the order involved in said last-mentioned appeals whereby the trial court directed the issuance of a writ of execution upon the application of the substituted plaintiff trustee in bankruptcy, such writ was issued and levied upon the homestead property in question. Thereafter and pending the appeal by the defendants from the order directing the issuance of said writ upon the application of the trustee, the substituted plaintiff trustee filed an application for the appointment of appraisers. Upon the day fixed for the hearing of such application defendants made a motion to quash the writ previously issued upon the application of the substituted plaintiff trustee pursuant to the order involved in 2nd Civil 19192 and 19210, which last mentioned motion was granted, and the application of the substituted plaintiff for the appointment of appraisers was denied without prejudice. The present appeal is from this latter order.

Inasmuch as in Shivell v. Hurd, Cal.App., 252 P.2d 62, 2nd Civil 19208, we have reversed the order of the trial court refusing to appoint appraisers upon the application of the original plaintiff Shivell, the ques-

tions sought to be presented herein have become moot. Accordingly, the appeal is dismissed, the parties to bear their own costs of appeal.

DORAN and DRAPEAU, JJ., concur.



115 Cal.App.2d 425

PEOPLE v. ATKINSON.

Cr. 859.

District Court of Appeal, Fourth District, California.

Jan. 16, 1953.

Defendant was convicted in Superior Court of Tulare County, Frederick E. Stone, J., of a second offense of driving an automobile under influence of intoxicating liquor. The Court denied his motion for new trial and he appealed. The District Court of Appeal, Barnard, P. J., held that where language in new statute was substantially the same as that in repealed statute, both statutes dealt with same offense, but new statute provided for greater punishment on second conviction, and new statute had express provision that it was restatement and continuation of repealed statute, it was proper to find defendant guilty of second offense based on former conviction under repealed statute and Superior Court had jurisdiction to try the case.

Order denying motion for new trial affirmed.

Criminal Law ⇐1202(1)

Where language in new statute was substantially the same as that in repealed statute, both statutes dealt with same offense, but new statute provided for greater punishment on second conviction, and new statute had express provision that it was restatement and continuation of repealed statute, it was proper to find defendant guilty of second offense of driving automobile under influence of liquor based on former conviction under repealed statute and Superior Court had jurisdiction to try the case. Vehicle Code, §§ 2, 7, 502.

J. M. Lopes, Visalia, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 502 of the Vehicle Code, it being charged that on February 18, 1952, he unlawfully drove an automobile upon a public highway while under the influence of intoxicating liquor. It was further charged that he had previously been convicted, in 1927 in the superior court of San Benito County, of a violation of section 112 of the Vehicle Act. Upon arraignment he moved for a dismissal and demurred to the information, which were denied and overruled. He then pleaded not guilty and denied having suffered the prior conviction. A jury found him guilty as charged, including the prior conviction. The court denied a motion for a new trial, suspended the imposition of sentence, and admitted him to probation one condition being that he pay a fine of $300. He has appealed from the order denying his motion to dismiss; from the order overruling his demurrer; from the order denying his motion for a new trial; from the jury's verdict; and from the judgment.

No contention is made that the evidence is not sufficient to show a violation of section 502 of the Vehicle Code on February 18, 1952, and the evidence clearly shows that the appellant had suffered the previous conviction charged, as a result of which he was fined $360. Appellant's sole contention is that the superior court had no jurisdiction in this matter, that the justice court (in Tulare) had no jurisdiction to hold him answerable under section 502 of the Vehicle Code for a conviction previously had under section 112 of the Vehicle Act, and that the justice court was the proper place of trial. It is argued that section 112 of the Vehicle Act was automatically repealed by the enactment of section 502 of the Vehicle Code

in 1935, and no longer has any effect; that a prior conviction thereunder now has no legal effect; and that the provisions of section 502 of the Vehicle Code were intended to apply only to one or more convictions under that section after it went into effect. In effect, it is contended that the offense committed on February 18, 1952, must be considered a first offense thereunder and, as such, was triable in the justice court.

The offense of which the appellant was convicted in 1927 was that of driving a vehicle upon a public highway while under the influence of intoxicating liquor. The language of section 112 of the Vehicle Act, under which that conviction was had, insofar as describing the offense is concerned, is substantially identical with the language used in section 502 of the Vehicle Code and substantially the same as that which has been continuously in effect since 1913. Section 502 made no change in the existing law, with respect to the offense, and merely changed the punishment including a greater possible penalty upon a second conviction.

Section 2 of the Vehicle Code, as adopted in 1935, reads: "The provisions of this code, in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments." Section 7 provides that "section headings contained herein shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any * * * section hereof." The reference in section 502 of the Vehicle Code to first and subsequent convictions "under this section" was clearly intended to refer to a conviction of the offense set forth in the section, and not merely to the number of the section. The purpose and intent was to include that statute in a new codification being made, and not to wipe the slate clean and start over with a new statute. While a change was made in the punishment provided for, the offense itself remained the same as under the previously existing statute and it was specifically provided, in section 2, that this should be construed as a restatement and continuation of the existing statute and not as a new enactment. Since the language describing the offense remained the same and must be taken as a continuation of the existing statute, the effect is the same as if section 112 of the Vehicle Act had remained in force, insofar as the present problem is concerned. The appellant was previously convicted of that same offense and it makes no difference whether it then was, or might have been, a felony or a misdemeanor. The new statute being a continuation of the former, the offense committed by the appellant on February 18, 1952, was a second offense within the meaning of section 502 of the Vehicle Code.

Assuming that section 112 of the Vehicle Act was repealed by the adoption of the Vehicle Code in 1935, there was not a moment in which the repealing act stood in force without the provision of the old statute being replaced by the new section of the code. It must, therefore, be considered as a continuance of the old law, with a modification as to the punishment rather than as an abrogation of an old law and the enactment of a new one. In re Estate of Childs, 18 Cal.2d 237, 115 P.2d 432; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 295 P. 1, 75 A.L.R. 439; Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868. It must be held that appellant's prior conviction of this same offense was properly taken into consideration, and that no lack of jurisdiction appears.

The purported appeal from the order denying the motion for a dismissal, from the order overruling the demurrer, from the verdict, and from the judgment are dismissed. No judgment was entered, and the others are not appealable. The order denying a motion for a new trial and granting probation is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

115 Cal.App.2d 296

OWL DRUG CO. v. BRYANT.

Civ. 18925.

District Court of Appeal, Second District, Division 1, California.

Jan. 12, 1953.

Mandamus proceeding to compel payment of interest upon unemployment contributions erroneously and illegally collected from date of assessment to date of judgment. The Superior Court, Los Angeles County, Frank G. Swain, J., entered an order denying the petition and discharging the alternative writ, and petitioner appealed. The District Court of Appeal, Patrosso, J. pro tem., held, inter alia, that the judgment in prior action wherein the validity of the assessment was litigated was res judicata and barred recovery of such interest, though petitioner would have been entitled to it in the prior action.

Affirmed.

1. Taxation ⇐543(8)

The provisions of the Unemployment Compensation Act relating to recovery of interest upon contributions erroneously or illegally assessed and collected from an employer are independent and mutually exclusive. Gen.Laws, Act 8780d, § 45.11 (c, d).

2. Judgment ⇐634

In determining validity of plea of res judicata, the determinative questions are whether the issue decided in the prior adjudication was identical with the one presented in the instant action, whether there was a final judgment on the merits, and whether the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.

3. Judgment ⇐715(2)

In suit to determine validity of assessment and collection of unemployment contributions, the issue presented involved measure and character of relief to which employer was entitled in event contributions were unlawfully assessed and collected, including interest from date of payment to date of judgment, and therefore judgment in such action awarding interest only from date of judgment was res judicata in subsequent mandamus action to compel payment of interest from date of contributions to date of judgment. Gen.Laws, Act 8780d, § 45.11(c, d).

4. Judgment ⇐585(2, 3)

Where a different title, right or obligation is pleaded in second action, cause of action is different than in prior action, though relief sought is the same, and judgment in prior action is not res judicata, but where second action is based upon the same right or obligation as the prior action, the cause of action is the same, though different or additional relief is sought, and the second action is barred.

5. Judgment ⇐713(2)

The title, right or obligation sought to be established or enforced, not the remedy or relief sought, determines the nature and substance of the cause of action, and when once adjudicated it cannot be relitigated upon any grounds that were or that could have been determined in the former action.

6. Taxation ⇐543(8)

Though one section of Unemployment Compensation Act provides for recovery of contributions unlawfully collected, and another section provides for recovery of interest, in view of provision that interest shall be allowed in judgment in proceeding for recovery of contributions, interest could be recovered in such an action for period between date of payment of contributions and date of judgment. Gen.Laws, Act 8780d, § 45.11(c, d).

7. Judgment ⇐592

Where a demand or right of action is in its nature entire and indivisible, it cannot be split up into several causes of action and sued piecemeal, and recovery for one part will bar a subsequent action for the whole, the residue or another part.

8. Taxation ⇐543(8)

Under provision of Unemployment Compensation Act that court shall provide for allowance of interest in judgment for recovery of contributions illegally assessed and collected, interest is not recoverable unless provision therefor is made in the judgment. Gen.Laws, Act 8780d, § 45.11 (c, d).

9. Judgment ⇐660

An erroneous judgment when rendered by a court having jurisdiction of the

parties and of the cause is as conclusive upon rights of parties as a correct one.

10. Mandamus ⇐4(5)

Error of court in failing to provide in judgment, awarding employer recovery of unemployment compensation contributions illegally assessed and collected, that interest should be paid from time of such contributions to date of judgment, was correctable only on appeal, and employer could not maintain subsequent mandamus action to compel payment of such interest. Gen. Laws, Act 8780d, § 45.11(c, d).

11. Judgment ⇐951(4)

Where employer in mandamus action to compel payment of interest on illegally assessed and collected contributions under Unemployment Compensation Act relied upon prior judgment declaring that such assessments had been unlawful, and such prior judgment was set out in the petition, and copies of such judgment and findings and conclusions in prior action were attached to returns to petition, no extrinsic evidence was necessary to enable court to determine legal effect of such prior judgment. Gen.Laws, Act 8780d, § 45.11(c, d).

Adams, Duque, Davis & Hazeltine, Los Angeles, Lawrence T. Lydick, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., for respondent.

PATROSSO, Justice pro tem.

Plaintiff instituted this proceeding in mandate against the Director of Employment and of the Department of Employment of the State of California to compel the payment of interest upon unemployment contributions erroneously and illegally collected from it. The appeal is from the order of the trial court denying the petition and discharging the alternative writ.

In a previous proceeding instituted by appellant against respondent in the Superior Court in and for the City and County of San Francisco, judgment was rendered therein on June 14, 1948 wherein it was determined that the respondent had erroneously and illegally charged against appellant's account benefits alleged to have been paid to former employees in the sum of $92,229 as a result of which respondent had illegally exacted from appellant contributions in the sum of $46,794.94. The judgment decreed that respondent remove and cancel such charges and that appellant recover from respondent the said sum of $46,794.94. An appeal was taken from this judgment by the respondent which was affirmed by the Supreme Court. Owl Drug Co. v. Bryant, 35 Cal.2d 905, 218 P.2d 8, memo opinion on the authority of Bell-Brook Dairies, Inc., v. Bryant, 35 Cal.2d 404, 218 P.2d 1. Thereafter respondent paid to appellant the sum of $46,794.94 as directed by said judgment together with the additional sum of $6,426.29, being interest at the rate of 7 percent per annum from the date of the judgment to the date of payment. The judgment, however, did not provide for the payment of interest on the over-assessments found to have been exacted from the appellant for the period intervening between the date of their respective payment to the date of the judgment, and respondent refused to pay interest thereon for any period prior to the entry of judgment. Appellant then instituted this proceeding to recover interest accruing during such period.

In dismissing the petition herein, the trial court determined that the judgment in the prior proceeding previously referred to operated as a bar to the maintenance of the present action. The correctness of this conclusion is the determinative question presented here.

The right of an employer to recover interest upon contributions illegally or erroneously assessed and collected derives from the provisions of section 45.11 of the Employment Insurance Act, Deerings General Laws, Act 8780d. This section is quite lengthy and need not be set forth in full. Omitting subdivisions (a) and (b) thereof which generally prescribe the procedure for the filing of claims with the commission for the refund of such contributions, sub-

divisions (c) and (d) insofar as material here, read as follows:[1]

"(c) (Interest.) Interest shall be allowed and paid only to the extent that interest and penalties collected under this act are available therefor upon any overpayment of contributions at the rate of six per cent (6%) per annum from the date of overpayment to the date of the allowance of the refund or credit, provided, however that no interest shall be allowed if the commission determines that any overpayment has been made intentionally or by reason of negligence on the part of the employing unit.

"(d) * * * No suit or proceedings shall be maintained in any court for the recovery of any amount of contributions, interest or penalties alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been filed pursuant to this section. Within 90 days after the mailing of the notice of the action by the appeals board upon a claim filed pursuant to this section, the claimant may bring an action against the commission on the grounds set forth in the claim in a court of competent jurisdiction in the County of Sacramento for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed, * * *.

"(Crediting judgment: Interest.) If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any contribution, interest and penalties due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed and paid only to the extent that interest and penalties collected under this act are available therefor, at the rate of 6 per cent per annum upon the amount of contributions found to have been illegally collected from the date of payment thereof to the date of such judgment."

[1] While each of the foregoing subdivisions speak of interest upon contributions erroneously or illegally assessed and collected they are independent and mutually exclusive. Subdivision (c) encompasses those cases where a refund of contributions is authorized by the commission. In such instances interest at the rate specified from the date of payment to the date of allowance of the refund becomes payable (to the extent that funds are available therefor) by virtue of the commission's allowance of the refund without more, unless the commission "determines that any overpayment has been made intentionally or by reason of negligence". Subdivision (d) on the other hand is restricted in its application to those cases where, following the refusal of the commission to authorize a refund, the employer avails himself of the remedy afforded by the statute of instituting a proceeding in the superior court to review the action of the commission and to recover such contributions as may be found to have been erroneously or illegally collected. As to these it is provided that interest at the prescribed rate upon the amount of contributions found to have been illegally collected from the date of payment to the date of judgment shall be allowed *"in any such judgment"*. This subdivision (d), unlike the language contained in subdivision (c) does not provide that upon entry of judgment interest shall become payable upon the amount of contributions thereby found to have been illegally collected from the date of payment thereof to the date of judgment but rather that the allowance of interest shall be provided for in or by the terms of the judgment. Thus the judgment is the measure of both the duty and authority of the commission to pay interest upon contributions found to have been illegally collected during the period between the date of payment thereof to the date of judgment.

With these preliminary observations we pass to a consideration of the effect of the

1. The reference here, as elsewhere in this opinion, is to the statute as it read at the time of the entry of judgment in the former proceeding, unless otherwise indicated.

prior judgment upon the right of the appellant to recover interest in the present proceeding upon the contributions thereby ordered repaid in view of the fact that no provision for the recovery of such interest was included therein.

[2] With respect to the plea of res judicata the Supreme Court in Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 895 says: "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

Inasmuch as the parties here are the same as those involved in the prior proceeding in which the judgment in question was entered, we may dismiss the third question suggested by the court without further discussion. Nor need the second long detain us, for an inspection of the findings of fact and conclusions of law as well as the judgment in that proceeding disclose that the judgment was rendered upon the merits following a trial in the course of which evidence was introduced upon behalf of the respective parties.

[3] There but remains to be considered therefore the first question, namely whether the issue decided in the prior adjudication is identical with the one presented here. The findings in the prior action disclose that the issue involved was the validity of the action of the respondent in charging against the account of appellant benefits paid to certain of its former employees. In determining this issue favorably to the appellant the court found that the charges in question were unauthorized and contrary to law because made without any notice to the appellant; that such charges aggregated the sum of $92,229 and that as a result thereof respondent had illegally exacted from appellant contributions in the sum of $46,794.94. From these findings the court concluded that appellant was entitled to judgment commanding the removal from the account of appellant charges in the amount stated and for the recovery of the amount of contributions found to have been illegally exacted from appellant as a result thereof. In the light of this it can hardly be doubted that the issue presented by and decided in the former proceeding necessarily involved the measure and character of relief to which appellant was entitled as a result of the action of the commission in wrongfully charging its account with the payment of benefits not authorized by law, which necessarily involved the question as to whether appellant was entitled to recover not only the amount of the overassessments as found by the court but in addition thereto interest thereon from date of payment as prescribed by the statute.

[4, 5] "If a different title, right or obligation is pleaded in the second action, the cause of action is different, even though the relief sought is the same. Ball v. Stephens, 68 Cal.App.2d 843, 851, 158 P.2d 207. But if the second is based upon the same right or obligation the cause of action is the same even though different or additional relief is sought. * * *

"It is the title, right or obligation sought to be established or enforced, not the remedy or the relief sought, which determines the nature and substance of the cause of action. When this has once been adjudicated it cannot be relitigated upon any grounds that were or that could have been determined in the former action." Ideal Hardware & Supply Co. v. Dept. of Employment, 114 Cal.App.2d 1443, 250 P.2d 353, 356.

In contending that the former judgment does not operate as a bar or estoppel to the maintenance to this proceeding counsel for appellant assert, in effect, that no cause of action for the recovery of the interest here sought had accrued at the time of the institution of the prior action. The argument is that the statute did not "then or now provide for any action to recover the *interest* provided for by section 45.11 of the act in the event it was determined by the reviewing court that the taxes had been overassessed or illegally collected." In support of this statement counsel direct attention to the fact that the prior action was

authorized by and instituted pursuant to section 41.1 of the act, and that, while as it then read, it authorized the institution of a proceeding "to recover any amount of *contribution* claimed as an overpayment" there was no provision for the recovery of *interest* thereon. Counsel however seemingly overlook the fact that at that time section 45.10 contained a provision for the allowance of interest upon the amount of overpayment to the date of judgment in substantially the identical language found in the last paragraph of section 45.11 as it read at the time of the entry of judgment, which section we have previously quoted at length, and which in effect provides that if a judgment is rendered for the plaintiff for the recovery of contributions interest shall be allowed "in any such judgment" from date of payment to date of judgment.

[6] In amplification of this argument it is further said: "interest however being provided for by separate and distinct statutory provision and being conditioned upon performance of a ministerial act by the administrative body, was and is properly recoverable only by mandamus proceedings and only after a failure by respondent to perform the statutory duty imposed". We fail to appreciate the force of the argument that, because the recovery of contributions was provided for in one section of the statute and the recovery of interest in another, this evidences a legislative intent that the recovery of interest could not be had in the same proceeding as that wherein the recovery of the contributions was sought and obtained. The fact that the statute expressly provides that interest shall be allowed *in the judgment* in a proceeding for the recovery of the contributions conclusively demonstrates the contrary. Neither are we able to understand counsel's statement that the allowance of interest was "conditioned upon performance of a ministerial act by the administrative body". If, as the statute plainly directs, interest is to be allowed *in the judgment*, the recovery thereof would appear to be "conditioned" upon inclusion of a provision to this effect in the judgment—a judicial act—not upon the performance of a ministerial act by the commission.

[7] When the appellant instituted the prior proceeding it had an entire and single cause of action arising from the legal wrong or tort of the respondent in placing against its account charges unauthorized by law. As a result it was entitled to relief therein including not only the cancellation of the wrongful charges but the recovery of the amount which had been illegally exacted from it together with interest thereon from the date of payment to the date of judgment. "(A) plaintiff must recover in one action all he is entitled to; if dissatisfied with the result, he cannot bring a new suit to recover something more on the same cause of action." 34 C.J. p. 822, 50 C.J.S., Judgments, § 657. "Where a demand or right of action is in its nature entire and indivisible it cannot be split up into several causes of action and sued piecemeal; but a recovery for one part will bar a subsequent action for the whole, the residue or another part." 34 C.J., p. 827, 50 C.J.S., Judgments, § 661. "This is the necessary result of the application of the well-settled principle that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits." Abbott v. The 76 Land & Water Co., 161 Cal. 42, 48, 118 P. 425, 428. It is of no consequence, therefore, if it be assumed, as counsel for appellants suggest, that in the prior proceeding the matter of the allowance of interest was not considered or urged upon the court.

The case of Girard Trust Co. v. U. S., 270 U.S. 163, 46 S.Ct. 229, 231, 70 L.Ed. 524, cited by appellant in support of its position is not helpful. That was an action to recover interest upon the refund of certain internal revenue taxes paid by the plaintiff. There the refund had been allowed by the commissioner of internal revenue under a statute which provided in part " 'That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance' ". Revenue Act of 1921, § 250(b), 42 Stat. 316. In this respect the statute there involved was strikingly similar to

the provisions of subdivision (c) of the act with which we are here concerned, and there can be no doubt that, *by the allowance of the refund*, the taxpayer was entitled to receive interest thereon as provided. The same result would undoubtedly follow here if we were concerned with a claim of refund allowed by the respondent commission as provided in subdivision (c). However, as previously noted the case here is governed not by the provisions of subdivision (c) dealing with the effect of the allowance of a refund by the commission but by subdivision (d) which provides for the allowance of interest, not by the commission, but by the court rendering judgment in a judicial proceeding for the recovery of the amount of contributions found by it to have been illegally collected. The cited case unlike the one at bar did not involve a consideration of the effect of a judgment for the recovery of overpayments which contained no provision for the recovery of interest thereon accruing prior to judgment upon a subsequent proceeding seeking the recovery of such interest.

[8] Appellant suggests that its right to recover the interest here sought is analogous to its right to recover interest upon the judgment which it obtained from the date of its rendition although the judgment contained no provision to this effect. The answer appears obvious. A judgment bears interest because it is so provided by statute and there is no need of the inclusion of a provision to this effect in the judgment. The statute here however does not purport to declare that a *judgment* rendered in a proceeding for the recovery of contributions illegally assessed and collected shall bear interest *from the date of payment of such overassessments.* On the contrary it says that the court shall provide for the allowance thereof *in the judgment.* This necessarily implies that if no such direction is contained in the judgment, there is no authority for the payment thereof.

[9, 10] It would appear that the superior court, when rendering judgment in the prior proceeding in favor of the appellant for the amount which it found to have been illegally exacted of it, should have included therein an allowance of interest as provided by the statute, and that it was in error in failing to do so. While erroneous and subject to correction upon appeal, no appeal therefrom was taken by appellant and it has long since become final. An erroneous judgment, however, when rendered by a court having jurisdiction of the parties and of the cause, is as conclusive upon the rights of the parties as a correct one. 15 Cal.Jur., p. 103, sec. 170. While inviting our sympathy, we are powerless to correct the error, if any, of the court in the prior proceeding.

Appellant also cites in support of its contention authorities declaring that in a contested action plaintiff may recover interest, if legally entitled thereto, although no demand therefor is included in the prayer of the complaint. They seemingly overlook the fact, however, that in order to recover interest under such circumstances provision therefor must be made in the judgment rendered in the particular action. These cases do not suggest that, if plaintiff although entitled thereto, fails to recover interest in the action, he may thereafter maintain an independent proceeding for the same. Thus, rather than supporting the contention of appellant, the authorities would appear to effectively destroy it.

[11] Appellant complains of the finding or conclusion of the trial court that the judgment in the prior action constitutes a bar to the maintenance of the present proceeding because (so it is said) no evidence was received by the trial court, the matter having been disposed of upon the petition and the returns thereto. However, appellant in its petition pleads the former judgment, and attached to the return of the respondent are copies of the judgment as well as the findings of fact and conclusions of law. There is no denial that these are true copies of the originals, and under the circumstances no extrinsic evidence was necessary to enable the court to determine the legal effect of such prior judgment. Indeed it is somewhat difficult to understand counsel's position in this regard in view of the fact that their entire claim to the recovery of the interest in the instant case is predicated upon the fact that appellant obtained a judgment for the *contributions* in the prior proceeding. Their

claim is necessarily based upon this judgment. Hence if an inspection of the judgment discloses that the proceeding in which it was rendered necessarily involved the question as to the right of appellant to recover interest to the date of judgment upon the amount ordered to be paid thereby, the trial court required no additional evidence to reach the determination which it did, namely, that such judgment was a bar to the maintenance of this proceeding.

Appellant also complains of the finding to the effect that in the prior proceeding appellant "did omit or neglect to seek and recover interest to which it was then entitled". It may be admitted that, although it is true that appellant *failed* to recover interest in the prior proceeding, there is no evidence to support the finding that it omitted or neglected to *seek* the recovery thereof. The finding, however, is wholly immaterial for, as we have already seen, appellant is concluded by the judgment rendered therein whether it did or did not then seek the recovery of such interest. The determinative fact is that, although it was then *entitled to demand* the recovery of such interest, the court failed or neglected to grant judgment therefor.

The foregoing makes unnecessary the consideration of other questions discussed by counsel for the respective parties.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



115 Cal.App.2d 435

PEOPLE v. HERNANDEZ.

Cr. 933.

District Court of Appeal, Fourth District, California.

Jan. 20, 1953.

Defendant was convicted in Superior Court, San Bernardino County, Martin J. Coughlin, J., of possession of a narcotic, and he appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to show that defendant knowingly had possession of narcotic and to sustain conviction and also held that rebuttal testimony of officer, that individual who had turned against defendant for personal reasons was not the informer, was not waiver of statutory officer-informer privilege.

Judgment affirmed.

1. Property ⇐10

Possession of a chattel is established when it is shown that a person has physical control thereof with intent to exercise such control or having had such physical control, has not abandoned it, and no other person has that possession.

2. Poisons ⇐9

In prosecution for possession of narcotic found in glove compartment of defendant's automobile, evidence was sufficient to show that defendant knowingly had possession of narcotic and to sustain conviction. Health and Safety Code, § 11500.

3. Witnesses ⇐219(1)

Rebuttal testimony of officer, that individual who had turned against defendant for personal reasons was not the informer, was not a waiver of the statutory officer-informer privilege. Code Civ.Proc. § 1881, subd. 5.

Albert Hampton, West Los Angeles, and Carl T. Rimbaugh, San Barnardino, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the crime of possession of a narcotic (heroin) in violation of section 11500 of the Health and Safety Code. A trial by jury resulted in a conviction as charged, and a three months jail sentence was imposed. The heroin was found in defendant's car. He now claims that the evidence is insufficient to show that he *knowingly* had *possession* of it, and that the court erred in denying him the right to

examine the arresting officer concerning the name of a claimed informer.

On the evening of March 8, 1952, about 11 o'clock, Narcotic Inspector O'Connor, accompanied by three other officers, saw defendant backing his car (a 1950 black Pontiac sedanette) out of the driveway of the "99er Cafe" on Highway 99 near Loma Linda. The inspector testified that defendant proceeded easterly towards Redlands; that they pursued defendant's car and as they approached the Mona Lisa Club about one mile from the 99er Cafe, they discovered defendant's car parked in a parking area across the street from it; that they remained in their car, and after about one hour, defendant, who had been at the club, drove away in his car; that due to the fact that they were obliged to make a turn at an island intersection, they lost sight of defendant's car; that they went to a house at 62 Juanita Street about 2 a. m. on March 9th, and maintained a "stake-out" for about 20 minutes; that the dark sedanette of defendant's pulled into a parking area; that the driver got out, went into the house, and after a short time the officers went in; that defendant was then in bed; that he was asked if he had any "contraband" and that defendant said "no"; that the officers said: "Well, we heard you have" and defendant said: "Well, go ahead and look around; you are the police". A description of defendant's clothing tallied with that worn by defendant at the Mona Lisa Club. The officer testified that they asked defendant if he had been at that club or the 99er Cafe that night and defendant said "no"; that they asked him where he had been earlier in the evening and defendant stated he had just been "out". He was asked if the car parked by the house was his and he said it was. The keys were given to the officer. Defendant went with them to the car and unlocked it. While searching the glove compartment defendant's "Legion cap" fell out on the floor. Defendant made a sudden motion of his hand to pick it up. The officer, by means of a flash light, suddenly noticed a small green box lying on the floorboard by the cap. The officer picked it up and asked the defendant what it was and what was in it and defendant said: "All right, you have got me". A few moments thereafter, however, he said: "I don't know anything about it." The box contained four paper bindles of gelatin capsules of heroin.

Defendant was arrested and questioned at the jail. The officer testified that he asked the defendant if he knew the seriousness of fooling around with narcotics and defendant stated that he did. He then asked him if he ran around with persons known as Vasquez and Contreras and defendant at first denied knowing these individuals but later said: "he knew them but did not run around with them because they fooled around with that stuff". Defendant was then asked why he lied when he told the officers he had not been at the Mona Lisa Club nor the 99er Cafe and defendant said: "Come to think of it, I was at the Mona Lisa; I was in the parking lot; I went there to get a taco". He was asked who was with him and he said he was alone. The inspector testified that defendant, known as "Bob", as well as Contreras and Vasquez, had been suspected dope peddlers for quite a while, and defendant had been pointed out to the inspector on an occasion about three weeks prior to his arrest.

While seated in the jail office the inspector told defendant he intended having the box examined for fingerprints and defendant immediately reached for the box but his hand was knocked away by the inspector. The box was turned over to the police chemist but apparently there was no evidence produced in reference to fingerprints thereon.

Defendant testified generally that he was never known as "Bob"; that he had never been to the 99er Cafe in his life; that on the evening in question he was taking Mexican Nationals to various places; that he stopped at the Mona Lisa for an enchilada and there saw Escavedo (also known as Escadero) who had turned against him for claimed personal reasons, and inferred that he might have placed the narcotics in defendant's car "to get even with him". However, the inspector testified that Escadero was not at the Mona Lisa that

evening and Escadero's name was never mentioned to him by defendant until two months after his arrest. He denied generally any guilty knowledge of the possession of heroin and stated that he did not know what the substance was.

[1, 2] Possession of a chattel is established when it is shown that a person has physical control thereof with intent to exercise such control, or having had such physical control has not abandoned it and no other person has that possession. People v. Bassett, 68 Cal.App.2d 241, 247, 156 P.2d 457; People v. Sweeney, 66 Cal.App. 2d 855, 860, 153 P.2d 371. It is not necessary to prove that the accused had the unlawful article on his person. People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23. The evidence, when considered in connection with the inference of guilty knowledge arising from the admissions, false, misleading and contradictory statements of the accused, is sufficient to support the conclusion that the defendant knowingly had possession of the heroin. People v. Gory, 28 Cal. 2d 450, 170 P.2d 433; People v. Bigelow, 104 Cal.App.2d 380, 384, 231 P.2d 881.

[3] On cross-examination, the inspector was asked by counsel for defendant from whom, or what source, he received the information about defendant "Bob" and the license number of his car. The court sustained the prosecution's objection to the question after the witness claimed a privileged communication under section 1881, subd. 5, Code Civ.Proc., which provides:

"(Confidential communications.) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: * * *

"5. *Public officers.* A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

It is problematical whether proper objections were made at the time and whether defendant sufficiently presented and maintained his position before the trial court. Defendant recognizes the privileged communication rule enunciated by the statute and the holdings in City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 161, 238 P.2d 581; People v. Santora, 51 Cal.App.2d 707, 125 P.2d 606; Fricke's California Criminal Evidence [1945] p. 282; 22 Cal.Law Review 669, 59 A.L.R. 1559; and 9 A.L.R. 1112, but argues that there are certain exceptions to this rule and the evidence here produced brought the defendant within those exceptions and that there was a waiver of the privilege by the officer when he testified that Escadero was not the informer. He cites such cases as People v. King, 122 Cal.App. 50, 10 P.2d 89; and Rex v. Richardson, 3 F. & F. 693 [1863].

Here the defendant denied knowledge of the presence of the narcotic in his car, and by innuendo endeavored to convince the jury that one Escadero planted the narcotics there as a means of "getting even" with him because of the fact that his sister had reported Escadero as an escapee. The rebuttal testimony of the officer that Escadero was not the informer was not a waiver of any claimed officer-informer privilege but was a rebuttal of the inference endeavored to be presented to the jury by the defendant.

The trial court committed no prejudicial error in excluding the testimony concerning the name of the informer, which name was communicated to the public officer in confidence.

Notwithstanding defendant's ability to present many favorable witnesses in reference to his claimed good character, the evidence was sufficient to sustain the conviction, and no prejudicial error appears.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

115 Cal.App.2d Supp. 875

PEOPLE v. KING.

C. A. 175244.

Appellate Department, Superior Court, San Diego County, California.

Dec. 12, 1952.

Prosecution for violating ordinance prohibiting any female employee in any on-sale establishment from mingling with any patron of such establishment. The Municipal Court, San Diego Judicial District, A. F. Molina, J., sustained demurrer without leave to amend complaint, and plaintiff appealed. The Superior Court, County of San Diego, Appellate Department, Glen, J., held that ordinance was not unconstitutional as being too vague, indefinite and uncertain, and that language used was adequate, unambiguous and understandable in expressing the legislative intent.

Order reversed with directions.

1. Intoxicating Liquors ⇐1

No one has an inherent right to engage in business of sale of intoxicating liquor, and, thus, such business may be entirely prohibited or permitted under close supervision, and the manner and the extent of regulation rests in the sound discretion of the legislative authority.

2. Intoxicating Liquors ⇐132

Purpose of ordinance prohibiting any female employee in any on-sale liquor establishment from drinking, dancing or mingling with any patron of such establishment was to prevent female employees from improprieties and immoral acts likely to result from intimate familiarity of sexes in liquor establishments.

3. Intoxicating Liquors ⇐144

Under the broad legislative powers, females may be prohibited from working in establishments dispensing intoxicating drinks to patrons.

4. Statutes ⇐47

A legislative enactment will be inoperative if the courts cannot give it a definite meaning.

5. Criminal Law ⇐13

Criminal statute should give fair warning in ordinary language of what will be criminal conduct under given circumstances, even though it is not likely that persons will carefully consider the context before violating the statutes.

6. Statutes ⇐188

Generally, some definite meaning must be given to words used in a statute in order to give it effect.

7. Statutes ⇐188, 206

Legislative intent is to be gathered from the whole act rather than from isolated words, and the words will, when possible, be given a reasonable but not a strained construction.

8. Statutes ⇐184

Every statute should be construed with reference to its purpose and the object intended to be accomplished by it and the evils to be cured.

9. Statutes ⇐188, 190

Words used in a statute should receive sensible construction in accordance with their common understanding, and if, when given their ordinary popular significance, the words are reasonably free from ambiguity and uncertainty, the courts need not look further.

10. Intoxicating Liquors ⇐238(1)

Under ordinance prohibiting any female employee in any on-sale liquor establishment from mingling with any patron of such establishment, whether the conduct of the female employee, considered under all of the circumstances present and with evil sought to be prohibited in mind, was or was not improper and likely to lead to evil doing between female and patron, is question for trier of facts.

11. Municipal Corporations ⇐111(1)

Ordinance prohibiting any female employee in any on-sale establishment from mingling with any patron of such establishment is not unconstitutional as being too vague, indefinite and uncertain, and the language used is adequate, unambiguous and understandable in expressing the legislative intent.

J. F. DuPaul, City Atty., Robert T. Sjogren, Deputy City Atty., San Diego, for appellant.

Edgar B. Hervey and James Edgar Hervey, San Diego, for respondent.

GLEN, Judge.

Defendant was charged with violating Section 33.1541.1 of the San Diego Municipal Code prohibiting any female employee in any on-sale liquor establishment licensed under the Alcoholic Beverage Control Act from drinking, dancing or mingling with any patron of such establishment.

It was specifically charged in the complaint that defendant, a female employee, "did unlawfully mingle with a patron of the Barbett Cafe."

In sustaining the demurrer the trial court in effect ruled that the ordinance was unconstitutional as being too vague, indefinite and uncertain.

[1] In determining the question of the alleged uncertainty and ambiguity of the word "mingle" one must keep in mind the evil sought to be regulated by the ordinance. No one has an inherent right to engage in the business of the sale of intoxicating liquor. Such business may be entirely prohibited or permitted under close supervision, and the manner and the extent of regulation rests in the sound discretion of the legislative authority.

[2] The obvious purpose of the ordinance under consideration is to prevent female employees from improprieties and immoral acts likely to result from intimate familiarity of the sexes in liquor establishments. It is plain enough that drinking with patrons or dancing with patrons would tend to encourage improprieties and there are, no doubt, many intimate acts of association too numerous to specifically prohibit by statute which would tend to encourage improprieties by female employees and patrons.

[3] Under the broad legislative power females may be, and in some cases are entirely prohibited from working in establishments dispensing intoxicating drinks to patrons. Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; Ex parte Hayes, 98 Cal. 555, 33 P. 337, 20 L.R.A. 701; People v. Jemnez, 49 Cal.App.2d Supp. 739, 121 P.2d 543.

[4, 5] The rule that a legislative enactment will be inoperative if the courts cannot give it a definite meaning is especially applicable to criminal cases for the reason that a fair warning should be given in ordinary language of what will be criminal conduct under given circumstances, even though it is not likely that persons will carefully consider the context before violating the statutes. It would be dangerous practice for the legislature to set out a large enough net to trap all possible offenders and leave it to the courts to say who should be held and who should be set free. Such practice would substitute the courts for the legislative department of government. See Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840.

[6–9] There are numerous rules of construction to guide courts interpreting doubtful language in statutes. See 23 Cal.Jur. page 719 et seq. Generally, some definite meaning must be given to words used to give them effect and the legislative intent is to be gathered from the whole act rather than from isolated words. Words will, when possible, be given a reasonable but not a strained construction and every statute should be construed with reference to its purpose and the objects intended to be accomplished by it and the evils to be cured. If words are given their ordinary popular significance and are reasonably free from ambiguity and uncertainty the courts need not look further. Words used in a statute should receive sensible construction in accordance with their commonly understood meaning. See People v. Pallares, 112 Cal. App.2d Supp. 895, 246 P.2d 173.

Is the word "mingle" as used in the ordinance here under consideration so indefinite and uncertain that it does not advise a female employee what she may or may not do under the statute? We think not. It would be next to impossible for the legislature to define, with precise nicety, all acts of a waitress in a liquor establishment that may lead to improprieties and tend to encourage

the evil sought to be cured by the ordinance. If the word "mingle" is construed in context with other words of the section in which it is found, it is apparent that the ordinance is concerned with improper conduct between patrons and employees and the extent of the impropriety depends upon the facts in each case. It thus becomes a mixed question of law and fact.

Many dictionary definitions of the word "mingle" may be found.

Funk and Wagnall's New Standard Dictionary of the English Language, page 1580:

II. i. 1. To be or become mixed, united, or closely joined; put oneself in familiar relation; intermingle; participate; as, to *mingle* with a crowd or in a dance.

Webster's New International Dictionary, page 1564:

2. To associate or unite, as things by interspersion or persons by ties of relationship; to join in company. ———, Intransitive: To become mingled; to mix or blend.

The Century Dictionary and Cyclopedia, Vol. VI, page 3774:

II. *intrans.* 1. To be or become joined, combined, or mixed; enter into combination or intimate relation, as to mingle with society.

A New English Dictionary on Historical Principles, Vol. VI, pps. 468–469:

4. Intr. Of things material and immaterial: to unite or combine in some intimate relation; to join together (or *with* another); to mix, blend.

5. Of a person: To mix or join oneself in any kind of association with others; to have intercourse *with*; to move about *among*, or *in* a gathering. Also, to be associated or take part with others *in* some action or combination.

Substituting a precise definition such as above set forth into the ordinance for the word "mingle" would leave no doubt in the mind of an ordinary intelligent person as to the acts prohibited.

[10] Many words of the English language take on different shades of meaning when used under different sets of circumstances. For example, it has been held in People v. Pallares, supra, that Section 647a(1) of the Penal Code is not ambiguous or uncertain in its use of the words "annoys or molests." The words "annoys or molests" have many different meanings when used out of context and a child may be annoyed or molested in many ways that are not criminal. At page 901, of 112 Cal. App.2d Supp., at page 177 of 246 P.2d, the Court says:

> "When the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this State indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children. It should be noted further that the section must be construed reasonably as setting up an *objective* test for annoyance or molestation; *a childish and wholly unreasonable subjective annoyance, arising, for example, from a child's dislike for proper correction by a teacher, is not covered by the section.* The annoyance or molestation which is forbidden is in no sense a purely *subjective* state on the part of the child. The objectionable acts of a defendant constitute the annoyance or molestation contemplated by the statute. See State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754." (Emphasis ours.)

So it is with the word "mingle." The objectionable acts of a female employee of a liquor establishment must be considered under all of the circumstances present and with the evil sought to be prohibited in mind. Thus, in each case it becomes a question for the trier of the fact to determine whether the conduct of the female employee is or is not improper and likely to

lead to evil doing between the female and the patron.

[11] The ordinance seeks to prohibit activities of female employees in liquor establishments *other* than those normally usually and properly associated with that occupation and we think the language used is adequate, unambiguous and understandable in expressing the legislative intent.

The demurrer was therefore improperly sustained.

The order is therefore reversed with directions to overrule the demurrer to the complaint and to proceed with the arraignment and trial of the defendant.

TURRENTINE, P. J., and BURCH, J., concur.

PEOPLE v. BARCLAY et al.

Cr. 5356.

Supreme Court of California, in Bank.

Jan. 9, 1953.

Rehearing Denied Feb, 5, 1953.

Defendant was convicted in the Superior Court of Contra Costa County, Wakefield Taylor, J., of first degree murder and robbery, and he appealed. The Supreme Court, Traynor, J., held that evidence sustained convictions.

Affirmed.

1. Homicide ⇐253(6)

Evidence sustained first degree murder conviction of one who allegedly killed deceased in commission of robbery. Pen. Code, § 189.

2. Criminal Law ⇐780(1)

If undisputed evidence establishes that a witness is an accomplice, jury should be so instructed. Pen.Code, § 1111.

3. Criminal Law ⇐742(2)

In prosecution for murder and robbery, question whether two of the witnesses for the prosecution were accomplices of defendant was properly left to determination of jury, and court did not err in not instructing jury that those witnesses were accomplices as a matter of law. Pen.Code, § 1111.

4. Criminal Law ⇐1173(2)

Where jury knew that witness for prosecution in murder and robbery prosecution had been indicted with defendant, and jury heard testimony of witness that he committed the crime, and jury knew that witness had withdrawn his plea of not guilty and had entered a plea of guilty, and district attorney stated in his argument to jury that there was no doubt that witness was an accomplice, failure of court to instruct that witness an accomplice as a matter of law was not reversible error. Pen. Code, § 1111.

5. Criminal Law ⇐780(3)

It is error to instruct jury that testimony of an accomplice should be viewed with "caution" without also instructing jury in language of statute providing that testimony of an accomplice ought to be viewed with distrust. Code Civ.Proc. § 2061, subd. 4.

6. Criminal Law ⇐780(3)

Instruction that it is the law that the testimony of an accomplice ought to be viewed with distrust, but that jury may not arbitrarily disregard testimony of accomplice, but should give to it weight to which jury found it to be entitled after examining it with "care and caution" and in the light of all evidence in the case, was not erroneous because of the use of the phrase "care and caution". Code Civ.Proc. § 2061, subd. 4.

7. Criminal Law ⇐780(3)

In prosecution for murder and robbery, wherein one witness, who was an accomplice as a matter of law, testified for the prosecution, and wherein two other witnesses testified whose status as accomplices was for jury, instruction that if either crime of murder or robbery, commission of which is alleged in the indictment, was committed by any of the witnesses in the case, then, as a matter of law, such witness was an accomplice, assuming that jury found defendant participated in either crime, was not erroneous on ground that it informed jury that only one of the witnesses could be an accomplice, and not all of them. Pen.Code, § 1111.

8. Criminal Law ⇐823(1)

In prosecution for murder and robbery, instruction that if either crime of murder or robbery was "committed" by any of the witnesses in the case, then, as a matter of law, such witness was an accomplice, assuming that jury found that defendant also participated in either of the crimes, was not erroneous, in view of another instruction given, on ground that word "committed" eliminated from definition of an accomplice the meaning that one who participates, aids, or assists, or takes part in the crime, is an accomplice, and limited meaning of accomplice to one who actually did or committed the criminal act. Pen. Code, § 1111.

9. Criminal Law ⇐823(1)

Instruction that in determining whether testimony of an accomplice has been corroborated, as required by law, jury must

assume to be removed from the case the testimony of the accomplice, and then examine all other evidence with view to determining if there be any inculpatory evidence tending to connect defendant with commission of the offense, and if such other evidence does that, then testimony of accomplice is corroborated, was not erroneous, in view of another instruction given, on ground that it permitted jury to find corroboration of the testimony of one accomplice and the testimony of other accomplices. Pen.Code, § 1111.

10. Criminal Law ⇐1169(12)

Where early in trial confession by defendant's co-defendant was admitted in evidence, and jury was instructed that it should not consider confession as evidence against defendant, and subsequently co-defendant withdrew plea of not guilty, and all matters set forth in confession were subsequently in evidence when co-defendant testified as a witness for the prosecution, error, if any, was not prejudicial to defendant.

11. Criminal Law ⇐1169(9)

In murder and robbery prosecution, it was not prejudicial error to allow expert witness to testify regarding similarity of fibres swept from deceased's pillow and fibres swept from clothes of defendant, because at time of initial investigation of room of deceased the pillow was covered with a slip, but the slip was missing when pillow arrived at laboratory.

12. Criminal Law ⇐510

Proof of elements of a crime, as contrasted with proof of connection of defendant with commission thereof, may rest on the uncorroborated testimony of an accomplice. Pen.Code, § 1111.

13. Robbery ⇐24(1)

Evidence was sufficient to sustain conviction of defendant for first degree robbery, on ground that revolver was used at time of robbery, though the only testimony that revolver was used was that of defendant's co-defendant, who was an accessory as a matter of law, and though co-defendant's testimony that co-defendant had a revolver was not corroborated. Pen.Code, § 1111.

14. Homicide ⇐282½

When a defendant is convicted of murder in the first degree, the jury determines his punishment as well as his guilt. Pen.Code, § 190.

15. Homicide ⇐311

Jury is not allowed to weigh possibility of parole or pardon in determining whether defendant is guilty of first degree murder, and it is therefore error to give an instruction that allows jury to consider consequences of a recommendation of life imprisonment in arriving at that determination. Pen.Code, § 190.

16. Homicide ⇐311

To aid jury in fixing punishment of defendant in first degree murder prosecution, court may instruct jury as to the consequences of the different penalties that may be imposed, so that an intelligent decision may be made. Pen.Code, § 190.

17. Criminal Law ⇐1202(4)

Where jury was instructed in murder prosecution that it was in discretion of jury whether death penalty should be inflicted, and six hours after jury retired, it returned and foreman asked whether defendant could be paroled if jury recommended life imprisonment, and court replied that matter was not within province of jury to consider, court properly refused to give defendant's request instruction that murder conviction would make defendant a habitual criminal, because of two prior convictions, so that he would not be subject to parole under any circumstances, since requested instruction was materially incorrect as defendant with two prior convictions would have been eligible for parole in nine years. Pen.Code, §§ 190 and 3047.5

George C. Carmody and Richard D. Sanders, Pittsburg, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., Francis W. Collins, Dist. Atty., Contra Costa, and David J. Levy, Deputy Dist. Atty., Martinez, for respondent.

TRAYNOR, Justice.

Defendant Lovell Barclay was charged by indictment with the murder and robbery of Alson G. Smith. He pleaded not guilty and admitted two prior felony convictions of robbery and one of manslaughter. A jury returned verdicts of guilty of murder in the first degree without recommendation and of robbery in the first degree. Defendant's motion for a new trial was denied, and he was sentenced to death on the murder conviction and to prison on the robbery conviction. The appeal to this court is automatic. Penal Code, § 1239(b).

Defendant operated a restaurant concession at the Hilltop Club in Crockett, owned by Smith. On the evening of March 6, 1952, Daniel Ortiz, James Davis, and William Hatfield, three acquaintances of defendant, drove to Crockett in Davis' car. They found defendant repairing his car and after some conversation the four men went to defendant's room in Crockett. The conversation turned to the subject of robbery, and Hatfield and defendant discussed the possibility of robbing a place about one hundred miles away. Defendant said that his car was in poor mechanical condition, and the two men asked Davis if they could use his car. Davis refused. After some discussion, defendant suggested that Davis drive him to the Hilltop Club so that he could borrow the car of a bartender who worked there. Davis agreed and the four men arrived at the Hilltop Club at about 3 o'clock in the morning.

Davis and Ortiz waited in the car. Hatfield and defendant forced open a window and entered the Club. Knowing that Smith kept most of his money in his room, the two men went upstairs. Hatfield entered the room first and found Smith asleep. He beat Smith until he was unconscious. The two men then ransacked the room and found Smith's wallet and several bags of silver. While their attention was distracted, Smith recovered consciousness and sat up in bed. Hatfield, using defendant's nickname, called out: "Frisco, what should I do?" Defendant said: "Man, you shouldn't have said my name * * *. I'll take care of him." Defendant threw a blanket over Smith's head. Hatfield turned his back as defendant beat Smith about the head for approximately a minute. The two men took the money and returned to the car where Ortiz and Davis were still waiting.

Ortiz and Davis asked about the bartender's car, but defendant and Hatfield laughed and told Davis to drive back to defendant's room. After they arrived, Davis and Ortiz saw Hatfield wash blood off his hands and watched the two men divide the money. Realizing that a crime had been committed while Hatfield and defendant were in the Club, Ortiz and Davis complained that they had become involved. They were given about $10 apiece and told to keep quiet. The four men separated and went home.

Smith never regained consciousness and died the day after the robbery. The injuries received from the beating were the direct cause of his death. When Davis and Ortiz read in a newspaper that Smith had died, they informed the police of the crime, and Hatfield and defendant were apprehended.

Hatfield and defendant were tried jointly. Ortiz and Davis testified as witnesses for the prosecution. Midway through the trial Hatfield withdrew his plea of not guilty and pleaded guilty. Subsequently he testified as a witness for the prosecution. An expert witness testified that he found fibres on defendant's clothes that matched fibres from the bedding on Smith's bed, and that he found dust on defendant's clothes that matched dust on the roof of the Hilltop Club taken from the point where defendant and Hatfield made their entry. Defendant took the stand in his own behalf and testified that on the night of the murder he completed his work at the Club at about 1:30 and then went home to bed. He contended that Hatfield, Ortiz, and Davis had falsely accused him of the crime in order to avoid responsibility for themselves. The jury rejected his defense and found him guilty.

[1] Since the evidence in the present case shows that defendant killed Smith in the commission of a robbery, it is clearly sufficient to support the conviction of murder in the first degree. Penal Code, § 189;

People v. Coefield, 37 Cal.2d 865, 868–869, 236 P.2d 570.

[2, 3] Defendant contends that the court erred in not instructing the jury that Davis, Ortiz, and Hatfield were accomplices as a matter of law. An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Penal Code, § 1111. If the undisputed evidence establishes that a witness is an accomplice, the jury should be so instructed. People v. Wallin, 32 Cal.2d 803, 809, 197 P.2d 734; People v. Ferlin, 203 Cal. 587, 601, 265 P. 230; People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L.R.A.,N.S., 704. Insofar as Davis and Ortiz are concerned, however, defendant's contention cannot be sustained. Davis and Ortiz testified that they knew nothing about the possibility of a robbery until the four men gathered in defendant's room; that they refused to take part in the projected robbery one hundred miles from Crockett; that they drove to the Hilltop Club with Hatfield and defendant in the belief that the only purpose of the trip was to get the bartender's car; that they were afraid that if they refused to go to the Hilltop Club, Davis' car would be taken by force; and that they did not know until after they returned to defendant's room that any robbery of the Hilltop Club had been contemplated. From the testimony of Davis and Ortiz the jury could reasonably conclude that the robbery of the Hilltop Club was an act independent of and foreign to the original criminal design to rob a place one hundred miles away, and that Davis and Ortiz were thus not guilty of the murder and robbery of Smith. People v. Harper, 25 Cal.2d 862, 870–873, 156 P.2d 249; People v. Kauffman, 152 Cal. 331, 335, 92 P. 861; see, also, Wharton's Criminal Law [12th ed.], § 258; 15 C.J.S., Conspiracy, § 74. Accordingly, the question whether or not Davis and Ortiz were accomplices to the crimes for which defendant was on trial was properly left to the determination of the jury. See cases collected in 19 A.L.R.2d 1352. If it is assumed that, as contended by defendant, Davis and Ortiz were guilty as a matter of law of the crime of concealing a felony, Penal Code, § 32, they still would not be "liable to prosecution for the identical offense charged against the defendant on trial" as required by section 1111. People v. Collum, 122 Cal. 186, 187, 54 P. 589; see People v. Wallin, supra, 32 Cal.2d 803, 807, 197 P.2d 734.

[4] The people concede that Hatfield was an accomplice as a matter of law and that it was error not to so instruct the jury. The court, however, clearly and correctly instructed the jury on the definition of an accomplice. The jury knew that Hatfield had been indicted with defendant; they had heard his testimony that he committed the crime; they knew that he had withdrawn his plea of not guilty and entered a plea of guilty. The district attorney stated in his argument to the jury: "With Mr. Hatfield we feel that he was an accomplice, there is no doubt about it. As to Davis and Ortiz, you are to decide whether or not they are accomplices." Under these circumstances, it is improbable that the jury considered that Hatfield was not an accomplice and that a different verdict would have been reached had an instruction been given that he was an accomplice. See People v. Ferlin, supra, 203 Cal. 587, 601–602, 265 P. 230; People v. Wahnish, 20 Cal.App.2d 58, 63, 66 P.2d 677.

The only evidence before the grand jury to connect defendant with the crime was the testimony of Ortiz and Davis. Defendant contends that the trial court erred in denying his motion to set aside the indictment, on the ground that it was not based upon evidence that would warrant a conviction by a trial jury. Penal Code, § 921; cf. Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859; People v. McRae, 31 Cal. 2d 184, 187 P.2d 741. It is unnecessary to pass upon this contention since, as we have seen, whether or not Ortiz and Davis were accomplices of defendant was a question of fact to be determined by the jury at the trial.

[5, 6] At the request of the People, the jury was instructed that: "It is the law that the testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard

such testimony, but you should give to it the weight to which you find it to be entitled after examining it with *care and caution* and in the light of all the evidence in the case." Defendant criticizes the italicized part of the instruction, on the ground that the jury should have been instructed only in the language of section 2061(4) of the Code of Civil Procedure, that "the testimony of an accomplice ought to be viewed with distrust," and that the additional words "care and caution" prejudicially weakened the instruction. It is error to instruct the jury that an accomplice's testimony should be viewed with "caution" without also instructing the jury in the language of the statute. People v. Hamilton, 33 Cal.2d 45, 51, 198 P.2d 873; see also People v. Dail, 22 Cal.2d 642, 653, 140 P.2d 828. The instruction given in the present case, however, read as a whole, is a correct statement of the law. People v. Hess, 107 Cal.App.2d 407, 430, 237 P.2d 568; People v. Chapman, 93 Cal.App.2d 365, 381, 209 P.2d 121.

[7, 8] The jury was instructed that: "If either the crime of murder or robbery, the commission of which is alleged in the indictment, was committed by any of the witnesses in this case, then as a matter of law such witness was an accomplice, assuming that you find that the defendant Barclay also participated in either of said crimes." Defendant contends that the instruction erroneously informed the jury that "only one of the witnesses, for example, Hatfield, could be an accomplice, and not all of them." The instruction, however, expressly applied to "any" of the witnesses. Defendant also contends that the word "committed" in the instruction "eliminated from the definition of an accomplice the meaning that one who 'participates', that is to say aids or assists, or takes part in the crime, is an accomplice, and limited the meaning of accomplice to one who actually did or committed the criminal act." In another instruction, the jury was informed that: "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof." When the two instructions are read together, no error appears.

[9] The jury was instructed that: "In determining whether or not the testimony of an accomplice has been corroborated as required by law, you must, for the purpose only of your consideration of that question, assume to be removed from the case the testimony of the accomplice, and then examine all other evidence with a view to determining if there be any inculpatory evidence, that is, evidence tending to connect the defendant with the commission of the offense. If such other evidence does do that, then the testimony of the accomplice is corroborated; if it does not, then there is no corroboration, although the accomplice may be corroborated in regard to any number of facts sworn to by him." Defendant contends that the instruction erroneously permitted the jury to find corroboration of the testimony of one accomplice in the testimony of other accomplices, on the ground that it told the jury that the test of corroboration was whether, aside from the testimony of "the" accomplice, "all other evidence" tended to connect the defendant with the commission of the offense. Defendant contends that "all other evidence" would include testimony of other accomplices so that the jury, even though it found Davis and Ortiz to be accomplices, might nevertheless have considered their testimony as corroborative of the testimony of Hatfield. In the instruction following that quoted above, however, the jury was told that: "The corroboration of an accomplice required by law may not be supplied by the testimony of one or more other accomplices, but must come from other evidence or circumstances, or from the testimony of one or more witnesses who were not accomplices." The two instructions, read together, correctly state the law.

[10] Early in the trial a confession by Hatfield was admitted in evidence. The jury was instructed that it should not consider the confession as evidence against defendant. See People v. Wade, 71 Cal.

App.2d 646, 652–653, 163 P.2d 59. Subsequently, Hatfield withdrew his plea of not guilty. The court denied defendant's motion for a mistrial and instructed the jury that the testimony regarding Hatfield's confession was struck from the record and must be disregarded. Hatfield later testified regarding all the matters set forth in his confession. Defendant now contends that his motion for a mistrial should have been granted, on the ground that the confession of Hatfield was admissible at the trial of defendant only if Hatfield and defendant remained jointly on trial until the cause was submitted to the jury. Since all matters set forth in the confession were subsequently in evidence when Hatfield testified as a witness for the People, the error, if any, was not prejudicial to defendant. People v. Simmons, 28 Cal.2d 699, 721, 172 P.2d 18; People v. Higbee, 78 Cal.App. 455, 459, 248 P. 927.

[11] Police officers took the pillow and quilt from Smith's bed and sent them to a laboratory for analysis. At the time of the initial investigation of Smith's room, the pillow was covered with a slip, but the slip was missing when the pillow arrived at the laboratory. The absence of the slip was never explained. Defendant contends that it was error to allow the expert witness to testify regarding the similarity of fibres swept from the pillow with fibres swept from defendant's clothes, on the ground that when examined by the expert the pillow was not in the same condition as at the time of the murder. Defendant, however, does not show how the absence of the pillow slip could have prejudiced him in any way.

Defendant next contends that his conviction of robbery in the first degree is unsupported by competent evidence. Robbery is of the first degree when it "is perpetrated by torture or by a person being armed with a dangerous or deadly weapon". Penal Code, § 211a. There is no evidence of torture in the present case, but Hatfield testified that he was armed with a .38 revolver at the time of the robbery. Hatfield's testimony, if competent, supplied sufficient evidence to sustain defendant's conviction of first degree robbery since defendant, although personally unarmed, aided and abetted the commission of the crime. Penal Code, § 31; People v. Perkins, 37 Cal.2d 62, 64, 230 P.2d 353.

[12, 13] Defendant contends, however, that the fact that there is no evidence to show that a deadly weapon was used in the robbery other than the testimony of Hatfield, admittedly an accomplice, requires the judgment to be modified by reducing the degree of the crime to robbery in the second degree. Penal Code § 1181; see People v. Mendes, 35 Cal.2d 537, 545–546, 219 P.2d 1. This contention cannot be sustained. Section 1111 of the Penal Code requires only that the corroborative evidence tend "to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies." People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681, 684; People v. Henderson, 34 Cal.2d 340, 342–343, 209 P.2d 785. Proof of the elements of the crime, as contrasted with proof of the connection of defendant with the commission thereof, may rest upon the uncorroborated testimony of an accomplice. People v. Harper, 25 Cal.2d 862, 877, 156 P.2d 249; People v. Negra, 208 Cal. 64, 69, 280 P. 354; People v. Griffin, 98 Cal.App.2d 1, 25, 219 P.2d 519; People v. Briley, 9 Cal.App.2d 84, 86, 48 P.2d 734; People v. Knowles, 75 Cal.App. 229, 230, 242 P. 508; see, 21 Cal.L.Rev. 247. The testimony of Ortiz, Davis, and the expert witness constituted sufficient corroborative evidence to connect defendant with the commission of the crime of robbery. It was unnecessary also to corroborate the testimony of Hatfield that a deadly weapon was used therein.

The jury was instructed that it was in their discretion whether the death penalty should be inflicted.[1] Six hours after the

1. "The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty

jury retired, it returned and the foreman asked: "The jury would like to review that portion of your instructions concerning what factors, if any, in law may be properly considered in determining whether the recommendation for life imprisonment may be included in returning the verdict." The court read again the instruction previously given. The foreman then asked: "In the recommendation 'as a punishment therefor we find that he be imprisoned in the state prison during the term of his life'—does it mean exactly that, or is that sentence subject to termination by parole?" The court replied that he didn't believe it was "within the province of the jury to consider" that question. The court then discussed the question with counsel out of the presence of the jury. Counsel for defendant stated: "At this time the defendant asks the court to instruct the jury that because of the fact that a conviction of this offense would make him a habitual criminal that he would not be subject to parole under any circumstances." The court refused to give the requested instruction and the jury returned to its deliberations. One hour later the jury returned a verdict of murder in the first degree without recommendation. Defendant contends that the ruling of the court was prejudicially erroneous, on the ground that the jury may have fixed the punishment at death because of a mistaken belief that otherwise defendant might be released from prison on parole within a few years of his conviction.

[14] When a defendant is convicted of murder in the first degree, the jury determines his punishment as well as his guilt. Penal Code, § 190; People v. Sainz, 162 Cal. 242, 246–247, 121 P. 922; cf. Penal Code § 209, [kidnapping with bodily harm]; Penal Code, § 264 [rape of female under age eighteen]. Since the issues of punishment and guilt are determined at the same time, there is danger that evidence or instructions offered on the former issue may influence the verdict on the latter issue. Accordingly, to avoid prejudice to either the People or the accused by injection of collateral issues into the case, evidence of the good or bad habits and background of the accused is generally held inadmissible. People v. Valenzuela, 7 Cal. 2d 650, 653, 62 P.2d 142; People v. Witt, 170 Cal. 104, 110–111, 148 P. 928; see also People v. Larrios, 220 Cal. 236, 241–242, 30 P.2d 404, 405 [court in discretion may permit defendant to show "something of his background"], and the consideration of the jury is limited to the facts and circumstances attending the commission of the offense itself. People v. Gosden, 6 Cal. 2d 14, 30–31, 56 P.2d 211; People v. Hall, 199 Cal. 451, 455, 249 P. 859; People v. Perry, 195 Cal. 623, 639, 234 P. 890; People v. Pantages, 212 Cal. 237, 275, 297 P. 890; see, 11 So.Cal.L.Rev. 351.

[15–17] For similar reasons of policy the jury is not allowed to weigh the possibility of parole or pardon in determining the guilt of the defendant, and it is therefore error to give an instruction that allows the jury to take into consideration the consequences of a recommendation of life imprisonment in arriving at that determination. See, People v. Letourneau, 34 Cal.2d 478, 494, 211 P.2d 865. To aid the jury in fixing the punishment of the defendant, however, the court may instruct the jury as to the consequences of the different penalties that may be imposed so that an intelligent decision may be made. People v. Chessman, 38 Cal.2d 166, 189–190, 238 P.2d 1001; People v. Osborn, 37 Cal.2d 380, 384–385, 231 P.2d 850; People v. Caetano, 29 Cal.2d 616, 619, 177 P.2d 1; People v. La Verne, 212 Cal. 29, 31, 297 P. 561; People v. Hall, 199 Cal. 451, 459, 249 P. 859; People v. Hong Ah Duck, 61 Cal. 387, 393. In the Osborn case, the court informed the jury that a recommendation of

> of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. If you should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict, using a form that will be handed to you when you retire to deliberate, but if you should fix the penalty as death, you will not specify the death penalty in your verdict, and you will say nothing about punishment in the verdict."

life imprisonment without possibility of parole would not be binding, thus impliedly answering in the affirmative the question of the jury whether a person sentenced to life imprisonment might be paroled. We stated: "It is understandable that jurors, who are charged with the duty of fixing the penalty in the event that they find a defendant guilty of first degree murder, should be interested in knowing the nature and effect of the penalties which they may impose; and neither reason nor authority indicates that the trial court should be prohibited from enlightening the jurors when questions are asked upon that subject." 37 Cal.2d at page 385, 231 P.2d at page 853. Recently, in People v. Chessman, supra, it was held that there was no error in informing a jury that when a person is sentenced to life imprisonment without possibility of parole there nevertheless remains the chance that the defendant will be freed by pardon, commutation, or action of the Legislature. The recent decisions of this court thus establish that a jury may consider the consequences of a recommendation of life imprisonment in determining the punishment of the defendant, although it may not consider the possible penalties in determining the guilt of the defendant.

The question remains whether error was committed in the present case. The instruction suggested by defendant would have informed the jury that "he would not be subject to parole under any circumstances." The instruction was materially incorrect. Since defendant had two [2] prior convictions, he would have been eligible for parole in nine years. Penal Code, § 3047.5. All instructions actually given by the court on the subject of punishment were correct statements of the law under the decisions of this court; defendant cannot show that any correct instruction offered by him was refused. At least under the circumstances of the present case, we do not think that the trial court was required to offer an additional instruction of its own motion. Cf. People v. Cook, 39 Cal.2d 496, 247 P.2d 567.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



15 Cal.App.2d 452

PEOPLE v. JORDAN.

Cr. 2387.

District Court of Appeal, Third District, California.

Jan. 21, 1953.

Rehearing Denied Feb. 2, 1953.

Defendant was convicted in the Superior Court of El Dorado County, Thomas Maul, J., of first degree murder, and he appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to corroborate testimony of accomplice.

Judgment affirmed.

Criminal Law ⇐511(1)

In murder prosecution, evidence was sufficient to corroborate testimony of accomplice. Pen.Code, § 1111.

Birchie H. Jordan, in pro per.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

The appellant, Birchie H. Jordan, was convicted by a jury of first degree murder and his punishment fixed at life imprisonment. This appeal is from the judgment entered in accordance with said verdict. No motion for a new trial was made. This case is before this court for a second time, the previous conviction and judgment of first degree murder having been reversed in People v. Petree, 109 Cal.App. 2d 184, 240 P.2d 327.

2. Since manslaughter is not one of the crimes enumerated in section 644 of the Penal Code, defendant's prior conviction of that crime did not affect his status as a habitual criminal.

As in the previous appeal, appellant's contention is that the verdict of the jury against him was based solely upon the uncorroborated testimony of Alfred F. Peterson who admitted that he was an accomplice, and, as in the former appeal, the sole question before us is whether there was sufficient corroboration of Peterson's testimony to sustain the verdict and judgment.

On the evening of October 12, 1949, at about 6:45 p. m., Robert M. Davidson was shot and killed during the perpetration of a robbery of the Clarksville Store, in Clarksville, El Dorado County, California. The robber who fired the shots was identified as Bruce Petree, and appellant allegedly helped to plan the robbery and acted as lookout during the commission of the robbery and killing.

The testimony of Alfred F. Peterson, admittedly an accomplice, was substantially as follows: On October 11, 1949, several guns were stolen from Fisher's Hardware Store and hidden on a hill near his and Petree's home; one of the guns was a .38 Colt revolver and the other a .22 Remington pump gun. He and Petree, driving in Petree's black 1937 Ford coupe, picked up appellant Jordan in Diamond Springs on October 12, 1949, drove to El Dorado to get some beer, then went to the place where the guns were hidden, got the .38 Colt and the .22 rifle, placed them in the car, and returned to El Dorado. They stopped at Diamond Springs where Jordan purchased some .38 shells and then returned to El Dorado for more beer. They then drove toward Shingle Springs, and a conversation was had regarding the proposed holdup of the Clarksville store. About a mile and a half past Shingle Springs they stopped for gasoline at about 6:00 or 6:30 p. m., at a Shell service station called Art's Garage, remaining there about 15 minutes. About a mile past the service station they stopped and appellant Jordan had some roadside target practice with the pistol. They finally drove to Clarksville, passed through, turned the car around about a quarter of a mile beyond Clarksville, waited for about 10 minutes, drove back about a few hundred feet past the Clarksville store and stopped the car. By this time it was dark and there were lights on in the store and on the car. Jordan and Petree got out of the car, Jordan taking the pump gun and Petree the pistol; Peterson was told to drive. Jordan gave Petree his brown hat and Petree put on an army jacket and a pair of sunglasses. Jordan told Petree to go into the store as the proprietor would know Jordan. Peterson watched through the rear view mirror of the car and could see them proceed for about 50 feet toward the store. Within a few minutes he heard two or three shots and both men ran back to the car with the guns in their hands. Petree said he thought he had killed somebody in the holdup and they both threatened Peterson not to say anything to any one. Peterson drove to Perkins and turned off on the Jackson road. En route to Jackson they dispossessed themselves of the guns and jacket; they made several stops for drinks before reaching Jackson. They returned from Jackson by Plymouth and let Jordan off in El Dorado at about 11:00 p. m. Petree and Peterson then went back to Peterson's house.

There was further testimony that shortly after 11:00 p. m. Deputy Sheriff Carlson and City Police Officer Bagwell of Placerville drove up to Petree's house and observed his 1937 black Ford coupe in the yard and noted that the hood of the automobile was warm. Carlson knocked on the door of Petree's house and Petree opened the door, but Carlson did not see any other persons present. Witnesses present in the Clarksville store during the holdup and killing testified that Petree was attired in brown hat and glasses, as well as black jeans, dark shoes and army jacket, and that he carried what was apparently a new pistol which he waved and later fired. The testimony of the expert witness who examined the bullets retrieved from the scene of the shooting was to the effect that they had been fired from a Colt type .38 caliber revolver that was either new or in new condition.

The witness Madeleine D. Moseley, who conducted the lunch counter in the Clarksville Store, testified that she heard a car

drive up shortly before Petree came into the store.

The witness Barnett Huse, an investigator for the Bureau of Criminal Identification and Investigation in the California State Department of Justice, testified as to a conversation with appellant, Birchie H. Jordan, in the office of the Sheriff of El Dorado County on November 1, 1949. The following appears in his testimony:

"In substance, Mr. Roberts, the defendant was questioned as to whether or not he was with Petree and Peterson on the evening of October 12, 1949, where they were and how he would trace any of the occurrences that he described. Mr. Jordan corroborated the statement of the other men that we questioned, that they were together, they had been together at all times, but he was able to give us times and places only in a relative manner."

"Mr. Jordan stated that he had been employed that day, that he was working as a bartender for one of the local places, and that the time he was through work depended on the time when the owner of the establishment relieved him, that the owner took the night shift; that he worked days, and that this time varied between four thirty and sometimes six thirty in the evening; that following that, that he and Peterson and Petree went in the Petree car to Plymouth and Jackson. I think they mentioned stopping at Sutter Creek, and that they returned then to El Dorado, arriving there shortly before eleven o'clock, but he was with the other boys at all times that evening, that they had been together at all times."

"He identified the two boys as Alfred Peterson and Bruce Petree. They were in Petree's car, and they left at approximately six or six thirty on the evening of October 12th. They went to Jackson by way of Plymouth; they didn't deviate from that road."

One Paul Baer, who did not testify at the previous trial, testified at the second trial that he knew Jordan and had seen and met him in Kelly's Bar in El Dorado, and that he also knew Petree and Peterson and was familiar with Petree's black 1937 Ford coupe. He testified that on October 12, 1949, he was working at Art's Garage below Shingle Springs; that he saw Petree's car come into the station just before dusk, at about 6 or 6:30, and that he filled it with gas; that Petree, Jordan and Peterson were together, with Petree driving. Baer testified further that appellant Jordan wore a brown hat with the brim turned up, a brown suit, and shirt with open collar, and that Petree and Peterson wore sport clothes. The car was driven into the station from the direction of Placerville and left in the direction of Sacramento, and that the three men remained at the service station for some 10 to 20 minutes.

Appellant did not take the stand in his own defense, but called as witnesses Harry Sadler, the owner of Kelly's Bar, Woodrow Wilson Downing, and James Evers, the owner, at the time of the robbery, of Art's Garage. He questioned them as to their knowledge of his whereabouts on the night in question. None of them remembered seeing him on that night.

Appellant contends that the only additional evidence adduced by the people at the second trial was that of the witness Paul Baer, and appellant argues that this still does not fulfill the dominant requirement of section 1111 of the Penal Code requiring that the testimony of an accomplice must "be corroborated by such other evidence as shall connect the defendant with the commission of the offense."

If appellant's contention that the only additional evidence adduced at the second trial was that of Paul Baer were correct, there would be considerable merit in appellant's argument that the evidence does not meet the requirements of section 1111. Upon the former appeal this court was not satisfied that there was sufficient corroboration of the testimony of the accomplice. We there said at page 188: "There is no independent evidence that Jordan was with Petree and Peterson when the crime was committed, nor do such conflicts in his statements to officers as to the time he joined them that evening show that he was

with them at any particular time. Though such conflicting statements may have tended to discredit him as a witness, they are not evidence of the fact as to when he did join Peterson and Petree that evening."

However, in the instant appeal the testimony of the witness Barnett Huse, hereinbefore quoted, shows that appellant admitted that he and the accomplice Peterson and Petree were together at all times on the night of the crime. This corroborates the story of the accomplice that appellant was with him at the scene of the crime. Although the witness Huse testified at the former trial, the admission of appellant that he was with Peterson and Petree at all times on the night of the crime was not brought out clearly. Appellant was an uncle of Petree, and Petree was a brother-in-law of Peterson. The testimony of the witness Baer shows that shortly before the crime was committed appellant, Peterson and Petree stopped at Art's Garage, that appellant was wearing a brown hat, and the others wore sports clothes and no hat, and that all three drove off in the direction of Sacramento. Shortly thereafter a car drove up to near the store at Clarksville and Petree entered the store wearing a brown hat.

We believe that this evidence tends to corroborate the story of Peterson that appellant aided and abetted in the commission of the robbery and murder and acted as lookout while Petree went in to rob the store.

In the case of People v. Griffin, 98 Cal. App.2d 1, 219 P.2d 519 (hearing denied), this court held that it is not necessary that the corroborative evidence prove independently that the defendant is guilty or that it extend to all of the elements of the offense; that circumstantial evidence may suffice; and that corroborative evidence may be sufficient, even though slight, if the connection of the defendant with the crime reasonably may be inferred therefrom. We there said, 98 Cal.App.2d at page 24, 219 P.2d at page 533:

"It is not necessary that the corroborative evidence prove independently either that the defendant is guilty of the offense or that he is guilty beyond a reasonable doubt. [Citing cases.] If this were not true and if it were required that a complete case for the prosecution be established without reference to the testimony of the accomplice, there would then be no occasion to offer the accomplice as a witness.

"Sufficient corroboration may be furnished by the defendant's own testimony [citing cases], or by admissions or confessions made by him [citing cases], or by silence in the face of an accusatory statement [citing case].

"The entire conduct of the parties, their relationship, acts, and conduct during and after the crime, may be taken into consideration by the jury in determining the sufficiency of the corroboration. [Citing cases.]

"If the corroboration is inculpatory it is not essential that it extend to all of the elements of the offense, nor to every fact and detail included in the testimony of the accomplices. [Citing cases.]

"Conversely, such evidence is sufficient if it tends in some slight degree, at least, to implicate the defendant. It need not be strong. [Citing cases.]

"The testimony of an accomplice need not be corroborated by direct evidence, or, stated in another way: Circumstantial evidence suffices for the purpose of corroboration. [Citing cases.]

"It is sufficient, even though circumstantial and slight, if the connection of the defendant with the alleged crime may be reasonably inferred from the corroborative evidence. [Citing cases.]

"The corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth. [Citing cases.] In the Trujillo case [People v. Trujillo], supra, our Supreme Court said, 32 Cal.2d [105] at page 110, 194 P.2d [681] at page 684: 'Such corrobora-

tion must create more than a suspicion of guilt, but is sufficient even though it "be slight and, when standing by itself, entitled to but little consideration". [Citing cases.] It is sufficient when the evidence offered as corroborative tends to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies. If his testimony could be completely proven by other evidence, there would be no occasion to offer him as a witness. [Citing cases.]"

In People v. Henderson, 34 Cal.2d 340, at page 342, 209 P.2d 785, at page 186, the court said:

"Section 1111 of the Penal Code requires corroboration of an accomplice's testimony by such other evidence as shall tend to connect the defendant with the commission of the offense, and provides that corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

"Although the corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connect the defendant with the commission of the crime in such a way as reasonably to satisfy the fact finding body that the accomplice is telling the truth. People v. Trujillo, 32 Cal.2d 105, 110–111, 194 P.2d 681. The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. People v. Negra, 208 Cal. 64, 69–70, 280 P. 354; People v. Yeager, 194 Cal. 452, 473, 229 P. 40.

* * * * * *

"The relationship of the men and all of their acts and conduct may be considered in determining whether there are corroborating circumstances. People v. Ross, 46 Cal.App.2d 385, 116 P. 2d 81; People v. Willmurth, 77 Cal. App.2d 605, 611, 176 P.2d 102."

And in the very recent case of People v. Barclay, 40 Cal.2d 146, 252 P.2d 321 our Supreme Court said:

"Defendant contends, however, that the fact that there is no evidence to show that a deadly weapon was used in the robbery other than the testimony of Hatfield, admittedly an accomplice, requires the judgment to be modified by reducing the degree of the crime to robbery in the second degree. Penal Code § 1181; see People v. Mendes, 35 Cal.2d 537, 545–546, 219 P.2d 1. This contention cannot be sustained. Section 1111 of the Penal Code requires only that the corroborative evidence tend 'to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies.' People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681, 684; People v. Henderson, 34 Cal.2d 340, 342–343, 209 P.2d 785. Proof of the elements of the crime, as contrasted with proof of the connection of defendant with the commission thereof, may rest upon the uncorroborated testimony of an accomplice. People v. Harper, 25 Cal.2d 862, 877, 156 P.2d 249; People v. Negra, 208 Cal. 64, 69, 280 P. 354; People v. Griffin, 98 Cal.App.2d 1, 25, 219 P.2d 519; People v. Briley, 9 Cal.App.2d 84, 86, 48 P.2d 734; People v. Knowles, 75 Cal.App. 229, 230, 242 P. 508; see, 21 Cal.L.Rev. 247. The testimony of Ortiz, Davis, and the expert witness constituted sufficient corroborative evidence to connect defendant with the commission of the crime of robbery. It was unnecessary also to corroborate the testimony of Hatfield that a deadly weapon was used therein."

Applying the principles laid down in the cited cases to the evidence in the instant case, we are satisfied that the jury was justified in concluding that the evidence other than the testimony of the accomplice

Peterson connected appellant with the commission of the crime in such a way as to reasonably satisfy them that the accomplice was telling the truth. No contention is made that the jury was not fully and fairly instructed as to the necessity and degree of corroboration of the testimony of an accomplice required, the sole contention of appellant being that the judgment was based on the uncorroborated testimony of an accomplice. We are unable to agree with this contention, and conclude from a review of the entire record that the appellant was fairly tried and that the evidence supports his conviction.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



115 Cal.App.2d 583

PEOPLE v. CRISP.

Cr. 4916.

District Court of Appeal, Second District, Division 3, California.

Jan. 28, 1953.

Defendant was convicted in the Superior Court, Los Angeles County, William B. Neeley, J., of driving a motor vehicle while under the influence of intoxicating liquor, and when so driving, doing an act forbidden by law or neglecting a duty imposed by law, which act or neglect proximately caused bodily injury to a person other than himself, and he appealed. The District Court of Appeal, Vallée, J., held that the evidence supported the conviction.

Affirmed.

Automobiles ⇐355(6)

Evidence sustained conviction of driving motor vehicle while under influence of intoxicating liquor, and when so driving, doing an act forbidden by law or neglecting a duty imposed by law, which act or neglect proximately caused bodily injury to a person other than defendant. Vehicle Code, § 501.

Kenneth E. Matot, Theodore R. Gabrielson, Douglas G. Hitchcock, and Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of a violation of Vehicle Code, section 501—driving a vehicle while under the influence of intoxicating liquor, and when so driving doing an act forbidden by law, or neglecting a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused bodily injury to a person other than himself. The sole claim here is that the judgment is unsupported by the evidence.

On June 17, 1952, President Linthicum was driving his automobile west on 97th Street in Los Angeles. As he approached Beach Street, he slowed down and saw an automobile traveling north on Beach. There was a stop sign on Beach at its intersection with 97th. The automobile traveling north on Beach did not stop at the sign, but entered the intersection and struck the car driven by President Linthicum as he was driving through the intersection. Shortly thereafter, a police officer arrived. He talked to defendant off and on for about forty minutes. Defendant talked incoherently, made inconsistent statements, his breath had a strong odor of alcohol, his speech was slurred, he stuttered, and appeared very confused. The officer testified defendant was intoxicated.

One of the occupants of the automobile which collided with that of President Linthicum testified there were four persons in the car, that defendant was driving, and that the car was going 15 to 25 miles an hour at the intersection.

Mrs. Abernathy was one of the occupants of the car driven by the defendant. She was injured in the accident, her head was knocked through the windshield, and she was rendered unconscious.

The foregoing evidence is sufficient to support the judgment. The evidence warranted the conclusions that 1) defendant was intoxicated; 2) while intoxicated, he drove the automobile; 3) in driving, he neglected a duty imposed by law—neglected to stop at the intersection; 4) such neglect proximately caused bodily injury to another, Mrs. Abernathy.

On stipulation, the case of the People was submitted on the transcript of the preliminary examination, with the reservation that both sides could introduce additional evidence. McNally, one of the occupants of the car which collided with that of President Linthicum, testified at the preliminary that defendant was driving the car. At the trial, McNally testified that defendant was not driving the car. Defendant argues that the implied finding that defendant was driving the car was based on "sheer speculation." The question as to which version of McNally's testimony should be accepted was for the trier of fact. Since the finding is supported by substantial evidence we may not disturb it. People v. Whitehurst, 112 Cal.App.2d 140, 245 P.2d 509.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



YORBA et al. v. ANAHEIM UNION WATER CO. et al. *

Civ. 4429.

District Court of Appeal, Fourth District, California.

Jan. 12, 1953.

Rehearing Denied Feb. 6, 1953.

Hearing Granted March 12, 1953.

Action to quiet title and for declaratory relief. The Superior Court of Orange County, Robert Gardner, J., rendered judgment adjudicating plaintiffs' riparian rights, prescriptive rights of defendant water company to waters diverted from river and conveyed by canal across plaintiffs' lands, and right of irrigation company to use of a portion of such water, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that finding that defendant water company had acquired a prescriptive right to divert one-half of entire surface flow of river subject to right of codefendant irrigation company to use of specified quantity of such water was supported by substantial evidence.

Judgment affirmed in part and reversed in part.

1. Waters and Water Courses ⇐152(8)

In action to quiet title and for declaratory relief, finding that defendant water company had acquired and owned a prescriptive right to divert one-half of entire surface flow of river at a point above plaintiffs' lands subject to conditions contained in prior injunction requiring delivery of specified amount of water to an irrigation company, was supported by substantial evidence.

2. Waters and Water Courses ⇐158½(1)

In action to quiet title and for declaratory relief, wherein plaintiffs claimed right to receive from defendant's canal across plaintiffs' lands water for irrigation and domestic purposes under agreement in deeds by which right of way for canal had been granted by plaintiffs' predecessors in title, finding that defendant's predecessors in ownership of canal had acquired right of way in canal by prescription rendered unnecessary a finding on issue of agreement in deeds or alleged servitude created thereby.

3. Quieting Title ⇐47(2)

In action to quiet title, findings as to ownership of specified parcels of land, the descriptions of which tied to the center line of specified railroad right of way, but excepting therefrom portion occupied by specified railway, constituted a finding that owners of specified parcels were not owners of the portion thereof within railroad right of way.

4. Waters and Water Courses ⇐152(10)

In action to quiet title and for declaratory relief, findings as to whether certain parcels of plaintiffs' lands were riparian to

* Subsequent opinion 259 P.2d 2.

river were not necessary to support judgment that defendant water company had acquired a prescriptive right to divert and use one-half of entire surface flow of river above plaintiffs' lands subject to rights of named irrigation company to specified quantity of water, since such judgment did not deprive plaintiffs of the right to develop water on their lands for irrigation purposes.

5. Waters and Water Courses ⇐152(8)

In action to quiet title and for declaratory relief, finding that defendant irrigation company was entitled to the use of 200 miner's inches of the water which codefendant water company had acquired the prescriptive right to divert from river was supported by evidence that injunction granted in previous action between defendants and plaintiffs' predecessors in interest had provided for delivery of specified quantity of water to ditch of irrigation company and that irrigation company and water company had executed agreements in conformity with injunction.

6. Waters and Water Courses ⇐152(11)

In action to quiet title and for declaratory relief with respect to rights to use of water from river for irrigation and domestic purposes, judgment improperly determined riparian rights of plaintiffs other than as against defendant corporations.

Harry M. Irwin, Los Angeles, Forgy, Reinhaus & Forgy and Fred Forgy, Santa Ana, for appellants.

H. C. Head and R. C. Mize, Santa Ana, Cosgrove, Cramer, Diether & RinDge, Los Angeles, for respondent Anaheim Union Water Co.

Head, Jacobs & Corfman, Santa Ana, for respondent Yorba Irr. Co.

MUSSELL, Justice.

Plaintiffs appeal from a judgment adjudicating their riparian rights, the prescriptive rights of defendant Anaheim Water Company to waters diverted from the Santa Ana River and conveyed by a canal through and across plaintiffs' lands, and the right of Yorba Irrigation Company to receive and use 200 miner's inches of water from said canal.

The complaint is to quiet title and for declaratory relief and contains two causes of action. It is alleged in the first cause of action, among other matters, that the plaintiffs are the owners of real property in the Canon de Santa Ana, County of Orange, comprising approximately 1500 acres; that each and all of the parcels of real property owned by plaintiffs are riparian to the Santa Ana River; that about 1,000 acres thereof are cultivatable and susceptible of irrigation from the waters of said river; that plaintiffs are entitled to divert, take and use water from the said river for the reasonable and proper irrigation of their lands and for domestic purposes; that approximately 250 inches of water, measured under 4 inch pressure, is a reasonable amount of water for the proper irrigation of plaintiffs' lands; that the plaintiffs are entitled to divert and take from the Santa Ana River sufficient water which will be required and utilized for the reasonable and proper irrigation of their riparian lands and for domestic uses thereon; that the defendants claim an estate and interest in the water of said river adverse to plaintiffs; that said claims of said defendants are without right and that whatever estate or interest that defendants may have in the water of said river is subject and subordinate to that of plaintiffs.

In the second cause of action it is alleged that by court decree a portion of the Rancho Canon de Santa Ana of Orange County, California, was divided into the Prudencio Yorba, Vicente Yorba and William McKee allotments (describing them by metes and bounds); that in 1878 and 1879 the Vicente Yorba and William McKee allotments were deeded to Prudencio Yorba; that each of the parcels of each of the plaintiffs constitute a part of one or the other of these three allotments and that plaintiffs acquired their titles as successors of Prudencio Yorba; that the allotments are contiguous to each other; that each is contiguous to the river and that the ordinary, usual and natural stream passes along over and under the southerly portion thereof; that each of the allotments was ripari-

an to the river and the owners were entitled to divert water therefrom for irrigation and domestic use on said land.

It was alleged that in April of 1876 the Canon de Santa Ana Water Company was incorporated for the purpose of acquiring rights of way and constructing canals and ditches to supply water for irrigation and domestic use; that in June, 1876, certain grantors, including Prudencio Yorba, Vicente Yorba and William McKee, executed and delivered deeds remising, releasing and quitclaiming to Canon de Santa Ana Water Company, its successors and assigns "a reasonable right of way through their lands in the Rancho Canon de Santa Ana" for a canal on the right bank (north bank) of the Santa Ana River * * * "westerly to the westerly boundary of said rancho and for ditches for bringing out and distributing said water"; that in consideration thereof, the canal company agreed that the grantors should have the same privileges of full stockholders in obtaining water from said canal; that their said land should be supplied with water at the lowest rate at which water is furnished and that said grantors should have free of cost all water necessary for domestic purposes and the watering of livestock; that upon the execution and delivery of said deeds "and pursuant thereto", the Canon de Santa Ana Water Company entered upon and took possession of the right of way; that by the execution and delivery of said deeds the grantors fully complied with and performed all the conditions by them undertaken; that thereafter Canon de Santa Ana Water Company and its successors constructed upon said right of way the canal commonly known as the Cajon Irrigation Canal or the Cajon ditch connecting with the Santa Ana River at the point designated in said deeds and extending therefrom upon and across the lands of Rancho Canon de Santa Ana which the grantors in said deeds owned at the time of the execution thereof, including the three allotments in question "to and beyond the western boundaries of said rancho", for the purpose of diverting water from the Santa Ana River through the canal for the irrigation of said lands and for domestic purposes; that ever since said canal was constructed, as aforesaid, until the present time, the successive owners of said right of way have diverted water from the Santa Ana River into and through said canal and have distributed and supplied water therefrom under and pursuant to said contract for irrigation and domestic purposes on said lands in the Rancho Canon de Santa Ana then owned by the grantors in said deeds; that following the execution of said deeds in 1876 Cajon Irrigation Company, a California corporation, acquired all the interests of said Canon de Santa Ana Water Company in said right of way and prior to September 12, 1878, entered upon and took possession of the right of way "claiming ownership thereof as the successor of Canon de Santa Ana Water Company"; that on September 12, 1878, Cajon Irrigation Company conveyed a one-half interest in said right of way and canal to Anaheim Water Company and on February 4, 1884, Cajon Irrigation Company conveyed all its interests in the right of way and canal to North Anaheim Canal Company; that on the same day North Anaheim Canal Company transferred its rights to Anaheim Union Water Company; that on February 9, 1884, Anaheim Water Company conveyed all its interests in the right of way and canal to Anaheim Union Water Company; that in February, 1884, Anaheim Union Water Company entered upon and into possession of the right of way pursuant to said conveyances and that at all times subsequent thereto and presently defendant Anaheim Union Water Company is the owner and in possession of said right of way.

It is alleged that on February 19, 1945, the defendant Anaheim Union Water Company adopted a motion directing its employees to prevent any use of water from the Cajon Canal by others than stockholders, excepting defendant Yorba Irrigation Company, and excepting diversions for domestic uses at six designated stations on the Bryant property and the property of the plaintiffs J. Coleman Travis, Ernest T. Yorba and Carlos Dominguez, and that the plaintiffs be notified to limit the use of water from the canal to domestic purposes.

It is alleged that by reason of said corporate action, plaintiffs were denied the same privileges as full stockholders in obtaining water from said canal; that defendant Anaheim Union Water Company now refuses to supply water from said canal to plaintiffs at its lowest rate and denies plaintiffs the right to receive water from said canal for the watering of stock and for domestic purposes except at the locations specified, and prevents plaintiffs from receiving any water from said canal for irrigation purposes and, accordingly, breached and repudiates its obligations arising under said deeds of June 26, 1876, and July 6, 1876, respectively.

Plaintiffs pray judgment decreeing that each parcel of their property is riparian to the Santa Ana River; that plaintiffs are entitled to divert therefrom sufficient water for irrigation and domestic uses upon their lands; that plaintiffs' right is prior and paramount to that of either of the defendants; that plaintiffs are entitled to receive water from the Cajon Canal upon the same terms and conditions as stockholders of defendant Anaheim Union Water Company and to be supplied with water at the lowest rate charged by defendant and to receive free of cost all water necessary for domestic purposes and the watering of livestock; that such rights are prior and paramount to the right of either of the defendants and their officers and agents be perpetually restrained from asserting any right to the waters of the river or the waters of the canal adverse to plaintiffs' right.

Defendant Anaheim Union Water Company in answering the first cause of action denied that the parcels of property of each of the plaintiffs lie contiguous to each other, and that each is contiguous to and abuts upon the river; denied that the ordinary and natural flow of the stream passes along the southerly portion of each of said parcels and that each of said parcels is riparian to the river, and that each of the plaintiffs is entitled to divert from the river sufficient water for reasonable irrigation of their irrigable lands.

It is denied that approximately 250 miner's inches is a reasonable amount of water for plaintiffs' irrigable lands and it is denied that the plaintiffs are entitled to take sufficient waters from the river as shall be required for the proper irrigation of said land and for domestic uses thereon.

In answering the second cause of action the said defendant denied that plaintiffs were entitled to divert and take water from the river sufficient for the proper irrigation of the irrigable lands of plaintiffs; admitted the execution and recording of the deeds conveying the right of way to the Canon de Santa Ana Water Company; admitted that the Canon de Santa Ana Water Company upon the execution of the deeds entered upon and took possession of the rights of way and thereupon it and its successors constructed the canal known as the Cajon Irrigation Canal connected with the Santa Ana River at the point designated in the said deeds and extending therefrom to and beyond the western boundary of the Rancho Canon de Santa Ana and that ever since said canal was constructed until the present time it has been used and presently is being used to carry and transport waters diverted from the Santa Ana River into and through said canal, and to distribute and supply waters therefrom to lands other than and downstream from but not to any of the lands described in said complaint.

The allegation that the Cajon Irrigation Company entered upon and took possession of the right of way and canal "claiming ownership thereof as the successor of the Canon de Santa Ana Water Company" is denied.

For a second defense Anaheim Union Water Company alleged that for exceeding sixty years immediately preceding the filing of the complaint, it and its predecessors in interest, under claim of right so to do, openly, notoriously and adversely, continuously and without interruption at a point four miles upstream on the Santa Ana River from the location of each parcel of plaintiffs' lands have diverted fifty per cent of the entire normal surface flow of the stream and from said point of diversion (by means of said Cajon Canal) have conveyed said water so diverted over and across lands downstream from said point of diversion, including some but not

all of the several parcels of land of the plaintiffs, and at a point downstream from plaintiffs' lands, have continuously and for more than forty years last past delivered from said Cajon Canal to defendant Yorba Irrigation Company 200 miner's inches continuous flow of water; that the waters so diverted into Cajon Canal remaining after delivery of 200 miner's inches to Yorba Irrigation Company during said entire period has been continuously applied and entirely consumed in beneficial uses and that during said period no portion of said water so diverted from said river into said Cajon Canal has been applied to irrigation uses upon any of plaintiffs' lands.

It is alleged that for a period exceeding fifty years immediately prior to the filing of the complaint Santa Ana Valley Irrigation Company, under claim of right so to do, openly, notoriously and adversely, continuously and without interruption, at a point on the Santa Ana River two miles upstream from the location of each parcel of plaintiffs' lands and two miles downstream from the location of the point of diversion of Anaheim Union Water Company, has diverted the entire normal surface flow of said stream passing said point of diversion of Anaheim Union Water Company and reaching said point of diversion of Santa Ana Valley Irrigation Company and by means of the Santa Ana Valley Irrigation Company's canal has conveyed said water so diverted over and across lands downstream from said point of diversion but not including any of the lands of the plaintiffs; that no portion of the water so diverted has been delivered to or applied to any beneficial use upon any of the plaintiffs' lands.

For a third defense it is alleged that plaintiffs' causes of action are barred by neglect and failure of the plaintiffs and their predecessors in interest prior to the bringing of this action to make any protest or demand against the defendants, or either of them, with respect to any of the matters alleged in the complaint; that plaintiffs and each of them has acquiesced in and has ratified the continuous diversions and the application of said water to beneficial use in the manner alleged in the answer; has ratified all the transactions and proceedings had and taken by each of the defendants and by reason of said lapse of time, said failure and neglect and said laches and acquiescence each of the plaintiffs is barred and estopped from maintaining this action.

It is further alleged that contemporaneous with the execution of the two deeds (June and July, 1876) the defendant and its predecessors in interest were diverting and subsequent thereto have continued to divert, under claim of right so to do, openly, notoriously, adversely and continuously, one-half of the entire normal surface flow of the Santa Ana River at a point known as Bed Rock Crossing, approximately four miles upstream from plaintiffs' lands, and by means of the Cajon Canal have conveyed the waters so diverted over and across lands downstream from said point of diversion, including some but not all of plaintiffs' lands; that said diverted waters have been entirely applied to and consumed in beneficial uses upon lands other than those of the plaintiffs; that during all of said period the plaintiffs and their predecessors in interest have developed underground percolating water on their lands and have irrigated entirely from underground water obtained by pumping operations and have obtained no water from said Cajon Canal for the irrigation of any of plaintiffs' lands; that the plaintiffs have not made or asserted any demand upon the defendant Anaheim Union Water Company or any of its predecessors in interest to be supplied with water from said canal for the irrigation of said lands and have voluntarily relinquished and waived any rights accruing to them under the terms of the June and July, 1876, deeds.

It is further alleged that in a certain action numbered 4676 in the Superior Court of Los Angeles county, entitled Anaheim Union Water Company, Plaintiff, v. Vicente Yorba, et al., Defendants, there was duly and regularly entered on the 21st day of June, 1903, an amended order of injunction, a copy of which is pleaded in the answer, restraining and enjoining the defendants and their agents "from diverting the waters of the Santa Ana River from

the Anaheim Union Water Company's ditch and preventing the plaintiff (Anaheim Union Water Company) from diverting the waters of said stream to the extent of the capacity of its ditch by means of its said ditch and conducting the waters of said stream through plaintiff's (Anaheim Union Water Company) ditch, conditioned upon the Anaheim Union Water Company delivering at a point therein designated not to exceed 200 miner's inches of water to the Yorba ditch; that no further proceedings have been taken in said action; that the plaintiffs and/or their predecessors in interest in the pending action were defendants in said action No. 4676; that the rights and obligations of the parties of record in the pending action have been finally and fully fixed, determined and decreed and said adjudication has become final and binding upon the parties; that the pending action constitutes a collateral attack upon said amended order of injunction and upon the rights of the parties of record in said action No. 4676.

The defendant Yorba Irrigation Company filed a separate answer in which several of the defenses of the water company were reiterated and it was further alleged that the Yorba Irrigation Company obtained its right to 200 miner's inches of water from the Cajon Canal because of the fact that Bernardo Yorba in 1865 caused the Yorba ditch to be constructed from the Santa Ana River and water to be conducted through said ditch to the lands in the area now supplied with water by Yorba Irrigation Company, all of which lands were then owned by Bernardo Yorba; that the Yorba ditch was used for furnishing water for said lands for beneficial purposes from the time of its construction "until after Cajon Canal was constructed and completed"; that after the issuance of the order of injunction in said action No. 4676 in Los Angeles county, the said Anaheim Union Water Company and said Yorba Irrigation Company entered into agreements in conformity with and pursuant to said order of injunction by which agreements Yorba Irrigation Company is entitled to receive from said Cajon Canal 200 miner's inches of water.

The trial court made extensive findings of fact and rendered judgment in substance: That the plaintiffs respectively are the owners of specified tracts of land which are particularly described, some of which are riparian to the Santa Ana River; that prior to 1903 defendant Anaheim Union Water Company acquired by prescription and is the owner of the vested right to divert from the Santa Ana River upstream from plaintiffs' lands one-half of its entire normal surface flow by means of the Cajon Canal and to put said water to beneficial use upon lands other than those belonging to the plaintiffs; that none of the plaintiffs own any right to take or use any of the waters from Cajon Canal, except that specified plaintiffs are the owners respectively of the right to take water therefrom at six specified locations and solely by the means specified therein for beneficial use upon designated parcels of plaintiffs' land; that Yorba Irrigation Company is the owner of the right to the use of and to take 200 miner's inches continuous flow from the waters conveyed in the Cajon Canal and that certain parcels of plaintiffs' lands are not riparian to the Santa Ana River.

Plaintiffs seek a reversal of the judgment herein on the ground that the evidence does not support certain findings made by the trial court and that there was error in not finding on other issues presented by the pleadings. Plaintiffs' first point is that the finding that prior to 1903 defendant Anaheim Union Water Company acquired and owns the prescriptive right to divert one-half of the entire surface flow of the Santa Ana River is not supported by any evidence.

The evidence supporting the findings of the trial court is largely documentary. In 1888 William Ham. Hall, state engineer, in his report on irrigation and the irrigation question, stated that in July, 1877 the Cajon Irrigation Company "made a filing at the head of the partially completed ditch (Cajon Canal) appropriating 4,320 inches of water, and began construction. They took possession adversely to the claim of the Canon de Santa Ana Company, and brought suit to quiet title as between them.

This action was never tried, and possession was never strongly resisted by the defendants"; that the Anaheim Union Water Company was organized in 1884; that "to this company were conveyed all the water rights and property of the Anaheim Water Company (including about 1,000 acres of irrigable land), the North American Canal Company, and the Cajon Irrigation Company. Since this consolidation was effected, perfect harmony has prevailed, and the area of irrigation has considerably extended. The only controversy they now have is with the owners of the Yorba ditch, whose rights by reason of long appropriation must be respected, and with whom they now have to share the half of the water in the river belonging to the north side. A suit is now pending to restrain the Yorba ditch owners from diverting more than 125 inches of water, but it has never been brought to trial." (The suit to which reference is made is entitled "Anaheim Water Company, et al. v. Cajon Irrigation, et al.", No. 1606, in the Superior Court of Los Angeles County.) It is further stated in said report that "the (Cajon) canal is 8 feet wide on the bottom for about 10 miles, when its width is diminished to 6 feet. It is calculated to carry 3 feet depth of water, with side slopes of 1 to 1. Its grade is 2.11 to 2½ feet per mile, its theoretical capacity almost 3,000 inches or 60 cubic feet per second, but it does not generally carry over 1,200 miner's inches or 24 cubic feet per second"; that the present organization (Anaheim Union Water Company) "has succeeded to the rights of the Anaheim Water Company, the Cajon Irrigation Company and its successor, the (New) North American Canal Company, the original North Anaheim Canal Company and the Kramer ditch, as well as to the work done under the irrigation district commissioners in districts one and two and to the rights of the Canon de Santa Ana Water Company."

M. N. Thompson, an engineer employed by defendant water company, testified that since 1930 diversion works located immediately upstream from the intake to the Cajon Canal have collected and divided equally the entire flow of the river (when it does not exceed 150 or 200 second feet at that point); that one-half of the flow is there delivered into the Cajon Canal on the north side of the river and one-half is there turned back into the river channel; that the portion returned to the river channel flows in the stream bed to the intake of the Santa Ana Valley Irrigation Company's canal, where, in its entirety, it is diverted into said canal on the south side of the river; that the practice is to divert the entire normal flow of the stream during the irrigation season into these two canals and their intakes located five miles and one and one-half miles, respectively, upstream from the most easterly (upstream) boundary of the plaintiffs' land.

H. C. Head, attorney for defendant water company for twenty-five years, testified that he first saw the Cajon Canal of the Anaheim Union Water Company in 1883 and had seen it many times since that date; that its present location is approximately the same as when he first saw it; that "the company has maintained the canal, improved it; since it was originally built it has been concreted, concrete lining. Wooden flumes have been replaced by pipe lines or cement structures. It has defended its rights to the water in litigation, constructed reservoirs to hold the flow overnight and for storage purposes"; that for twenty-five years or more the Anaheim Union Water Company "has claimed the right to take the water from the river as it has taken it against anyone."

Leo Sheridan, secretary of defendant water company, testified that since 1915 the company has taken one-half of the river stream at the Cajon intake.

In 1885 an action, No. 4676, was commenced in the Superior Court of Los Angeles County by Anaheim Union Water Company and against some 58 or 59 defendants, predecessors in interest of the plaintiffs in the instant action. This litigation involved a controversy between plaintiff Anaheim Union Water Company and the Yorba irrigators over conflicting claims to diversion rights in the Santa Ana River in the vicinity of Bed Rock Crossing, five miles upstream from the lands of the appellants and conflicting claims to

amounts and use of the water there diverted and transported downstream through the Cajon and Yorba ditches and applied to beneficial uses at Yorba and Anaheim on lands downstream from the most westerly boundary from the lands of appellants. No portion of the waters in controversy in that litigation, case No. 4676, were used on the lands of the appellants herein.

An injunction was issued ordering the defendants to refrain and desist from diverting the waters of the Santa Ana River from the Anaheim Union Water Company's ditch and preventing the plaintiff from diverting the waters of said stream to the extent of the capacity of its ditch by means of its said ditch conducting the waters of said stream through said ditch, provided that so long as the plaintiff delivers from its ditch into the ditch of the defendants at its head sufficient water to fill the same to the extent of the capacity of the Yorba ditch not exceeding a flow of 200 miner's inches measured under 4 inch pressure. In June, 1903, by stipulation of the parties, the order of injunction was amended providing that the waters delivered to the Yorba ditch be delivered during the months of June, July, August and September and at such other times as sufficient water could be had in the river at the head of the Yorba ditch and the balance of the time the defendants should take the said amount of water into their ditch. This injunction, as amended, it still in force and effect.

It appears from the pleadings and files in said action that the order of injunction was intended by the parties and has been considered by them as a final disposition of their controversy for many years and there is testimony in the record that this injunction defining the rights of the parties was the result of "a mutual understanding" and from that time until the present has been followed.

[1] We conclude that the record herein contains substantial evidence supporting the trial court's finding that defendant union water company acquired and owns a prescriptive right to divert one-half of the entire surface flow of the Santa Ana River subject to the conditions contained in the injunction issued in action No. 4676.

[2] Appellants next claim that no finding was made on the issue of the agreement in the 1876 deeds or the alleged servitude created thereby. In this connection, the trial court found that the deeds involved were executed on June 26, 1876 and on July 6, 1876, and both deeds are set forth in the finding. The grantors therein remised, released and quitclaimed to the Canon de Santa Ana Water Company, its successors and assigns reasonable right of way through (grantors') land in the Rancho Canon de Santa Ana for canal, flumes and aqueducts to conduct water over the land of the grantors. Each deed contained a provision that the grantors should have the same privileges as full stockholders in obtaining water and should be supplied with the same at the lowest rate at which water was furnished and that the grantors should have free of cost all water necessary for domestic purposes and watering of stock at convenient places on the said canal. It is claimed by appellants that the two deeds created a servitude on the right of way conveyed by said deeds appurtenant to the lands then owned by the said grantors and that no finding was made on this issue. However, the court found that other than as set forth in the finding relative to the execution of said deeds the Canon de Santa Ana Water Company made no contract with the grantors or any of the grantors named in the said deeds; that upon the execution of said deeds the Canon de Santa Ana Water Company entered upon and into possession of the right of way described in said deeds. The court further found that the said water company never executed any deed or other conveyance of said right of way, or of any right or property acquired by said company through said deeds. Defendant Anaheim Union Water Company does not claim to have acquired the rights of the Canon de Santa Ana Water Company by conveyance. Its claim is based on the prescriptive rights acquired by Cajon Irrigation Company, defendant Anaheim Union Water Company's predecessor in ownership of the canal. The trial court found in this connection

that subsequent to the execution of said deeds the Cajon Irrigation Company and its grantees, predecessors of the defendants herein in the ownership of said canal, acquired said right of way in said canal by prescription and owned the same. Since defendant's title was not acquired by said deeds, a finding on the issue of the agreement or alleged servitude was not necessary.

It is next contended that no finding was made on the issue of plaintiffs' alleged ownership or portions of their lands and the contiguity thereof with other parcels of plaintiffs' land. The complaint alleges that the plaintiffs are the owners "subject to rights of way for railroad" of respective parcels of land described in exhibit "A" annexed to the complaint; that said parcels lie contiguous to each other and each abuts on the river and is riparian thereto; that the plaintiffs are entitled to divert and take water from the river sufficient for proper irrigation of their riparian lands. These allegations are denied by the defendants.

The findings and conclusions specifically cover ownership of the property, continuity of each parcel respecting other parcels, the description of those parcels that abut and those that do not abut upon the river.

[3] Appellants contend that there is no finding as to the ownership of half of the portion of the land within the right of way of the A. T. & S. F. Railroad bordering parcels 10, 11 and 12. The descriptions in the complaint of those three parcels tie to the center of the railroad. The descriptions in the findings likewise tie to that center line but then add "excepting therefrom that portion occupied by the railway of the A. T. & S. F. Railroad". Such exception is a finding that the owners of parcels 10, 11 and 12 are not the owners of the portion thereof within the railroad right of way. The trial court found specifically respecting the contiguity of the various parcels of real property owned by the plaintiffs and their lying contiguous to each other and this finding is supported by the record before us.

Appellants assert that the findings that specified parcels of plaintiffs' lands are not riparian to the Santa Ana River are contrary to the undisputed facts and the law. The court found that the Prudencio Yorba, Vicente Yorba and William McKee allotments, within the respective periods of time that Prudencio Yorba, Vicente Yorba and William McKee were the respective owners thereof, was contiguous to and abutted upon the Santa Ana River and that these parties, as owners of said allotments, were entitled at all times throughout their ownership thereof to divert and take water from the Santa Ana River for the reasonable and proper irrigation of the irrigable lands in said allotments, and for domestic uses thereon. The court found that parcels 3, 6, 7, 8, 9, 10, 11, 11a, 11b, 12, 14, 19 and 20a, as said parcels are numbered and particularly described in the findings, are not riparian to said river by reason of various conveyances made by the owners thereof. The defendant Anaheim Union Water Company is not claiming title or right to water as a riparian owner but as a holder of a prescriptive title. As far as the water company is concerned, the present action is not between riparian owners of water rights in the Santa Ana River.

[4] Findings as to whether certain parcels of plaintiffs' lands are or are not riparian to the Santa Ana River are not necessary to support the judgment herein that the defendant Anaheim Union Water Company acquired a prescriptive right to divert and use one-half of the entire normal surface flow of the river, subject to the rights of the Yorba Irrigation Company to 200 miner's inches thereof. The judgment does not deprive plaintiffs of the right to develop water on their lands for irrigation purposes, a right which they have exercised for many years.

[5] Finally, it is argued that the findings that defendant Yorba Irrigation Company owns the right to the use of 200 miner's inches of water from the Cajon Canal is not supported by the pleadings or evidence. This contention is without merit. The evidence shows that the Anaheim Union Water Company had been delivering 200 miner's inches of water to the Yorba irrigators and to the Yorba Irri-

gation Company out of the Cajon Canal at a point near the old Catholic Church (west of the lands owned by plaintiffs herein) since 1885, being the time of the commencement of the injunction proceedings heretofore referred to as case No. 4676. That case, as noted, involved a controversy between the Anaheim Union Water Company and predecessors in interest of plaintiffs herein and the Yorba irrigators over conflicting claims to diversion rights in the Santa Ana River at a point upstream from the lands of appellants, and the injunction issued therein provided for the delivery of 200 miner's inches of water to the Yorba ditch. The Yorba Irrigation Company and the Anaheim Union Water Company executed agreements in conformity with the injunction by which agreements the Yorba Irrigation Company is entitled to receive from the Cajon Canal 200 miner's inches of water continuous flow delivered at a point in the Yorba Irrigation Company district at a point west of the lands of the plaintiffs herein and being the area originally supplied with water through the original Yorba ditch. The finding that the Yorba Irrigation Company has acquired the right to the use of said 200 miner's inches of water is fully supported by the evidence.

The evidence shows that for a period of more than five years immediately preceding the filing of the complaint herein some of the plaintiffs by means of pipe connections have taken water from the Cajon Canal for use on their various properties for domestic purposes and the watering of stock. In its findings the trial court recognized the rights of such plaintiffs to such water and specifically designated the amount to which said plaintiffs were entitled by reason of such connections and use.

The record shows that the respondents herein, for many years, have continously, without contest or dispute, diverted, transported and applied to beneficial use one-half of the normal flow of the Santa Ana River. The diversion has been at a point upstream from the lands of the plaintiffs herein involved and the application of the water to beneficial use has been in an area below and downstream from the lands of appellants, except 100 miner's inches delivered to the Bixby Tract and water obtained by plaintiffs through the pipe connections described herein.

[6] The judgment is affirmed except insofar as it purports to determine the riparian rights of plaintiffs other than as against the defendant corporations. These excepted portions of the judgment are reversed. Respondents to recover costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



115 Cal.App.2d 500

GRIZZLE v. MILLER et ux.

Civ. 15329.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1953.

Action for breach of contract whereunder plaintiff was to repair defendants' home which was damaged by fire, and defendants filed a cross-complaint. The Superior Court, County of San Mateo, A. R. Cotton, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence justified finding that difficulties were caused by unreasonable demands made by defendants and by defendants' refusal to permit plaintiff to complete work in accordance with contract.

Judgment affirmed.

Contracts ⇐350(1)

In action for breach of contract whereunder plaintiff was to repair defendants' home which was damaged by fire, evidence sustained finding that difficulties between parties were caused by unreasonable demands made by defendants and by defendants' refusal to permit plaintiff to complete work in accordance with contract.

Scampini, Markley & Mortara, San Francisco, for appellant.

Marvin J. Colangelo, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for breach of contract to repair certain premises damaged by fire. He alleged and proved he was prevented from completing the contract by the unlawful act of defendants. The action resulted in a judgment for plaintiff in the amount fixed by contract.

The facts are simple. The home of defendants was damaged by a fire and by an arrangement with the insurance carrier plaintiff was engaged to repair the damage and his bid for that purpose was accepted by the defendants. During the progress of this work the defendants frequently interfered with the workmen on the job and demanded work other than that covered by the contract. Finally, the defendants ordered the workmen off the premises and prohibited them from completing the work.

Evidence was taken as to some of the paint job which defendants claimed was improperly done and which plaintiff explained as having been caused by chemicals used in fighting the fire, causing the paint to react abnormally. Whatever the cause of these defects may have been, the evidence is that the plaintiff volunteered to remedy them and in fact scraped off some of the paint, rewashed the walls and repainted one room. It is a proper inference to be drawn from all the evidence that the difficulties between the parties were caused by unreasonable demands made by the defendants and by their refusal to permit the plaintiff to complete the job in accordance with his contract.

There is nothing to the case but a conflict in the evidence on these details. The findings of the trial court are fully supported by substantial evidence and this requires an affirmance of the judgment.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

115 Cal.App.2d 459

KIMBERLIN v. LOS ANGELES CITY HIGH SCHOOL DIST.

Civ. 19156.

District Court of Appeal, Second District, Division 1, California.

Jan. 22, 1953.

Mandamus proceeding to compel board of education to reinstate dismissed teacher, for accumulated salary, and for other relief. The Superior Court, Los Angeles County, Arnold Praeger, J., rendered a judgment for the board of education and the teacher appealed. The District Court of Appeal, Drapeau, J., held that where teacher delayed almost a year from final notice of dismissal before bringing suit and where another teacher was hired and could be dismissed only for cause, dismissed teacher was guilty of laches and was not entitled to reinstatement.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

The question of laches, is in the first instance, one for the determination of the trial court and its conclusion will not be set aside by an appellate court if such determination finds substantial support in the evidence.

2. Equity ⇐71(1)

"Laches", in legal significance, is not mere delay, but delay that works a disadvantage to another, mere delay alone being unimportant.

See publication Words and Phrases, for other judicial constructions and definitions of "Laches".

3. Mandamus ⇐166

In mandamus proceeding to compel board of education to reinstate dismissed teacher, uncontroverted allegations in answer that another teacher was hired in the teacher's place for 1951–52 school year and that there was no vacant position to which teacher could be assigned, would be accepted as true and considered as if they were evidence. Code Civ.Proc. § 1091; Education Code, §§ 8101, 13083, 13581–13583.

4. Mandamus ⇐143(2)

In mandamus proceeding to compel board of education to reinstate dismissed

teacher, even if teacher could and did waive accumulated salary, he would still be guilty of laches where he delayed almost a year from date of final dismissal in bringing suit and another teacher had been hired and could not be dismissed except for cause. Education Code, §§ 8101, 13083, 13581–13583.

Tanner, Odell & Taft and Robert A. Odell, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux and Clarence H. Langstaff, Deputies County Counsel, Los Angeles, for respondent.

DRAPEAU, Justice.

By this proceeding in mandamus, petitioner Kimberlin seeks to compel the respondents to reinstate him in a teaching position; classify him as a permanent employee, and pay him alleged accumulated salary.

Petitioner is a certificated teacher of wood shop, and served in that capacity for the school years 1948–1949 and 1949–1950 under the classification of probationary employee.

"The school year begins on the first day of July and ends on the last day of June." Sec. 8101, Education Code. In the Los Angeles District, the probationary period is two complete consecutive years; hence at the beginning of the third consecutive school year a teacher in this district is entitled to classification as a permanent employee, if reemployed. Sec. 13083, Ed. Code. In the absence of resignation or dismissal, he is automatically reemployed and classified a permanent employee.

In the instant case, respondents claim that petitioner was dismissed at the end of the second year. Petitioner contends that respondents did not comply with the law; that he was not lawfully dismissed, and consequently is entitled to reinstatement and to a permanent classification.

The applicable sections of the Education Code are:

"13581. *Dismissal during school year for cause only.* Governing boards of school districts shall dismiss probationary employees during the school year for cause only, as in the case of permanent employees.

"13582. *Notice of nonrequirement of services during ensuing year. (Time for giving.)* On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year. (*Delivery or mailing to employee.*) The notice shall be deemed sufficient and complete when delivered in person to the employee by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to the employee at his last known place of address.

"13583. *Dismissal for cause in districts with average daily attendance of 60,000 or more.* Anything in Section 13582 to the contrary notwithstanding, governing boards of school districts having an average daily attendance of 60,000 or more pupils shall dismiss probationary employees for cause only. The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof."

The record discloses that on May 5, 1950, respondent board notified petitioner by letter that "on May 4, 1950, written charges * * * were filed with the Board of Education * * * charging that there exists a cause or causes for your dismissal. We enclose a copy of said charges.

"You are hereby further notified that it is the intention of said Board of Education to dismiss you upon the 16th day of June, 1950, unless, within fourteen (14) days after the date of service of this notice, you file with the Board of Education a verified answer in writing to these charges and a written request for a hearing upon the same. If you do request a hearing, then the Board of Education will fix a time and place therefor and will notify you accordingly."

On May 18, 1950, petitioner's then counsel wrote to respondent board to the effect that the procedures adopted for dispensing with Mr. Kimberlin's services did not comply with the Education Code. This for the reason that the hearing on his dismissal should have taken place prior to May 15th, and that any hearing held subsequently would be ineffectual for any purpose.

Respondent board on June 6th notified petitioner that on June 12, 1950 it would hold "a hearing on the charges filed with the Board of Education on May 4, 1950, asking your dismissal from your position as a probationary employee of the Los Angeles City High School District."

To this, petitioner's counsel replied that petitioner would not participate in the hearing. At its hearing on June 15th, continued from June 12th, the board found the charges against petitioner were true, and on June 16th sent to him by registered mail the following notice:

> "In accordance with findings and order adopted by the Board of Education at its continued special meeting on June 15, 1950, you are hereby notified that you are dismissed from your position as Probationary Teacher in the Los Angeles City High School District, effective at the close of business June 30, 1950, and that your services will not be required for the ensuing year."

On April 26, 1951, petitioner made demand for reinstatement; for classification as a full time permanent employee, and for payment of back salary through the month of March, 1951.

The instant proceeding in mandamus was filed on June 14, 1951. Petitioner appeals from the judgment denying his petition for a peremptory writ of mandate which was based upon findings and conclusions of the trial court that (1) he had been dismissed in the manner required by law; (2) he was guilty of laches for unreasonable delay in commencing this proceeding; and (3) he failed to exhaust his administrative remedies.

[1, 2] This court agrees with the trial court's conclusion that appellant was guilty of laches. This for the reason that, as said in Newbury v. Civil Service Comm., 42 Cal.App.2d 258, 261, 108 P.2d 745, 747: "The question of laches is in the first instance one for the determination of the trial court and its conclusion will not be set aside by an appellate court if such determination finds substantial support in the evidence. Greenberg v. DuBain Realty Corp., 27 Cal.App.2d 111, 118, 80 P.2d 537." See, also, Fry v. Board of Education, 17 Cal.2d 753, 761, 112 P.2d 229, Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779, and La Shells v. Hench, 98 Cal.App. 6, 15, 276 P. 377, 381, where it is stated: "Laches is a question of fact on the evidence, and each case becomes largely a law unto itself. In other words, the matter is one which reposes in the sound discretion of the chancellor. * * * Laches in legal significance is not mere delay, but delay that works a disadvantage to another, mere delay alone being unimportant. The reasoning upon which the rule of laches is based is not alone a lapse of time during which the neglect to enforce a right has existed, but the changes of conditions which have intervened."

Here the alleged final notice of dismissal was dated June 16, 1950. Ten months later on April 26, 1951, petitioner made demand upon respondents for reinstatement. He did not file the instant proceeding until June 14, 1951. In excuse for the delay, petitioner testified that his attorney suffered a physical breakdown and discontinued his law practice early in December of 1950. Also, that another attorney, who was recommended to him, could not take his case because "he was called to Sacramento on business." And that finally in March of 1951, he procured the services of counsel who now represent him.

[3] It is here contended that no evidence whatever was offered by respondents in support of their affirmative defense of laches, but that the court made a finding that the board employed another teacher who held appellant's position during the school year 1950–1951, and concluded that petitioner was guilty of laches for unreasonable delay in commencing the instant action.

In connection with this defense, respondents alleged in their answer:

"III. That the respondents notified the petitioner on May 5 and on June 16, 1950, that his services would not be required for the 1950–51 school year and that he was dismissed as a probationary teacher; that on September 11, 1950, at the time of opening of school for said school year, respondent Board of Education employed another teacher to fill the position formerly held by the petitioner; that said teacher held said position during the entire 1950–51 school year and was paid in full the salary provided for said position; that respondent Board of Education, prior to the service and filing of the petition herein, entered into a contract in writing with said teacher for said position for the 1951–52 school year; that there is no vacant position to which petitioner could now be assigned; that the petition herein was served on respondents on June 11, 1951, and filed in the above entitled court on or about the same date.

"IV. That by reason of the aforesaid, respondents have been prejudiced so that petitioner ought to be estopped from obtaining the writ of mandate prayed for."

Section 1091 of the Code of Civil Procedure provides that on trial of a proceeding in mandamus "the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance." Under this section "affirmative allegations of the answer are to be taken as true, unless they are countervailed by pleading or proof *presented by the petitioner*; to this extent the answer may be considered as if it were evidence." 16 Cal.Jur. 869, sec. 66, citing Hunt v. Riverside, 31 Cal.2d 619, 623, 191 P.2d 426; Ertman v. Municipal Court, 68 Cal.App.2d 143, 150, 155 P.2d 908, 156 P.2d 940. See, also, McClatchy v. Matthews, 135 Cal. 274, 276, 67 P. 134.

[4] On the question of prejudice or disadvantage resulting to the defendant in a mandamus proceeding by reason of petitioner's dilatory tactics, it was stated in Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 680, 62 P.2d 1047, 1050, as follows:

"It is not the lapse of time so much as it is the consequences of the delay which goes to make up the defense of laches. Unless prejudice results from the delay the defense is not established, but, if prejudice has resulted, the one whose prompt action would have forestalled it can avoid the responsibility only by showing that he sought his remedy promptly. It is to be presumed that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for. It appears from the answer of defendants that ever since petitioner's discharge his position has been filled by one or more of the other city employees, and that there was at the time of the filing of the petition no vacant position in the department to which petitioner could be assigned. If petitioner should be reinstated, he no doubt would lay claim to the salary which he would have earned except for his discharge * * *. Whatever he might receive would be for services which he had not rendered but which had been performed by others, who had been compensated therefor. The city would thereby be prejudiced."

The same reasoning applies to the facts here under review. This notwithstanding the fact that at the trial, appellant, through his counsel, offered to waive his right to receive compensation for the period prior to judgment should the court order his reinstatement. Without undertaking to determine the effectiveness of such purported waiver, the fact remains that another had been appointed to the position formerly held by appellant, whose employment may not be terminated except for cause. Ed. Code, sec. 13583, supra. Thus the respondent district would be prejudiced if appellant were now reinstated by reason of the

financial burden incident to the addition of another employee.

Because of the conclusions reached herein, it is not deemed necessary or expedient to discuss other very interesting questions presented by this appeal.

For the reasons stated, the judgment is affirmed.

DORAN, Acting P. J., and PATROSSO, J. pro tem., concur.



115 Cal.App.2d 483

Guardianship of BOXLEY.

BOXLEY v. McGINLEY et al.

Civ. 19222.

District Court of Appeal, Second District, Division 3, California.

Jan. 22, 1953.

Proceeding in the matter of guardianship of an incompetent person. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered an order awarding fees for legal services and reimbursement for expenditures to be paid from the estate in guardianship, and the guardian appealed. The District Court of Appeal, Shinn, P. J., held that court had no authority to award to attorneys fees for services rendered to or reimbursement for expenditures made on behalf of the ward and not the guardian or guardian ad litem.

Order reversed.

1. Insane Persons ⇐62

While an allowance could properly be made for legal services rendered to guardian ad litem in proceeding for removal of guardian of person and estate of incompetent person, court had no authority to award to attorneys fees for services rendered to or reimbursement for expenditures made in behalf of ward and not guardian or guardian ad litem. Probate Code, §§ 1556, 1556.1, 1580.

2. Insane Persons ⇐62

Guardianship of the estate of an incompetent person is a statutory proceeding and liability of estate for services of attorneys is governed by regulations contained in Probate Code. Probate Code, §§ 1556, 1556.1.

3. Insane Persons ⇐96

An insane or incompetent person who is a party to an action must appear either by his general guardian or by a guardian ad litem, except in a proceeding for restoration to capacity. Probate Code, § 1470.

4. Insane Persons ⇐38, 74

A proceeding for removal of guardian of an incompetent person may not be initiated by the ward and he is not competent to engage the services of attorneys to institute such a proceeding. Probate Code, § 1580.

5. Insane Persons ⇐62

The statutory provisions under which the guardianship estate of an incompetent person may be charged with attorneys' fees for services rendered guardian exclude, by implication, liability of the estate for attorneys' fees for services in connection with administration of estate which are rendered to the incompetent directly or to persons other than the guardian. Probate Code, §§ 1556, 1556.1, 1580.

6. Insane Persons ⇐62

Allowance of attorneys' fees to be paid from guardianship estate of an incompetent person should have been limited to the reasonable value of legal services rendered to guardian ad litem in proceeding for removal of guardian of person and estate of incompetent and appointment of another guardian and reimbursement for expenditures in prosecution of such proceeding. Probate Code, §§ 1556, 1556.1, 1580.

7. Insane Persons ⇐62, 94(1)

Appearance of attorneys for incompetent person at hearing of petition of guardian of his person and estate for instructions was not on behalf of guardian ad litem appointed to institute and prosecute proceedings for removal of guardian and efforts made by attorneys to have ward transferred from state hospital to private

sanitarium were not within the scope of authority or duties of guardian ad litem under his order of appointment, and hence court had no authority to award attorneys' fees for such services, though successful, to be paid from guardianship estate. Probate Code, §§ 1556, 1556.1, 1580.

8. Insane Persons ⇐62

Guardian ad litem should join in petition for allowance of attorneys' fees for services rendered and reimbursement for expenditures made in connection with proceeding instituted by guardian ad litem for removal of guardian of the person and estate of an incompetent person. Probate Code, §§ 1556, 1556.1, 1580.

Roland Maxwell and Paul H. Marston, Pasadena, for appellant.

John P. McGinley and John E. Glover, in pro. per., for respondents.

SHINN, Presiding Justice.

Chester W. Boxley as guardian of the person and estate of Harry Thomas Boxley, an incompetent person, appeals from an order awarding fees to John P. McGinley and John E. Glover for legal services and reimbursement for expenditures to be paid to them from the estate in guardianship. Some of the services of the attorneys and some of the expenditures were under a direct or purported employment of the attorneys by the ward. Others were under employment by a guardian ad litem, and further services were rendered by the attorneys in a voluntary appearance on behalf of the ward upon a hearing of the guardian's petition for instructions.

By its order the court allowed $750 "as and for attorneys' fees for legal services rendered to said Incompetent as alleged in said Petition [of the attorneys], and the further sum of One Hundred Seventy and 11/100 Dollars ($170.11) to reimburse said John P. McGinley and John E. Glover for expenditures made by them for and on behalf of the Incompetent as alleged in said Petition." The proceedings were as follows: June 13, 1951—Petition of Harry Thomas Boxley for removal of Chester W. Boxley as guardian and appointment of another guardian; July 27, 1951—Petition dismissed; July 23, 1951—Order appointing John P. McGinley guardian ad litem "to maintain and prosecute the proceedings for the removal of Chester W. Boxley as Guardian herein and to take such action in connection therewith as may be necessary or advisable"; July 27, 1951—Petition of Arthur Luehwesman as guardian ad litem for the removal of Chester W. Boxley as guardian and for the appointment of himself as guardian. (Although the briefs state Mr. Leuhwesman was appointed as guardian ad litem the record does not show his appointment or the resignation of Mr. McGinley); September 19, 1951—Petition for removal denied; September 26, 1951—Petition of guardian for instructions; October 29, 1951—Order made for removal of ward from Camarillo State Hospital to Baldy View Sanitarium at San Gabriel; December 10, 1951—Petition of attorneys for fees and reimbursement; March 20, 1952—Order for attorneys' fees and reimbursement.

The first petition for removal was signed by the ward and by Messrs. McGinley and Glover as his attorneys. About one-half of the extensive correspondence carried on by the attorneys was prior to the appointment of a guardian ad litem and an indeterminable part of the services were rendered during that time. After a guardian ad litem was appointed the deposition of the guardian was taken and a substantial amount of money was expended by the attorneys. They also conducted the trial in the hearing of the petition of the guardian ad litem for removal of the guardian. Their services for the guardian ad litem ended with the denial of his petition. Thereafter the attorneys appeared on the hearing of the guardian's petition for instructions. In that petition the guardian represented to the court that it would be to the best interest of the ward to remain in the State Hospital. The attorneys, on behalf of the incompetent, resisted the efforts of the guardian to keep the ward in the State Hospital and in accordance

with his long expressed desire sought his removal to a private sanitarium. The court ordered the transfer.

[1] The principal question is whether the court had authority to award to the attorneys fees for their services and reimbursement for expenditures rendered to the ward and not to the guardian or guardian ad litem. Appellant denies that the court had such authority, although conceding that an allowance could properly be made for services rendered to the guardian ad litem. This is a sound position.

[2–5] Guardianship of the estate of an incompetent being a statutory proceeding we must look to the Probate Code for the regulations which govern with respect to liability of the estate for the services of attorneys. Under section 1556, Probate Code, a guardian is allowed his reasonable expenses incurred in the execution of his trust and the court may make an allowance for attorneys' fees on petition of the guardian. Section 1556.1, added in 1951, reads in part: "At any time after the filing of the inventory and appraisement, but not prior to the expiration of three months from the issuance of letters of guardianship, any attorney who has rendered services to a guardian may petition the court for an order fixing and allowing his compensation for services rendered to that time." Nowhere do we find a grant of authority to the court to charge the estate of an incompetent with liability for attorneys' fees other than those rendered to a guardian which, of course, includes a guardian ad litem. An insane or incompetent person who is a party to an action must appear either by his general guardian or by a guardian ad litem. An exception is made of a proceeding for restoration to capacity. Prob.Code, § 1470. A guardian may be removed for the causes specified in § 1580 but there is no provision for the institution of a removal proceeding by the ward himself. A removal proceeding is clearly one which may not be initiated by the ward. He is not competent to engage the services of attorneys to institute such a proceeding. The statutory provisions under which the estate of the ward may be charged with the amount of attorneys' fees for services rendered a guardian exclude, by implication, liability of the estate for attorneys' fees in connection with the administration of the estate which are rendered to the incompetent directly or to persons other than the guardian.

[6, 7] The allowance made by the court should have been limited to the reasonable value of the services rendered to the guardian ad litem, and reimbursement should likewise have been limited to the expenditures of the attorneys in the prosecution of the proceeding of the guardian ad litem for removal of the guardian. The appearance of the attorneys at the hearing of the guardian's petition for instructions was not on behalf of the guardian ad litem and the efforts made to have the ward removed from the State Hospital were not within the scope of his authority or duties under the order of appointment.

[8] It is clear from the findings that certain paragraphs of the petition of the attorneys were true, as well as from the order itself, that the allowance was made for the entire services. Although the court was convinced that the ward should long since have been removed to a private sanitarium and that the efforts of the attorneys had accomplished that result, there was no determination as to the value of the services rendered the guardian ad litem. The result accomplished was the principal factor in evaluating the services but there is no basis in the evidence, nor in the facts recited in the order, which would enable this court to place a value upon the services for which an allowance could properly be made. When the matter is reheard the petitioners should be allowed to amend their petition to conform to the views herein expressed, and the guardian ad litem should join therein.

The order is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

115 Cal.App.2d 487

DANIELS et al. v. BALDWIN et al.

Civ. 15301.

District Court of Appeal, First District, Division 2, California.

Jan. 23, 1953.

Hearing Denied March 23, 1953.

Widow brought suit in equity against administrator of deceased husband to quiet title to certain realty and to money. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment in favor of widow, and an appeal was taken. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to entitle widow to recovery.

Judgment affirmed.

1. Executors and Administrators ⇐59

In suit in equity by widow against administrator of deceased husband to quiet title to realty and to money, evidence consisting of joint tenancy deed by which widow and her deceased husband had held title to realty as joint tenants, and proof of death of husband and sole and exclusive possession of realty by widow was sufficient to support judgment for widow with respect to realty.

2. Executors and Administrators ⇐59

In suit in equity by widow against administrator of deceased husband to quiet title to certain realty and to money, evidence consisting of three bank books evidencing joint tenancy bank accounts of widow and deceased husband, and proof that widow did not consent to withdrawal of any money by deceased husband from such accounts on day of his death, was sufficient to support judgment on cause of action dealing with money.

3. Trial ⇐21

Where defendants voluntarily refrained from appearing at time set for hearing of suit in equity to quiet title, they could not be heard on appeal to complain as to the conduct of the trial.

4. Jury ⇐14(9)

In suit in equity to quiet title to certain realty and money, parties were not entitled to trial by jury as a matter of right.

5. Trial ⇐370(2)

Where trial court denies motion for trial by jury in suit in equity, on ground that parties are not entitled to trial by jury as a matter of right, it is entirely proper that case be tried by trial court alone.

John P. Doran, San Francisco, for appellant.

Doyle & Clecak, San Francisco, for respondents.

NOURSE, Presiding Justice.

[1] Plaintiffs sued in equity to quiet title to certain real property and to money held by the defendant Harney as special administrator of the estate of Shull H. Daniels. The controversy is of long standing and on a former appeal this court held that the money involved herein rightfully belonged to Jennie Daniels. Daniels v. Harney, 111 Cal.App.2d 400, 244 P.2d 773. Subsequent litigation in the trial court prevented the disposition of the funds, and the second cause of action herein was brought to seek another judgment determining the ownership of such funds. The cause was tried before the court without a jury and resulted in a judgment for the plaintiffs on both causes of action. When the case was called for trial on the day regularly set for that purpose the defendant failed to appear although proper notice to them had been given. The evidence covering the first cause of action consisted of a joint tenancy deed by which the plaintiff Daniels and her deceased husband held title to the realty as joint tenants. Proof of the death of the cotenant and of the sole and exclusive possession of the realty by the widow was duly made. No further proof was necessary to support the judgment on that cause of action.

[2] As to the second cause of action, three joint tenancy bank accounts and three bank books evidencing said accounts were placed in evidence. Proof was also made that the widow did not consent to the withdrawal of any money from these accounts. The evidence thus offered was amply suffi-

cient to support the finding in favor of that respondent.

[3–5] Appellants contend that the court erred in not giving full consideration to their affirmative defenses. Since they voluntarily refrained from appearing at the time set for the hearing they can not be heard to complain at this time as to the conduct of the trial. Finally, they argue that the court erred in denying their motion for a trial by jury. The cases are uniform that in a proceeding of this character in equity the parties are not entitled to a trial by jury as a matter of right. When the trial court acting upon that principle denies a motion for a trial by jury it is entirely proper that the case be tried by the court alone. Rablin v. Greiner, 4 Cal.2d 255, 257, 48 P.2d 696, is one of the many cases supporting this principle.

The judgment is affirmed.

GOODELLL and DOOLING, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



115 Cal.App.2d 428

LUCE et al. v. SUTTON et al.

No. 15340.

District Court of Appeal, First District, Division 1, California.

Jan. 19, 1953.

Action for price of meat sold and delivered, tried on theory that co-defendants stood in relationship of principal and agent in respect to operation of restaurant business. The Superior Court, Monterey County, Anthony Brazil, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Bray, J., held that where trial court made no specific finding that agency relationship existed, although evidence warranted such finding, but trial court's findings were sufficient to constitute a passing upon the credibility of witnesses on agency issue, District Court of Appeal, rather than remand case for findings or a new trial, would add to the findings one to the effect that, in the incurrence of the indebtedness upon which plaintiffs' causes of action were based, co-defendants stood in agency relationship.

Findings amended and judgment affirmed.

1. Principal and Agent ⇐145(1, 2)

A principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons, made in the course of the business of the agency and within the scope of the agent's powers as such, although made in name of agent and not purporting to be other than his own personal obligation or contract.

2. Principal and Agent ⇐145(1)

A creditor may sue an undisclosed principal when found, although he may not have known of the existence of such principal at the time the debt was incurred.

3. Principal and Agent ⇐145(1)

Rule, that in order to recover from an undisclosed principal the creditor must not be guilty of negligence, applies to situations of ostensible agency, and not to those of undisclosed agency.

4. Principal and Agent ⇐145(4)

Where one deals with another believing him to be a principal, and subsequently learns that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal.

5. Principal and Agent ⇐145(4)

In action for price of meat sold and delivered, tried on theory that co-defendants stood in relationship of principal and agent in respect to operation of restaurant business, failure of principal to demand in trial court that plaintiff elect whether they desired to hold the principal or the agent, constituted waiver of principal's right to require such election.

6. Principal and Agent ⇐195

In action for price of meat sold and delivered, tried upon theory that co-defendants stood in relationship of principal and agent in respect to operation of restaurant business, trial court's finding that co-defendants were liable in both individual and partnership capacities was contradic-

tory, and rendered finding on question of agency inadequate.

7. Appeal and Error ⇐1122(2)

Where there is a total failure to find on a material issue and the evidence on it is conflicting, District Court of Appeal will not make findings. Code Civ.Proc. § 956a.

8. Appeal and Error ⇐1122(2)

In action for price of meat sold and delivered, tried on theory that co-defendants stood in relationship of agent and principal in respect to operation of restaurant business, wherein trial court made no specific finding that agency existed, although evidence warranted such finding, but wherein the trial court's findings were sufficient to constitute a passing on the credibility of the witnesses on the agency issue, District Court of Appeal, rather than remand the case for findings or a new trial, would add to the findings one to the effect that, in the incurring of indebtedness upon which the causes of action were based, the co-defendants stood in agency relationship. Code Civ.Proc. § 956a.

Rosendale, Thomas & Muller, Salinas, for appellant Trondhjem.

L. W. Wrixon, San Francisco, for respondent.

BRAY, Justice.

In an action for the price of meat sold and delivered, plaintiffs obtained judgment against both defendants. Defendant Trondhjem alone appeals.

Questions Presented.

1. Was there evidence of agency? 2. Are the findings that defendants were co-partners, which findings admittedly are unsupported, fatal to a recovery on the agency theory?

Pleadings.

In the caption of the complaint defendants were described as "Verne C. Sutton and Sam Trondhjem, *individually* and as copartners doing business under the firm name and style of The Big Hat Cafe." [1] The first count of the complaint alleged such copartnership. It then alleged "*defendants above named* became indebted to plaintiffs" for goods, wares and merchandise sold and delivered "at the special instance and request of *said defendants*," that "*said defendants*" promised to pay $2,969.99 therefor, and that said sum is now due, owing and unpaid by "said defendants" to plaintiffs. The second cause of action incorporated the copartnership allegation from the first count and then alleged that "*defendants above named*" became indebted to plaintiffs on a book account for goods sold and delivered to "*said defendants.*" As in the first count reference was made several times to "*said defendants.*" The third count also incorporated the copartnership allegation from the first count. It then alleged an account stated between defendants "above named" and plaintiffs. Apparently this count was abandoned, becauses it is completely ignored in the findings and no reference is made to it by either party. The fourth count likewise incorporates the copartnership allegation from the first count. It then alleges a cause of action for the reasonable value of goods, wares and merchandise sold and delivered, charging "*defendants*" as in the other counts. Each defendant filed a separate answer denying generally and specifically the allegations of the complaint. The findings found all the allegations of the first, second and fourth counts of the complaint to be true and defendants' denials untrue. Thus, the court found the defendants to be copartners and that "*defendants above named*" were indebted to plaintiffs as alleged in the three counts. The court gave judgment against both defendants *individually* and as copartners for $1,003.75 together with interest.

Evidence.

Trondhjem was the lessee of a building in Salinas which contained a restaurant known variously as the Big Hat Coffee Shop, Big Hat Restaurant and Big Hat Cafe. He owned the equipment in the restaurant. He also operated a bar in the building. The bar and restaurant have separate front entrances. There is a door

1. Except where otherwise noted, emphasis is added by us.

between the two. There is only one street number and address for the bar and restaurant, although there were two different mail deliveries. Plaintiffs' meat was all delivered to the restaurant. Sutton was a cook or chef by trade. In April or May, 1950, Sutton came to the Big Hat Cafe. There is a direct conflict in the testimony concerning his capacity there. Sutton testified he was hired by one Moxley to cook for $75 per week and he knew nothing of the arrangement between Trondhjem and Moxley. He cosigned a note with Moxley to Trondhjem for $150 advanced by the latter to start the operation. Trondhjem testified that he orally subleased the restaurant to Moxley and Sutton on a percentage basis to be paid when they "got going good." Because Trondhjem had previously found Sutton irresponsible, Moxley was to be responsible for all bills. The first charge made by plaintiffs to the Big Hat Cafe was February 6, 1950 (apparently before Sutton came). Plaintiffs' salesman had told plaintiffs' branch manager that Trondhjem was the owner and plaintiffs' ledger carried him as such. However, Trondhjem never ordered nor paid for any goods. Later, the sales were made on Sutton's credit also. Moxley was employed by Safeway Stores. He and Suttton operated the restaurant for about a month, Sutton being the chef and in charge. Before Moxley left, Trondhjem brought Sutton a written lease to sign. Sutton refused. Safeway objected to Moxley being in the restaurant business. Moxley then left the business entirely, Sutton staying on, cooking and running the restaurant until about August 4, a period of roughly two months. Until "around May" plaintiffs' business with the Big Hat Cafe was on a cash basis. Then plaintiffs extended credit to Sutton based on his statement to plaintiffs' representative that he was operating the restaurant on a "lease basis" and that Trondhjem got a certain percentage of the "take." At no time did plaintiffs' representative talk to Trondhjem. Cash payments to plaintiffs were made from time to time by Sutton. Sutton employed the waitresses and dishwasher in the restaurant but Trondhjem paid them, although Trondhjem received none of the receipts of the restaurant except for reimbursement by Sutton for payroll, sales, social security and unemployment taxes. Trondhjem signed and filed the social security, unemployment, compensation, and federal income tax returns and reports to the State Board of Equalization for sales tax and paid all these taxes. In Trondhjem's personal income tax return he included these moneys received and paid out by him. The utility accounts were in his name as were both the bar and restaurant licenses. His explanation of paying the waitresses and the social security payments was "So that I would be within the regulations," as he knew that under the law he could not run a bar unless he ran a restaurant also. One Bailey, who took over the operation of the cafe on August 7, testified that Trondhjem told him that "he had a cook in there that was working there" and that he was tired of the responsibility of the restaurant and would like to lease it. Trondhjem denied making this statement. Trondhjem did not fix prices in the restaurant, received no restaurant mail. Although the restaurant cash was not entered in Trondhjem's books or traced to the bank account, a notation was made therein of restaurant receipts as supplied by Sutton and "net settlement sheets" were made up. The cash register slips were turned over to Trondhjem. Checks on the restaurant bank account could only be signed by Moxley and Sutton and then only by Sutton.

Sutton testified that after a month Moxley left him in the restaurant to run it until Trondhjem got some one to take Sutton's place as cook. Trondhjem never paid Sutton anything for his work. Sutton was paid $75 per week by check signed by Moxley. After Moxley left Sutton paid himself by check at least on two occasions. At the time the restaurant closed in August Sutton had not been paid in full. At that time Sutton had drawn a $100 check in favor of plaintiffs. There was not sufficient moneys in the bank to cover the check, so Sutton took the cash that was on hand and deposited enough to meet the check. This left a balance of $1,003.75 due plaintiffs for meat furnished the restaurant. After the restaurant was closed and Bailey took pos-

session no accounting to Sutton of the inventory turned over to Bailey was made by Trondhjem.

Agency.

A reading of the reporter's transcript as well as the briefs on this appeal shows that the case was tried, not on the theory of defendants being partners, but on the theory that a principal and agent relationship existed between Trondhjem and Sutton. Plaintiffs so stated at the trial. Plaintiffs concede that the evidence does not justify a finding of partnership between Trondhjem and Sutton. Appellant contends that the court's theory was that both an actual and an ostensible agency was shown. We do not find it necessary to determine whether the evidence shows an ostensible agency for the reason that there is ample evidence upon which a finding of actual agency can be made. The evidence clearly shows that when the original leasing of the property by Moxley fell through, Sutton, who had been hired by Moxley as cook at $75 per week, remained on in operation of the restaurant for Trondhjem. While there was no express agreement between Trondhjem and Sutton, the evidence shows that in order to keep the restaurant open, which was necessary for Trondhjem to operate his bar, Harem Corp. v. State Bd. of Equalization, 87 Cal.App.2d 915, 198 P.2d 48, Trondhjem maintained Sutton in possession on the same terms as Sutton had been working for Moxley, namely, $75 per week. Trondhjem paid the waitresses and the dishwasher, the social security and other taxes, made the necessary reports and kept the license in his name.

[1, 2] "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract." Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 64, 207 P. 539, 541. "A creditor may sue an undisclosed principal when found, although he may not have known of the existence of such principal at the time the debt was incurred." Hulsman v. Ireland, 205 Cal. 345, 352, 270 P. 948, 951. The evidence shows that credit was not extended by plaintiffs to Sutton exclusively. The credit report received by plaintiffs was on the Big Hat Cafe, not on Sutton personally. The charge on plaintiffs' books was to the cafe and Trondhjem was shown thereon as owner. Plaintiffs had been informed by Sutton of Trondhjem's interest in the cafe at least to the extent of 6 per cent of the profits. Hence, the rule set forth in Walton v. Davis, 22 Cal.App. 456, 134 P. 795, and Rigney v. De La Salle Institute, 10 Cal.App.2d 492, 52 P.2d 579, that the doctrine of undisclosed principal does not apply where the creditor gives exclusive credit to the agent, is not applicable here.

[3] Appellant cites Hill v. Citizens Nat. Trust & Sav. Bank, 9 Cal.2d 172, 176, 69 P. 2d 853, for the proposition that in order to recover from an undisclosed principal the creditor must not be guilty of negligence. That rule applies to situations of ostensible agency, and not to those of undisclosed agency.

Findings.

[4–6] This brings us to the question of whether the trial court found that such agency existed. It did not expressly so find. In the complaint defendants were sued both individually and as partners. The charging portions of the various counts charged "defendants above named" thereby including them in both their individual and partnership capacities. In finding in the terms of the complaint, the court found them liable in both capacities. But such a finding is contradictory. Sutton could not have been both Trondhjem's partner and his agent. Again, the court found Sutton liable as well as Trondhjem. " 'The rule is well established that where one deals with another believing him to be a principal, and subsequently learns that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal.' " Grosso v. Monfalcone, Inc., 13 Cal.App.2d 405, 409, 56 P.2d 1266, 1268. Had defendant Trondhjem so demanded in the trial court, he could have

required plaintiffs to elect whether they desired to hold the principal or the agent. Grosso v. Monfalcone, Inc., supra, 13 Cal. App.2d 405, 409, 56 P.2d 1266, 1268. He did not do so. Now, "a failure to demand such an election in the lower court constitutes a waiver of the right." Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 777, 78 A.L.R. 585; Craig v. Buckley, 218 Cal. 78, 82, 21 P.2d 430; McEwen v. Taylor, 106 Cal.App.2d 25, 30, 234 P.2d 754. Trondhjem cannot complain of the judgment against Sutton. But such judgment is important in determining whether there is a sufficient finding of agency. In view of the contradictory nature of the findings we must hold that the court did not adequately find on the agency question.

But that does not end the appeal. This court has the right to make findings on the subject. Code Civ.Proc. § 956a; People v. One 1949 Ford Tudor Sedan, Cal.App., 251 P.2d 776; Gustafson v. Blunk, 4 Cal. App.2d 630, 635, 41 P.2d 953.

[7] As said in San Jose, etc., Title Ins. Co. v. Elliott, 108 Cal.App.2d 793, 803, 240 P.2d 41, where there is a total failure to find on a material issue and the evidence on it is conflicting, this court will not make findings. But here, there was not a total failure. While the findings on agency are not specific, the findings as made by the trial court are sufficient to constitute a passing by that court on the credibility of the witnesses on the agency issue, because the trial court obviously declined to believe defendants' testimony. In making findings in this case we are not passing on the contradictory evidence without it first having been passed on by the trial court. We are merely making specific findings after the trial court has definitely indicated its determination of the credibility of the witnesses. This is in line with the purpose of section 956a as discussed in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, where it was pointed out that whenever possible and the interests of justice would seem to require, the reviewing court has the power to make findings in addition to, and even contrary to, those made by the trial court. "This section shall be liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial." Code Civ.Proc. § 956a.

[8] Sending the case back for findings or a new trial would not be warranted. The case was tried on the agency theory. Trying it again would be merely a duplication. Exercising the power conferred by section 956a, Code of Civil Procedure, we hereby add to the findings one to the effect that in the incurring of the indebtedness upon which plaintiffs' causes of action are based Sutton acted as the agent of Trondhjem.

The findings are so amended, and the judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



SCHOLTHAN et al. v. RUSALEM et al. *

Civ. 4701.

District Court of Appeal, Fourth District, California.

Jan. 23, 1953.

Hearing Granted March 23, 1953.

Action for reformation of a deed. The Superior Court of Riverside County, Clarence Kincaid, J., entered a judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where counsel for plaintiffs disregarded court's admonition to remain in attendance because trial of action would follow the matter then being tried at the very earliest opportunity and did not appear when case was called for trial, refusing to grant a continuance and dismissing action on defendant's motion were not abuse of discretion.

Judgment affirmed.

1. Appeal and Error ⇐966(1)
Continuance ⇐7

The granting or refusing of a continuance is a matter of discretion with trial court and appellate court will not interfere

* Subsequent opinion 260 P.2d 68.

with the exercise thereof except in case of a clear abuse of discretion.

2. Trial ⇐6(1)

Where trial court on date set for trial advised counsel for plaintiffs to remain in attendance because trial of plaintiffs' action would follow the matter then being tried at the very earliest opportunity, further notice to plaintiffs of date of trial was unnecessary.

3. Continuance ⇐20(1)

Where counsel for plaintiffs, knowing that case being tried on date set for trial of plaintiffs' action would soon be concluded and being advised by court that trial of plaintiffs' action would follow at the very earliest opportunity, disregarded court's admonition to remain in attendance and did not appear when plaintiffs' case was called for trial on Monday, three days later, refusing to grant a continuance and dismissing action on defendants' motion were not abuse of discretion. Code Civ. Proc. § 581, subd. 3.

Phillip Barnett, Los Angeles, for appellants.

Hilton H. McCade, Palm Springs, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from a judgment of dismissal entered upon motion of defendants under the provisions of section 581, subdivision 3, of the Code of Civil Procedure. This section provides that an action may be dismissed by the court when either party fails to appear on the trial and the other party appears and asks for the dismissal. The questions involved are whether the trial court abused its discretion in refusing to grant a continuance of the trial and dismissing the action.

The action (for reformation of a deed to real property situated in Palm Springs) was filed August 10, 1950. After the cause was at issue, a preliminary conference was held at Indio and the trial date of March 6, 1952, was agreed upon by stipulation. On March 6th plaintiffs' counsel and witnesses appeared in Indio ready for trial. However, the court was engaged in another trial on that date and the matter was then set for trial on April 25, 1952. From the affidavit of counsel for plaintiffs it appears that he mailed a motion for continuance to the trial court on April 14, 1952; that this motion did not reach the trial court until April 25th; that the motion was made on the grounds that counsel for plaintiffs would be unavailable for trial on April 25th and on the further ground that said counsel would testify as a witness as to the various contracts and oral statements between the parties. The record shows that on April 25th plaintiffs' counsel appeared in court and announced to the judge that he was prepared to proceed with the trial; that the court was then trying a personal injury action in which the arguments were being made to the jury; that the court stated that it was apparent that the instant action would not be tried on that day. It also appears that the motion for continuance was argued and denied by the court.

The reporter's transcript shows that the following proceedings then took place:

"The Court. (Referring to the time of trial of the instant action) It will have to trail, gentlemen, that's all I can say.

"Mr. Robertson. (Counsel for plaintiffs) We did not intend to move for continuance of this matter today, we intended to go ahead with this matter and proceed with it, get it off your calendar and our calendar.

"The Court. We will get it off the calendar at the very earliest moment.

"Mr. Robertson. I can not come back next week, I am prepared to go to trial today. I don't want to be criticized because I am filing these things, we were prepared to go ahead today.

"The Court. I am not criticizing you, I am just telling you your case will trail this case at the first moment. It will not be much longer, you just wait until this case concludes, whenever that is.

"Mr. Robertson. Is the court going to assign a date for it?

"The Court. No, you are just going to trail, you will have to stay right here. I am unable to tell you when this case will conclude; I thought it would be three days; it is now seven days.

"Mr. Robertson. Do you try matters on Monday?

"The Court. Not normally, it is calendar day and pretrial calendar, but it will follow at the very earliest opportunity, it will be the next case tried, I can assure you of that, that's all I can say, you will trail.

"Mr. Robertson. Very well."

In his affidavit on motion for a new trial counsel for plaintiffs stated that following these proceedings he was informed by the clerk of the court that Monday, April 28th, was a motion and pretrial conference day; that the instant case would undoubtedly not be tried on that day and in all probability would be tried on April 30, 1952.

The record shows that the personal injury action was concluded at about 6:30 P.M. on April 25th; that on Monday, April 28th, the trial court called the instant case for trial and counsel for the defendants announced that he was ready to proceed. Counsel for plaintiffs was not present and had apparently gone to San Francisco. The court then granted defendants' motion for a judgment of dismissal under the provisions of section 581, subdivision 3, of the Code of Civil Procedure and the judgment of dismissal was then entered.

[1] The granting or refusing of a continuance is, as conceded by the appellants, a matter of discretion with the trial court. Except in the case of a clear abuse of such discretion, an appellate court will not interfere with the exercise thereof. 5 Cal.Jur. 968; Connor v. Jackson, 94 Cal. App.2d 462, 466, 210 P.2d 897; May v. Rosen, 91 Cal.App.2d 794, 798, 205 P.2d 1118; Foster v. Hudson, 33 Cal.App.2d 705, 707, 92 P.2d 959.

[2, 3] In the instant case, while the affidavits of plaintiffs' counsel indicated that he would be unable to represent plaintiffs at the trial on April 25th, and that his testimony at the trial could be material to the issues in dispute, it appears that associate counsel for plaintiffs was present in court and ready to proceed with the trial on that day. The court then advised him to remain in Indio and that the trial would follow the matter then being tried at the very earliest opportunity. Counsel knew that the preceding case was being argued and would probably soon be concluded. Nevertheless, he left for San Francisco, disregarding the court's admonition to remain in attendance. Counsel for plaintiffs had notice of the time of trial from the court itself and further notice was unnecessary. Under the circumstances shown, we cannot say as a matter of law that the trial court abused its discretion in refusing a continuance and in ordering a dismissal of the action.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



FLYNN v. FLYNN.*

Civ. 19049.

District Court of Appeal, Second District, Division 1, California.

Jan. 27, 1953.

Hearing Granted March 26, 1953.

Motion by defendant husband to modify terms of property settlement agreement which had been ratified, approved, confirmed and specifically incorporated in a decree of divorce. The Superior Court of Los Angeles County, Elmer D. Doyle, J., denied the motion, and the husband appealed. The District Court of Appeal, Drapeau, J., held that where the agreement was introduced in evidence in the divorce action as an exhibit only and did not become part of the judgment roll,

* Subsequent opinion 265 P.2d 865.

and the terms of the agreement were not actually made part of the decree, except by reference, there was insufficient incorporation of the terms of the agreement in the divorce decree to give the Superior Court jurisdiction to modify them.

Order affirmed.

Divorce ⇐254

Where property settlement agreement entered into by parties prior to their divorce was introduced in evidence in the divorce action as an exhibit only and did not become part of the judgment roll, and was approved by the trial judge but not made a part of the decree except by reference there was an insufficient incorporation of the terms of the agreement in the divorce decree to give the Superior Court jurisdiction to modify them.

Jerry Giesler, Beverly Hills and Robert E. Ford, Los Angeles, for appellant.

Loeb & Loeb, Los Angeles (Herman F. Selvin and Harry L. Gershon, Los Angeles, of counsel), for respondent.

DRAPEAU, Justice.

The parties hereto were married in 1935. Thereafter they entered into a property settlement agreement which provided for the support and maintenance of Liliane Carre Flynn. In 1942 Mrs. Flynn was awarded a divorce from defendant, the interlocutory judgment decreeing that "The property settlement agreement between the parties hereto dated October 11, 1941 and received in evidence herein, is hereby ratified, approved and confirmed and the same is hereby specifically incorporated herein and made a part of this decree, and defendant is hereby ordered to make all of the payments provided therein to be paid by him, at the times and in the manner therein provided, and plaintiff and defendant are hereby ordered to comply in all respects with each and all of the terms and provisions of said agreement and to perform all their obligations thereunder as therein provided."

The final judgment of divorce provided that "wherein said interlocutory judgment makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if set forth herein in full, and that wherein said interlocutory judgment relates to the property of the parties, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto."

On May 9, 1950, an order to show cause "In re modification of alimony, custody of child and child support as ordered in the final judgment of divorce" issued out of the Superior Court. By this means, defendant sought to terminate or reduce alimony and other payments provided by the property settlement agreement to be made to Mrs. Flynn.

When the matter came on for hearing, plaintiff's counsel objected to the introduction of any evidence on the ground that the court had no jurisdiction to modify the terms of the agreement respecting alimony because "there is no incorporation into the interlocutory or final decrees of divorce of the terms or provisions of the property settlement agreement."

Thereafter, on October 11, 1951, the following minute order was entered:

"Defendant's Order to Show Cause re Modification of Order of April 7, 1943 having been heretofore submitted by the Court on August 15, 1951, the Court now renders its decision and denies the motion on grounds of lack of jurisdiction, in that there is no direct Order of Court; the Property Settlement is incorporated in the Interlocutory and Final Decrees of Divorce by reference only."

Defendant appeals.

The sole question presented is whether the provisions for support and maintenance of respondent were made an enforceable portion of the judgment of divorce so as to give the Superior Court jurisdiction to modify them.

The leading case on merger of a property settlement agreement in a divorce decree is Hough v. Hough, 26 Cal.2d 605, 609–613, 160 P.2d 15, 17, where it is stated: "Turning first to the relation between the

separation agreement and the divorce decree, it appears to be well settled, that if the agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree. * * * 'and as soon as incorporated into the decree *the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such.'*

* * * * * *

"In Lazar v. Superior Court, 16 Cal.2d 617, at page 620, 107 P.2d 249, at page 250, the agreement authorized its incorporation in the decree, but this court in determining whether the agreement was sufficiently incorporated in the decree to justify a contempt citation for disobedience, stated:

"'If a property settlement agreement is complete in itself and is *merely referred to* in a divorce decree or approved by the court *but not actually made a part* of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. Baxter v. Baxter, 3 Cal.App. 2d 676, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, *if the agreement is actually incorporated* in the decree, then *such provisions become a part of the order of the court and may be enforced as such.*' (Emphasis added.) The essence of that statement is that the agreement becomes merged in the decree." (Emphasis included.)

In Price v. Price, 85 Cal.App.2d 732, 734–735–738, 194 P.2d 101, 103, it was stated: "The sole question presented by the appeal is whether the trial court erred in granting defendant's motion for judgment on the pleadings. On this point the parties have confined their arguments as to the question of whether if a property settlement agreement has by a recital in the decree been *made a part* of the Interlocutory and Final Decrees of Divorce, a separate action may be maintained on the agreement itself apart from these decrees."

The court then discussed the Hough case, supra, and continued: "It will be noted from this language that the determining factor is whether the agreement is *incorporated* into the decree and made a part thereof rather than being made a part of the decree by *reference*. Obviously there is a difference for if there is an actual *incorporation* of the agreement into the decree, the decree standing alone then carries within itself the complete measure of the rights and obligations of the parties. In the court's files, the decree or judgment itself supplies all the information necessary to whomsoever may be interested. If recorded it announces to the world the respective interests of the parties in any property involved.

"If on the other hand the agreement is *made a part of the* decree by *reference* only the above it not true. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree or judgment alone. Reference might be to an exhibit attached to a *pleading*, to another judgment, or even to an agreement offered in evidence and withdrawn and not available as a part of any public record. * * * It or a true copy thereof would of necessity have to be sought out and produced in order to determine what the complete judgment actually provided. If it could not be produced, or its terms definitely established, then that part of the judgment represented by it could not be enforced. In particular it could not be enforced by contempt proceedings. Hough v. Hough, supra, [26 Cal.2d 605, 160 P.2d 15]; Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. * * * It would seem to logically follow then that if a property settlement is made a part of a divorce decree by mere reference it is not incorporated into the decree within the meaning of that term as it is used in the Supreme Court cases of Hough v. Hough, supra, and Lazar v. Superior Court, supra, and in the District Court of Appeal case of

Schnerr v. Schnerr, supra. That consequently contempt proceedings are unavailable to assist in its enforcement and that resort may be had only to 'the usual contract remedies' ". (Emphasis included.)

See, also, Shogren v. Superior Court, 93 Cal.App.2d 356, 358–364, 209 P.2d 108, 110, where under the heading *"Was the Agreement Sufficiently Incorporated into the Decrees?"* the court discusses the above cited cases and many others on the subject, and concludes:

"In spite of the confusion that exists in the authorities the later decisions have fairly, although perhaps vaguely, crystallized the rule. A fair summation of the rule as it exists today is the following: (1) If a property settlement agreement is merely referred to in the divorce decree, or approved by the court but not actually made a part of the decree and the performance of any of its provisions ordered, then the provisions of the agreement cannot be enforced by contempt proceedings. (2) If the agreement or any of its provisions are actually incorporated in the decree and the decree orders the performance of such agreement or provision or provisions, then the agreement or the provision or provisions so incorporated are merged in the decree and may be enforced only as the order of the court.

"Applying these tests to the decrees in our case, we find that the agreement did not become merged therein. While the decrees made the agreement parts thereof by reference and the agreement was physically attached to the interlocutory decree, there was no order made in either decree for the performance of the provisions of the agreement. Therefore, enforcement by contempt proceedings does not lie."

In the instant case, while the interlocutory decree orders appellant "to make all of the payments provided therein to be paid by him", the terms of the agreement were not actually made a part of the decree, except by reference. The agreement was introduced in evidence in the divorce action as an exhibit only, and did not become part of the judgment roll. In the circumstances and upon authority of the foregoing principles of law, there was insufficient incorporation of the terms of the agreement in the divorce decrees to give the Superior Court jurisdiction to modify them.

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.



115 Cal.App.2d 611

BARBETTO v. LO PRESTO.

Civ. 15054.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1953.

Action for assault against defendant, who was foreman of plaintiff's employer, for injury alleged to have resulted from blow struck by foreman somewhere on back of plaintiff. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., sitting without jury, entered judgment for defendant on the findings, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that evidence supported findings.

Judgment affirmed.

Assault and Battery ⇐35

In action for assault, evidence supported finding that it was untrue that defendant struck plaintiff on back or otherwise, and that it was untrue that because of any acts of defendant, plaintiff was disabled by an injury to her spine or otherwise.

Aaron Vinkler, San Francisco, for appellant.

F. W. Tenney, Heller, Ehrman, White & McAuliffe, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries alleged to have resulted from an

assault committed by the defendant, who was a foreman of Roos Bros., plaintiff's employer. The injury was alleged to have resulted from a blow struck by the foreman somewhere on the back of the plaintiff.

The case was tried before the court sitting without a jury and resulted in a judgment for defendant on findings that it was untrue that the defendant struck the plaintiff on the back or otherwise, and that it was untrue that because of any acts of the defendant the plaintiff was disabled by an injury to her spine or otherwise.

The facts are not complicated. The foreman and other witnesses who saw the incident testified that he patted plaintiff on the shoulder and told her not to talk so much. It is also undisputed that on more than one occasion prior to the incident the plaintiff had been injured by a fall or strain, and it was a fair inference for the court to draw that whatever her suffering at the time the complaint was filed, it was caused by these prior incidents and not by any act of the defendant.

The evidence fully supports the findings.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



115 Cal.App.2d 612

IRVINE v. MAZURETTE et al.

Civ. 15190.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1953.

Rehearing Denied Feb. 28, 1953.

Hearing Denied March 26, 1953.

Action on a common count for work, labor, and services. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to sustain trial court's finding that plaintiff's services during first 33 weeks were worth $50 a week, or $1,650.

Judgment affirmed.

1. Work and Labor ⇐30(4)

In action on common count for work, labor, and services, findings that plaintiff's services during first 33 weeks at $50 a week were worth $1,650 and that during next 17 weeks at $80 were worth $1,360, or a total of $3,010, less credit for $57.20 withholding taxes paid and $1,504 stipulated to have been received by plaintiff, leaving a balance due of $1,448.80, were not contradictory.

2. Judgment ⇐21

Where a number of defendants were named in action on common count for work, labor, and services, and several filed answers, but appellants were alone referred to in the findings of fact and conclusions of law as having appeared at trial, filed motion for new trial, notice of appeal, and request for reporter's transcript, and condensed statement in lieu of the transcript, judgment which was for plaintiff for $1,448.80 but which did not name appellants as the defendants from which amount was to be recovered, was not void for uncertainty.

3. Work and Labor ⇐28(4)

In action on common count for work, labor, and services, evidence was sufficient to sustain trial court's finding that, during the first 33 weeks, plaintiff's services were worth $50 a week or $1,650.

Marvin C. Hix, San Francisco, for appellants.

R. A. Ferrario, Oakland, Albert K. Whitton, Oakland, for respondent.

NOURSE, Presiding Justice.

The appeal is on a settled statement. The action is a common count for work, labor and services alleged to be worth $3,300. The court found for plaintiff but held that the value minus credits was $1,448.80. Defendants appeal.

[1] Appellants' first contention, that the findings are contradictory, is clearly with-

out merit. Finding 2 shows with sufficient clarity that plaintiff's services during the first 33 weeks at $50 a week were worth $1,650 and during the next 17 weeks at $80 were worth $1,360 (a total of $3,010) whereas credit is given for $57.20 withholding taxes paid and $1,504 stipulated to have been received by plaintiff (total $1,561.20) leaving the balance of $1,448.80.

[2] Next it is contended that the judgment is void for uncertainty because it states only, "That plaintiff have and recover Judgment in the sum of One Thousand Four Hundred Forty Eight Dollars and Eighty Cents ($1,448.80)," without naming the defendants from whom this amount is to be recovered. Respondent concedes that such is a mistake, but urges that judgment (and findings) make it clear that the judgment is against the defendants in this action and that such defect is considered a clerical misprision which the lower court can at any time correct. Leviston v. Swan, 33 Cal. 480. But no correction is necessary under the circumstances of this case. Though a number of defendants were named in the complaint, and an answer was filed on behalf of some of them, the individuals Mazurette and Armstrong were alone referred to in the findings of fact and conclusions of law as having appeared at the trial, and the judgment went against "the defendants" without specification of any names. However, these two individuals alone filed a motion for a new trial and thereafter filed the notice of appeal herein, and they alone filed the request for a reporter's transcript. Thereafter a condensed statement in lieu of the reporter's transcript was prepared and filed on behalf of the two individual defendants who thereafter had been noted as the only appellants. For these reasons there can be no uncertainty in the judgment and it would be an idle act to remand the case for a correction of the claimed error.

[3] The main assignment of error is that the finding that $1,650 was due for work done during 33 weeks from August 16, 1948, to April 2, 1949, is not supported by the evidence. Appellants concede that they employed plaintiff as a materials clerk or cost accountant at $80 a week to work on prefabricated houses. They contend, however, that orders for said houses came in several months later than expected and that until he started on the regular work on April 2, 1949, he did only sporadic work as a laborer for them at their request for which work he was fully paid by grocery orders to the amount of $200 he received. In a quantum meruit action it is necessary to show what benefits defendant accepted to entitle plaintiff to recover. Rowell v. Crow, 93 Cal.App.2d 500, 503, 209 P.2d 149. It is also contended that the evidence fails to show what work plaintiff did during said period, what benefits appellants received from it, and that it was worth more than the amount of $200 paid.

At the trial plaintiff testified in substance that on August 8, 1948, defendant Mazurette told him that defendants were ready for him to start work, that he reported for work on August 16, 1948, and from that date until April 2, 1949, put in 40 hours per week at defendants' place of business; that defendant Mazurette introduced him to defendant Armstrong stating that Armstrong was his partner. "That Mazurette and Armstrong were in and out of the place of business almost daily throughout said period and were aware of his presence, and directed him as to certain work they desired him to do throughout that period of time." That he set up a cost system for the construction of prefabricated houses, carried lumber and material, assisted in setting up machinery and in wiring the premises and machinery and later assisted Armstrong in the fabrication of a sample prefabricated house; still later he was directed by defendants to do preparatory work for the erection of prefabricated houses for Evans Brothers at Martinez. This evidence was corroborated by the witness Hoffman who during part of said period did for defendants the same kind of work as plaintiff, for $1.60 per hour, at which he averaged approximately $50 a week, and the witness Allen who saw plaintiff regularly at work on defendants' premises during the whole period. Conflicting testimony of defendants need not be mentioned as it was rejected by the trial court.

Respondent urges that from this evidence an implied request can be derived. It would seem that it sufficiently supports the conclusion of the trial judge in that it shows that during that period at the implied request of defendants plaintiff was present full time at their place of business to assist as general laborer and that his availability as a general laborer to do all work asked of him is the benefit the defendants accepted. Though the evidence is somewhat meager as to the value of the work that the plaintiff performed, it is sufficient to support the findings and that ends the controversy so far as this appeal is concerned.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.



115 Cal.App.2d 581

ORAVEC v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19465.

District Court of Appeal, Second District, Division 3, California.

Jan. 28, 1953.

Divorced wife brought mandamus proceedings against the Superior Court of the State of California, in and for the County of Los Angeles, to compel court to hear and determine divorced wife's application for temporary support of minor children, court costs, and attorney fees in support action against divorced husband. The District Court of Appeal, Shinn, P. J., held that Superior Court had jurisdiction of action by divorced wife against divorced husband, though divorce had been obtained in foreign state.

Writ of mandamus issued.

Divorce ⇦332

Superior Court had jurisdiction to award divorced wife, who had procured divorce decree in foreign state, support money for support of minor children, attorney's fees and costs. Civ.Code, §§ 137, 137.1, 137.2, 137.3.

Jacque Boyle, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is a proceeding in mandate to require the respondent court to hear and determine petitioner's application for temporary support of minor children, court costs and attorney's fees in her action against her former husband, George F. Burkes, now pending in respondent court. It is alleged in the petition that the court failed and refused to consider petitioner's application and dismissed it upon the ground that the court was without jurisdiction to grant it. It is alleged that in another state petitioner was granted a divorce from defendant, was awarded custody of the minor children and defendant was ordered to make weekly payments to petitioner for the support of the children; that the minor children have been and are in the custody of petitioner; that defendant, having the ability so to do, has failed and refused to provide for their support and maintenance; that petitioner is without funds, all of which facts were duly presented to respondent court in petitioner's application for temporary allowances aforesaid. By her complaint petitioner also sought judgment for $3,900 alleged to be due and unpaid under the foreign judgment; also support for the minor children and an award for attorney's fees and costs. Upon the hearing pursuant to the alternative writ no appearance was made by respondent court or George F. Burkes.

The superior court had jurisdiction to award support money for the support of the minor children, for attorney's fees and costs. The facts of the case differ in no material respect from those in the case of Dixon v. Dixon, 216 Cal. 440, 14 P.2d 497. It was there held that in an action brought by the mother of a minor child against the father seeking support for the child, the court had authority under section 137 of the Civil Code to make an allowance for support, for counsel fees and costs. The fact that the wife had been granted a divorce in another state did not preclude

her right to sue for support of the child. Former section 137 has been rewritten and some of its provisions appear as separate sections. Under section 137.1 petitioner had a right to bring suit against the children's father for their support, maintenance and education. In the action which petitioner brought the court was authorized under sections 137.2 and 137.3 to order the father to pay her any amount necessary for the support, maintenance and education of the children and such amount as was reasonably necessary for the cost of maintaining the action and for attorney's fees. The jurisdiction of the court was in no manner affected by the judgment of divorce which awarded petitioner the custody of the children and made an award against their father for their support. Dixon v. Dixon, supra; Smith v. Smith, 115 Cal.App.2d 92, 251 P.2d 720. It is immaterial that petitioner was also seeking to establish the foreign judgment. The action was for the support and maintenance of children and the court was required to hear and determine the application on the merits.

Let a writ issue commanding the superior court to vacate its order dismissing plaintiff's application and to proceed with a hearing on the same.

WOOD and VALLÉE, JJ., concur.



115 Cal.App.2d 693

FRASER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY, PASADENA BRANCH.

Civ. 19458.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1953.

Prohibition proceedings were brought to restrain Superior Court, in and for the County of Los Angeles, Pasadena Branch, from further proceeding with appeal from judgment of justice court. The District Court of Appeal, Vallée, J., held that where judgment was rendered by justice court against defendant wife but in favor of defendant husband, nonappealing husband was an "adverse party" within meaning of statute requiring that copy of notice of appeal be served on "adverse party" in event of appeal from judgment of justice court to Superior Court, and that Superior Court had no jurisdiction of wife's appeal in absence of service of copy of notice of appeal on husband.

Writ granted.

1. Justices of the Peace ⇐160(4)

Where judgment was rendered by justice court against defendant wife but in favor of defendant husband, nonappealing husband was an "adverse party" within meaning of statute requiring that copy of notice of appeal be served on "adverse party" in event of appeal from judgment of justice court to superior court, and superior court had no jurisdiction of wife's appeal in absence of service of copy of notice of appeal on husband. Code Civ.Proc. § 974.

See publication Words and Phrases, for other judicial constructions and definitions of "Adverse Party".

2. Justices of the Peace ⇐160(7)

Where judgment was rendered in justice court against defendant wife but in favor of defendant husband, and only wife appealed to superior court, and superior court did not have jurisdiction of appeal because copy of notice of appeal was not served on husband as required by statute, filing of document in superior court by attorneys, who had appeared for husband and wife in justice court, reciting that husband appeared by his attorneys and waived all notice of proceedings, did not operate to give superior court jurisdiction. Code Civ.Proc. § 974.

3. Justices of the Peace ⇐161(5)

Where judgment was rendered in justice court against defendant wife but in favor of defendant husband, and only wife appealed to superior court, and superior court did not have jurisdiction of appeal because copy of notice of appeal was not served on husband as required by statute,

appearance of husband in superior court when cause was called for trial did not operate to give superior court jurisdiction. Code Civ.Proc. § 974.

Davidson & Davidson and Harold M. Davidson, Alhambra, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, and Hahn, Ross, & Saunders, Los Angeles, for respondents.

VALLÉE, Justice.

Prohibition is sought to restrain further proceedings by respondent court in an action pending therein in which petitioners are the plaintiffs, and Harold H. Bennetto and Bernadette M. Bennetto, husband and wife, are the defendants. The action now pending in the superior court was begun in the justice court, and a judgment was rendered therein in favor of the plaintiffs against Bernadette M. Bennetto, and in favor of Harold H. Bennetto against plaintiffs. The same attorneys appeared for Bernadette and Harold in the justice court. Within the time allowed by law, Bernadette filed a notice of appeal from the judgment. The notice of appeal was directed to the justice, to the plaintiffs, and to their attorneys. She served a copy of the notice of appeal on the attorney for the plaintiffs, but did not serve a copy of the notice, or any notice of the appeal, on Harold. The appeal was taken on questions of both law and fact.

When the cause came on for trial in the superior court, plaintiffs, petitioners here, moved the court to dismiss the appeal on the ground section 974 of the Code of Civil Procedure had not been complied with since Harold was an adverse party on the appeal; that he had not been served with the notice of the appeal, and that therefore the superior court was without jurisdiction of the appeal. The attorneys appearing for Bernadette (the same attorneys who had appeared for Bernadette and Harold in the justice court), over objection of the plaintiffs, were permitted to file a document which read: "Appearance of Harold Bennetto: Harold Bennetto hereby appears, by his attorneys, Hahn, Ross & Saunders, in the above entitled matter, for all purposes, and waives all notice of proceedings in the above matter. Dated November 26th, 1952. Hahn, Ross & Saunders By Saul Ross." Harold was then present in the superior court and Mr. Ross stated that he (Harold) would waive notice of the appeal. Although the court ruled that the proceeding was a trial *de novo* in the superior court, the motion was denied.

[1] Petitioners contend the superior court did not acquire jurisdiction of the appeal by reason of the failure to serve Harold. We have concluded the contention must be sustained.

Section 974 of the Code of Civil Procedure reads: "Any party dissatisfied with the judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after notice of the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, *and serving a copy on the adverse party.* The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact or both." (Italics added.) Section 976 reads: "When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action or hearing on the order made after judgment must be tried or heard anew in the superior court." Section 980a reads: "When the action is tried anew or the application for an order is heard anew on appeal the trial or hearing must be conducted in all respects as other trials or hearings in the superior court. * * *"

Molenaar v. Superior Court, 137 Cal.App. 643, 31 P.2d 221, is squarely in point and decisive of the question. The Molenaar case was a proceeding for a writ of prohibition to restrain further proceedings by the superior court in a case which had been appealed from the justice court. The action in the justice court was against a husband and wife. Judgment was against the wife and in favor of the husband. The same

attorney represented both defendants throughout. The wife appealed. Notice of appeal was served on the plaintiff in the action, but not on the husband. The respondents there contended, as do respondents here, that the husband was not an adverse party and no service on him was required; and that, even if he were an adverse party, no service was required because the same attorney had represented both defendants at the trial in the justice court and therefore the husband had knowledge of the fact that an appeal had been taken. The court held, 137 Cal.App. at page 645, 31 P.2d at page 223: "Under the statute, the respondent court had no jurisdiction of this appeal if notice thereof was not served on any adverse party. The general rules for determining who is an adverse party are well settled. Briefly, a party is adverse, within the meaning of the statute, if the judgment gave him something which may be taken away by a reversal or modification thereof. MacDonald v. Superior Court, supra [101 Cal.App. 423, 281 P. 672]. In that case judgment had been entered against one of four defendants in favor of the plaintiff and of the other defendants. Notice of appeal was not served upon the defendants in whose favor judgment was entered. The court said: 'A non-appealing coparty is an adverse party, if his interest may be affected by a reversal or modification of the judgment appealed from. So here the codefendants are adverse parties for the reasons given. They were successful in the justice's court, and a different judgment might take away the fruits of their judgment. If the appeal were properly perfected, they would be required to appear and prepare their defense, as the hearing in the superior court would be a trial *de novo*, and might result in an entirely different judgment.'

"In the case before us, the defendant against whom judgment was entered appealed from the entire judgment on questions of law and fact, but did not serve the defendant in whose favor the judgment had been rendered. The nature of the appeal called for a trial *de novo*, during which the appealing defendant would have the right to prove either that no money was owed to the plaintiff or that any amount due was owed by her husband and not by herself. In the event she proved the latter, a judgment should be entered in favor of the plaintiff against the husband alone. The interest of the husband might be seriously affected by the new judgment and, under established rules, he must be considered an adverse party.

"The question remains whether service of notice of appeal on the husband as an adverse party was unnecessary because the attorney who took this appeal had represented both defendants at the trial and therefore had knowledge of the fact that an appeal was taken. It has been held that actual knowledge cannot take the place of service of notice of appeal. Estate of Pendergast, 143 Cal. 135, 76 P. 962."

The effect of the appeal, if it had been well taken, would have been to vacate the judgment of the justice court *in toto*, and to require that all issues of fact between the plaintiff and both defendants be tried anew in the superior court; and if, on a trial of the issues, the superior court should have determined in favor of the plaintiff, it would have been authorized to render a judgment against both defendants. Rossi v. Superior Court, 114 Cal. 371, 374, 46 P. 177. Harold was an adverse party, and in order that an effective appeal be taken it was necessary to serve a copy of the notice on him.

[2, 3] The filing of the document we have quoted did not operate to give the superior court jurisdiction; nor did the appearance of Harold in the superior court when the cause was called for trial. Service of a copy of the notice of appeal on the adverse party is a jurisdictional prerequisite; it cannot be dispensed with; nor can it be supplied after the time limited by the statute for taking the appeal; and unless it is done, the superior court does not acquire jurisdiction, and the appeal is ineffectual for any purpose. McKeen v. Naughton, 88 Cal. 462, 465–466, 26 P. 354; Brown v. Superior Court, 65 Cal.App. 147, 223 P.2d 426; Dalzell v. Superior Court, 67 Cal. 453, 7 P. 910. Such jurisdiction cannot be conferred by stipulation of the

parties. Harpold v. Superior Court, 58 Cal. App. 629, 631, 209 P. 219. In the Harpold case, the court said, 58 Cal.App. at page 631, 209 P. at page 220: "[T]here is no duty on the part of the respondent court, nor is there any power resting in the respondent court, to take jurisdiction of, or to hear an appeal, except as the statute provides, and the statute governing the subject expressly provides that 'the appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party.'" The exercise of jurisdiction by a reviewing court in a case where there has been no service of the notice of appeal when service is required, is ineffectual and void. Trobock v. Caro, 60 Cal. 301.

Section 940 of the Code of Civil Procedure formerly provided that an appeal from the superior court was taken by filing with the clerk of that court a notice of appeal and serving a similar notice on the adverse party or his attorney. Am.Code Amdts. 1873–74, p. 336. It was held that service of the notice of appeal had a twofold purpose: first, to give the appellate court jurisdiction of the person of the respondent, and, second, to give it jurisdiction of the subject matter of the appeal; that the requirement of service on the adverse party or his attorney was mandatory; that if service was not made within the statutory time the appellate court did not acquire jurisdiction of the case; that the voluntary appearance by the adverse party within the time in which service of the notice on him would be effectual to vest jurisdiction of the appeal in the appellate court gave that court jurisdiction of the appeal, but that the voluntary appearance of the adverse party after the time in which service of the notice on him was required did not give the appellate court jurisdiction since jurisdiction over the subject matter can never be conferred by consent. 2 Cal.Jur. 327, §§ 116, 117. In the present case Harold did not appear in the superior court until long after the time in which service of the notice could be made on him had elapsed.

Let a peremptory writ of prohibition issue as prayed.

SHINN, P. J., and WOOD, J., concur.

115 Cal.App.2d 634

CALIFORNIA HOME EXTENSION ASS'N v. HILBORN.

Civ. 4488.

District Court of Appeal, Fourth District, California.

Jan. 29, 1953.

Hearing Denied March 26, 1953.

Action arising out of cross-complaint for profits due under an alleged agreement by which cross-complainant was to receive share of profits from sales of land as result of his sales promotions work. The Superior Court of Riverside County, John G. Gabbert, J., denied motion of cross-defendant for release of certain funds deposited with court, and granted motion of cross-complainant for appointment of a receiver, and cross-defendant appealed. The District Court of Appeal, Barnard, P. J., held that record did not show that trial judge had abused his discretion in appointing receiver on determination of existence of joint venture and probability of loss to cross-complainant.

Order affirmed.

1. Stipulations ⇐14(1)

Where cross-defendant had deposited various sums with clerk of court for purpose of releasing certain parcels of realty from attachment, and stipulation was made that money deposited should be held by clerk until final determination of the action, denial of cross-defendant's motion to release the money so deposited on ground that attachment had expired or had been released was proper. Code Civ.Proc. §§ 542a, 542b, 564, subd. 1.

2. Receivers ⇐36

Under statute pertaining to appointment of receivers in an action between partners or others jointly owning or interested in any property or fund, appointment of receiver in action based on allegation by cross-complainant of employment agreement by which he was to receive 50 per cent of net profits of all lands sold as result of sales promotions conducted by him, and for which he sought an accounting, was proper, even though a "joint venture" was not expressly alleged to have existed, and especially so when case had been tried and a prior appeal had been considered on theory of joint venture. Code Civ.Proc. § 564, subd. 1.

3. Joint Adventures ⇐1.13

A joint venture is similar to a partnership with respect to the right to an accounting of profits, in accordance with the agreement of the parties.

4. Receivers ⇐38

In proceedings under agreement by which cross-complainant was allegedly employed by cross-defendant, to promote sales of realty in return for 50 per cent of the net profits, wherein cross-complainant moved for order appointing receiver of the property involved in the venture, and cross-defendant contended that appointment of receiver was improper because no joint venture existed, record was not such as to warrant conclusion that, as a matter of law, there existed no such probability of interest on part of cross-complainant in property involved as would justify appointment of receiver, and no abuse of discretion in such appointment was disclosed. Code Civ.Proc. § 564, subd. 1.

Joseph Seymour, Riverside, Robert E. Austin, John N. Helmick, Los Angeles, for appellant.

Jerome L. Richardson, G. E. Jones, Riverside, for respondent.

BARNARD, Presiding Justice.

In this action the defendant, by answer and cross-complaint, alleged that he was employed upon an agreement that he was to receive 50% of the net profits of all land sold as a result of sales promotions conducted by him, and sought an accounting. He recovered judgment which was reversed on appeal, California Home Extension Ass'n v. Hilborn, 37 Cal.2d 459, 235 P.2d 369, and the action has not yet been retried.

Shortly after the action was filed an attachment was issued and levied upon real properties belonging to the plaintiff. From time to time the plaintiff deposited various sums with the clerk of the court for the purpose of releasing certain parcels from the attachment, which sums totaled $12,677.39. Each deposit was made on a signed stipulation providing that the money deposited should be held by the clerk until the final determination of the action, whereupon it should be returned to the plaintiff or paid to the defendant, as ordered by the court.

On September 14, 1949, by court order the defendant was permitted to withdraw the cash bond he had deposited in securing the attachment. On April 9, 1951, the plaintiff filed notice of a motion for release of the $12,677.39 thus deposited in court upon the grounds that the lien of the attachment had expired, that it had been released by the filing of an undertaking on appeal, and that it had been released by the defendant's withdrawal of his original bond. On November 23, 1951, the defendant obtained an order to show cause why a receiver should not be appointed to take charge of all assets of the joint venture existing between the plaintiff and the defendant. The plaintiff's motion and the defendant's application for a receiver were heard together and an order was entered on April 4, 1952, denying the motion for release of the funds, granting the motion for the appointment of a receiver, and appointing such a receiver. The plaintiff has appealed from that order.

[1] It is first contended that the court erred in denying appellant's motion to release the money it had deposited with the clerk in securing releases of the attachment. It is argued that any lien of the attachment had expired by limitation of time under the provisions of sections 542a and 542b of the Code of Civil Procedure; that the attachment was released by the filing of an undertaking staying execution pending the former appeal; and that all effects of the attachment were terminated when the respondent withdrew the money used as an attachment bond. These contentions are not controlling. These funds were deposited without any condition relating to whether or not the attachment should remain in force, and upon a clear stipulation that they should remain impounded until a final determination of the action, and should then be returned to the appellant or paid to the defendant in accordance with the order of the court. The appellant is bound

by this stipulation, and no error appears in this portion of the order appealed from.

It is next contended that the court erred in granting the motion for the appointment of a receiver since this action does not come within the provisions of that portion of subdivision 1 of section 564 of the Code of Civil Procedure which provides that receivers may be appointed in an action:

> "* * * between partners or others jointly owning or interested in any property or fund, on the application * * * of any party whose right to or interest in the property or funds * * is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured".

It is argued that respondent's cross-complaint alleged his employment by the appellant, with an agreement to pay him 50% of the net profits from sales of lands when final payment was made by the purchasers, but failed to allege a joint venture; that it does not disclose any interest in any funds or property; that a receiver could not be appointed since the complaint failed to state a cause of action in that it failed to allege that final payment had been made by the purchasers of lands; that there was no showing that the property or funds in the hands of the appellant are in danger of being lost; that respondent's affidavits in support of his application are insufficient in that they were made on information and belief, and in that they set forth ultimate facts and conclusions rather than probative facts; and that the order appointing the receiver is void because no "joint venture" is alleged in the pleadings or affidavits.

[2] While the pleadings are somewhat vague in some respects they sufficiently allege that the respondent was associated with the appellant in a real estate subdivision and selling project; that his compensation was to be 50% of the profits from the sales made as a result of sales promotions which he conducted; and that an accounting was necessary in order to determine the amount due him. While the words "joint venture" were not used in the pleadings, or in the affidavits used on this motion, the case was tried mainly on the issue as to whether or not a joint venture existed, and the court found that it did. The pleadings were deemed sufficient by the supreme court on the prior appeal, and the judgment was reversed because the trial court had erroneously refused to receive certain evidence on that issue. On the present appeal it cannot be held, as a matter of law, that no joint venture existed, that the pleadings were insufficient to raise such an issue, or that no cause of action was stated.

[3, 4] On the prior appeal the supreme court held that the major issue was whether or not the parties to this action were associated in a joint venture; that the evidence on this point was highly conflicting; and that the evidence was not such as to compel a finding on that issue in favor of this appellant. A joint venture is similar to a partnership with respect to the right to an accounting of profits, in accordance with the agreement of the parties. Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601. If this was a joint venture, the respondent is entitled to a share in the profits made which would give him an interest in the property or funds which represent that profit. Whether or not a joint venture here existed is the main question of fact involved in a retrial of the action, but before a new trial was had this motion was made before a different judge. He knew that this issue had once been decided in favor of the respondent on sufficient but conflicting evidence. While he knew that further evidence on this issue was to be expected on a new trial, he did not know exactly what that evidence would be, and he was not in a position to finally pass on its weight. He may have considered, as things then stood, that it appeared "probable" that the respondent had an interest in these properties or funds within the meaning of section 564. This was also a question of fact and it cannot be held, as a matter of law, that no such probability appeared as would justify the court's conclusion under the circumstances existing at the time the order was made. The matter was one within the discretion of the trial court and, while we would have held the other way had we been

passing on the question as one of fact, we cannot hold that an abuse of discretion appears. Whitley v. Bradley, 13 Cal.App. 720, 110 P. 596; Breedlove v. J. W. & E. M. Breedlove, Excavating Co., 56 Cal.App. 2d 141, 132 P.2d 239.

The order appealed from recites that it was made after evidence had been introduced by the respective parties, but this appeal is submitted upon a clerk's transcript without any record as to what evidence was presented at the hearing. Without passing upon the sufficiency of the affidavits in themselves, it cannot be held, on the record before us, that there was an insufficient showing with respect to the danger of loss, removal or injury in connection with the properties or funds involved in this litigation.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



115 Cal.App.2d 565

PEOPLE v. McCOY.

Cr. 4898.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1953.

Hearing Denied Feb. 26, 1953.

Defendant, who had been found guilty of assault with a deadly weapon, but committed to a state hospital on ground that he was insane at the time of the commission of the offense, filed motion to vacate the judgment and the commitment. The Superior Court of Los Angeles County, Philip H. Richards, J., entered order denying the motion, and defendant appealed. The District Court of Appeal, Fox, J., held that stipulations made by defendant had effect of waiving separate trial on pleas of not guilty and of not guilty by reason of insanity, and that he was not entitled to have judgment set aside on ground that both issues had been determined at a single trial.

Order affirmed.

1. Criminal Law ⇐998

A motion to vacate a judgment is an application for relief in the nature of a writ of error coram nobis, which is a remedy of narrow scope, not intended to authorize any court to revise or review its opinion, but only to enable it to recall some adjudication made while some fact existed which, if before court, would have prevented rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court.

2. Criminal Law ⇐623

In a case tried by the court without a jury, the right to have questions of guilt and insanity separately tried may be waived.

3. Criminal Law ⇐623

In prosecution for assault with deadly weapon, stipulation to effect that case be submitted to court on transcript of testimony taken at preliminary hearing, supplemented by two letters offered by defendant, and by reports of psychiatrists, had effect of a waiver of separate trials on issues of guilt and insanity.

4. Criminal Law ⇐998

Facts that defendant, charged with assault with deadly weapon, testified on advice of public defender, and that testimony may have been influential in determination that he had been insane at the time of committing the alleged assault, furnished no grounds for the granting of a motion to vacate judgment and commitment.

5. Criminal Law ⇐997

Lack of effective advice and assistance of counsel cannot be determined in coram nobis proceedings.

6. Stipulations ⇐14(11)

In prosecution for assault with deadly weapon, where defendant pleaded not guilty by reason of insanity, stipulation to effect that matter would be submitted to court upon transcript, documents, and reports of doctors theretofore appointed by the court, constituted waiver of any possible right to have reports of doctors verified or to have doctors present in court and examined under oath.

7. Criminal Law ⇐1169(1)

In prosecution for assault with deadly weapon, defendant, who pleaded not guilty by reason of insanity, was not prejudiced by the admission of unverified reports of doctors who stated therein that defendant was insane at the time of the commission of the alleged assault.

8. Criminal Law ⇐636(9)

There is no constitutional or statutory right of an accused to be present at the hearing of his motion to vacate a judgment and a commitment for insanity.

Lloyd S. McCoy, in pro. per.

Edmund G. Brown, Atty. Gen., and Frank Richards, Asst. Atty. Gen., for respondent.

FOX, Justice.

Defendant appeals from an order denying his motion to vacate the judgment committing him to the Mendocino State Hospital.

Defendant was charged in May, 1950, with assault with a deadly weapon. He was represented by the public defender and pleaded not guilty and not guilty by reason of insanity. Two psychiatrists were appointed by the court to examine the defendant and report as to his mental condition. The case was submitted on the transcript of the testimony taken at the preliminary hearing, supplemented by two letters offered by defendant. The doctors filed a written report as to defendant's mental condition, each stating that in his opinion defendant was insane at the time he committed the alleged assault. The court found defendant guilty, but that he was insane at the time of the commission of the offense, and needed medical care. The court issued a commitment ordering the sheriff to deliver defendant into the custody of the superintendent of the Mendocino State Hospital.

In July, 1952, defendant filed in the superior court of Los Angeles County a motion to vacate the judgment and commitment upon the grounds: (1) that only a single trial was had on his plea of not guilty and not guilty by reason of insanity; (2) that defendant, on the advice of his attorney, testified against himself at his trial, and consequently was adjudged insane; (3) that the reports of the doctors were unverified and therefore did not constitute legal evidence upon which to judge defendant's sanity; and (4) that no doctor or witness testified under oath at the trial. It is from the denial of this motion that defendant appeals.

[1] A motion to vacate a judgment is an application for relief in the nature of a writ of error coram nobis, which is a "remedy of narrow scope." People v. Kerr, 113 Cal.App.2d 90, 93, 247 P.2d 927, 928. The writ "is not intended to authorize any court to revise and review its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." People v. Gilbert, 25 Cal.2d 422, 442, 154 P.2d 657, 667.

[2, 3] There is no merit in defendant's contention that the judgment should be set aside because only a single trial was had on his plea of not guilty and not guilty by reason of insanity. In a case tried by the court without a jury, which was the fact in the instant case, the right to have guilt and insanity separately tried may be waived. People v. Dessauer, 38 Cal.2d 547, 554, 241 P.2d 238. The effect of the stipulations was to waive separate trials on these issues.

[4, 5] The fact that defendant testified on advice of his counsel and was adjudged insane at the time of committing the alleged assault, and that his testimony may have been influential in the court's determination that he was insane, furnish no grounds for setting aside the judgment. Lack of effective advice and assistance of counsel cannot be determined in coram nobis proceedings. People v. Ynostroza, 105 Cal. App.2d 332, 333, 232 P.2d 913; People v. Herod, 112 Cal.App.2d 764, 247 P.2d 127.

[6] There is no merit in defendant's complaints that the reports of the doctors were not verified and that they did not testify under oath at the trial. The matter

was submitted to the court by stipulation upon the "transcript, documents, and reports of the doctors heretofore appointed by the court." This constituted a waiver of any possible right to have the reports of the doctors verified or to have them present in court and examined under oath. People v. Dessauer, supra, 38 Cal.2d at page 552, 241 P.2d 238.

[7] Furthermore, it is apparent that defendant was not prejudiced by the lack of sworn testimony on the issue of insanity. Each doctor, in his report, stated that the defendant was insane at the time of the commission of the alleged assault, which substantiated defendant's plea of not guilty by reason of insanity.

[8] Defendant also complains that he was not present when his motion was heard. There is no constitutional or statutory right of an accused to be present at such a proceeding. People v. Kerr, supra; People v. O'Connor, 114 Cal.App.2d 723, 251 P.2d 64. We find no basis for defendant's assertion that the trial and the hearing on his motion were not conducted in a fair and impartial manner.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.



115 Cal.App.2d 468

HAGGERTY v. WARNER et al.

Civ. 19211.

District Court of Appeal, Second District, Division 3, California.

Jan. 22, 1953.

Action for monies allegedly due under agreement to the effect that for valuable consideration and services, plaintiff was to receive five per cent of all of defendants' billings on sales of units. The Superior Court of Los Angeles County, Harold B. Jeffery, J., sustained, without leave to amend, demurrers to all but two counts of a first amended complaint and an amendment thereto, and entered judgment for plaintiff on the two remaining counts, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that agreement was not void either for uncertainty or for lack of provision for its termination.

Judgment affirmed in part, and reversed in part with directions.

1. Judgment ⇐195

Where trial court entered judgment in favor of plaintiff on third and fourth counts of amendment to first amended complaint, after sustaining, without leave to amend, demurrers to first, second, and fifth counts of first amended complaint and to first and second counts of the amendment, which consisted of the third, fourth, sixth and seventh counts of the first amended complaint, such judgment had effect of dismissing action as to all such counts even though it did not do so in such terms.

2. Contracts ⇐42

The time of the delivery of a written contract is ordinarily deemed to be the time when the contract becomes binding, unless a different intent appears.

3. Contracts ⇐9(2)

Agreement, under which plaintiff, for valuable consideration and services, was to receive five per cent of defendant's billings on sales of units, was not void for uncertainty because of phrase relating to receipt of five per cent of billings, which meant that plaintiff was to receive percentage of all sales of units.

4. Contracts ⇐215(1)

The effect of the omission from an agreement of the time for its duration is generally determined by a construction of the contract, and the duration may be implied from the nature of the contract or from the circumstances surrounding it.

5. Contracts ⇐9(3)

Agreement under which plaintiff, for valuable consideration and services, was to receive five per cent of defendant's billings on sales of units, was not void for lack of termination provision, but was subject to construction, among others, that it

was to continue as long as billings were made by defendant.

6. Pleading ⇐428(4, 6)

An objection to introduction of any evidence, on ground that complaint fails to state a cause of action, is in nature of general demurrer to complaint or of motion by defendant for judgment on the pleadings, whereunder allegations of complaint must be accepted as true, sole question presented to court is whether complaint fails to state cause of action, and nothing dehors the complaint may be considered.

7. Assumpsit, Action of ⇐6(1)

When a contract has been fully performed and nothing remains to be done under it except the payment of money by defendant, plaintiff may declare generally in indebitatus assumpsit.

8. Action ⇐45(4)
Assumpsit, Action of ⇐29
Contracts ⇐352(1)
Pleading ⇐369(2)

An indebitatus assumpsit count may be joined with one on the contract, and plaintiff is under no compulsion to elect but may submit his case to trier of fact for determination upon the facts, and it is province of trier of fact to decide which count is supported by the evidence.

9. Work and Labor ⇐22

Count alleging that defendants became indebted to plaintiff for personal services rendered at defendants' special instance and request, that defendants orally agreed to pay percentage of defendants' billings on sales, and that amount of such billings was unknown to plaintiff and could not be ascertained without accounting, but that defendants had not made payment, was sufficient to meet requirements of common count cast in the form of indebitatus assumpsit.

10. Work and Labor ⇐22

Where common count for services rendered alleges that they were performed at request of defendants who promised to pay for them and failed to do so, such count is good.

11. Contracts ⇐324(1)

Where plaintiff is seeking but one recovery under a contract, he may plead either upon the express contract or in quantum meruit.

12. Work and Labor ⇐22

A count in quantum meruit states that plaintiff performed certain services for defendants, alleges their reasonable value, and alleges that they were rendered at the special instance and request of defendants but were not paid for.

13. Pleading ⇐225(2)

When a count states facts sufficient to constitute a cause of action, denial of leave to amend is an abuse of discretion even though a special demurrer thereto is well taken.

Andrew J. Copp, Jr. and H. Dexter McKay, Los Angeles, for appellant.

Kaufman & Leland and N. Stanley Leland, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiff appeals from a judgment denying him any relief except as expressly given. It adjudged that he recover $1,796.74 with interest.

Plaintiff's original complaint contained four counts, to which defendants filed an answer. When the matter came on for trial, defendants objected to the introduction of evidence on the first and second counts. The court regarded this motion in the nature of a demurrer, sustained it, and gave plaintiff leave to amend.

Plaintiff then filed a first amended complaint containing seven counts. Defendants demurred to the first five counts. The demurrers to the first, second, and fifth counts, which were based on a written contract set forth in *haec verba,* were sustained without leave to amend on the ground the contract alleged was void for uncertainty. The demurrer to the fourth count was overruled. Defendants' motion to strike certain portions of the third count was granted and the demurrer thereto sustained with leave to amend.

Plaintiff then filed what was termed a "Second Amended Complaint," but which we shall refer to as an amendment since, in reality, as its first count it amended merely the third count of the first amended complaint (to which a demurrer had been sustained with leave to amend) and retained as its second, third, and fourth counts, the fourth, sixth, and seventh counts, respectively, of the first amended complaint. Defendants answered this amendment. When the matter came on for trial defendants' counsel moved to preclude evidence as to the first and second counts of the amendment on the ground neither one stated facts sufficient to constitute a cause of action. The motion was granted. Defendants' counsel then stated that no defense would be made with respect to the third and fourth counts of the amendment, and conceded that plaintiff was entitled to judgment on either one or the other. The latter two counts sought the recovery of $1,796.74 for monies advanced by plaintiff on behalf of defendants and at their special instance and request. Judgment was, therefore, entered in that amount.

[1] Plaintiff complains that the judgment makes no disposition of the first, second, and fifth counts of the first amended complaint and the first and second counts of the amendment. While the judgment does not in terms dismiss the action as to these counts, we think that is its effect.

Plaintiff contends the court erred in sustaining the demurrers to the first, second, and fifth counts of the first amended complaint without leave to amend. We agree. The contract on which these counts were based reads:

"Pasadena, California
June 25, 1948

"Agreement

"For valuable consideration and services rendered we hereby agree to pay to John W. Haggerty, of Los Angeles, California, his successors, or assigns, Five Per Cent (5%) of all our billings on sales of units for talking dolls and on the records for same. This agreement shall be binding upon us, our successors and assigns.

"Warner and Sons
"J. C. Tittemore By J. J. Warner
Witness"

The premise on which defendants' demurrer was founded was that the foregoing contract was void because 1) it made no provision for its termination, and 2) the phrase "Five Per Cent (5%) of all our billings on sales of units" is too indefinite and vague to give certainty to the contract. The premise is untenable. In Rutherford v. Standard Engineering Corp., 88 Cal.App. 2d 554, 199 P.2d 354, it was contended the contracts were so uncertain as not to constitute agreements enforceable in law. The court said, 88 Cal.App.2d at page 561, 199 P.2d at page 358: "The answer to the contentions is—did the contracting parties understand each other without indulging in surmise? The trend of recent decisions indicates a policy of upholding contracts if a reasonable construction may be reached that the intention of the parties was mutually understood and readily may be ascertained. Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706." In the last cited case, the Supreme Court said, 21 Cal.2d at page 184, 130 P.2d at page 710: "It is a fundamental principle as stated in McIllmoil v. Frawley Motor Co., 190 Cal. 546, 549, 213 P. 971, 972: '"The law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained."' [Citations.] Also, adverting to section 1654 of the Civil Code, in cases of uncertainty not removed by the rules stated in sections 1635 to 1653 of that code, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, and the promisor is presumed to be such party." Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706.

The following facts, among others, deemed true on demurrer, are alleged in the first count of the first amended complaint and incorporated by reference in

the second and fifth counts: Defendants, at the time the contract was entered into, were and had been in the business of manufacturing and selling a mechanism, called units, which would reproduce sounds in dolls and other toys; between the fall of 1947 and June 1, 1949, defendants employed plaintiff to exploit and promote the units for them; on May 1, 1949, the parties entered into the contract set forth above; although the contract is dated June 25, 1948, it was not entered into or delivered until May 1, 1949, and was done so to include "all billings by defendants on sales of units * * * accruing on and after the first day of June, 1949"; from June 1, 1949, defendants have continuously manufactured, sold, and made billings on sales of the units, and the amount of the billings is unknown to plaintiff.

[2, 3] With the foregoing facts in mind, it is obvious from the contract itself that for a valuable consideration *and* services rendered by plaintiff the parties contemplated he was to receive a certain percentage of all "sales of units" after May 1, 1949. The time of the delivery of a written contract is ordinarily deemed to be the time when the contract becomes binding unless a different intent appears. 17 C.J.S., Contracts, § 359, page 818. The term "billings" used in the contract is a verbal noun. What the parties meant by the term is, for the reasons hereafter given, a matter for the trial forum. It is obviously an expression which has a definite meaning in the commercial or mercantile world. Webster's New International Dictionary (2d Ed.) shows, in a footnote, that "billing" is the "pres. part. and verbal n. of bill." It also appears from Webster that "bill" means "1. To charge or enter in a bill; to make a bill, inventory, or list of; as, to *bill* goods; to *bill* passengers. Specif., *Com.*, to enter, or post, in a book of accounts; to prepare a bill of (charges to customers). 2. To submit a bill of charges to, as a customer."

[4, 5] Nor is the contract fatally uncertain and indefinite, as defendants urge, merely because it omits a time for its duration. The effect of the omission from an agreement of the time of its duration is generally determined by a construction of the contract, 6 Cal.Jur. 218, § 143, and may be implied from the nature of the contract or from the circumstances surrounding it. 13 C.J. 271, § 60; 17 C.J.S., Contracts, § 36; 12 Am.Jur. 860, § 305; see, Noble v. Reid-Avery Co., 89 Cal.App. 75, 78, 264 P. 341; Miles v. Cal. Growers Wineries, Inc., 45 Cal.App.2d 674, 679, 114 P.2d 651; Sutliff v. Seidenberg, 132 Cal. 63, 64–66, 64 P. 131, 469; Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 706–707, 75 P. 329. The contract is subject to the construction, among others, that it was to continue as long as "billings" were made by defendants.

The court, therefore, erred in sustaining the demurrer to the first, second, and fifth counts of the first amended complaint without leave to amend.

Plaintiff next urges that the court erred in granting defendants' motion to preclude evidence under the first and second counts of the amendment to the first amended complaint.

[6] The well-established principles with respect to the objection of a defendant to the introduction of evidence is concisely stated in Miller v. McLaglen, 82 Cal.App. 2d 219, at page 223, 186 P.2d 48, at page 50, where this court said: "An objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is in the nature of a general demurrer to the complaint or a motion by a defendant for judgment on the pleadings. [Citations.] An objection by a defendant to the introduction of any evidence may only be sustained where the complaint fails to state a cause of action, and that is the sole question presented to the court. [Citations.] Upon such an objection the allegations of the complaint must be accepted as true for the purposes of the objection. [Citations.] * * * Nothing dehors the complaint may be considered. No defense set up in the answer may be considered. The truth of the allegations of the complaint must be assumed. If the complaint states a cause of action the objection must be overruled."

[7–10] The four counts of the amendment are cast in the form of common counts. The first count is but an amendment of the third count of the first amended complaint to which a demurrer had been sustained with leave to amend after certain portions thereof had been ordered stricken. It is, in effect, cast in the form of *indebitatus assumpsit*. It is grounded on the theory of money debt due on a contract fully performed by plaintiff. It is established that when a contract has been fully performed and nothing remains to be done under it except the payment of money by defendant, plaintiff may declare generally in *indebitatus assumpsit*. Castagnino v. Balletta, 82 Cal. 250, 258, 23 P. 127; Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 25, 206 P. 653; Locke v. Duchesnay, 84 Cal.App. 448, 455, 258 P. 418; Hall v. King, 100 Cal.App. 70, 73, 279 P. 814; Abbott v. Limited Mut. Compensation Ins. Co., 30 Cal.App.2d 157, 165, 85 P.2d 961. Such count may be joined with one on the contract, and a plaintiff is under no compulsion to elect but may submit his case to the trier of fact for determination upon the facts, and it is the province of the trier of fact to decide which count is supported by the evidence. Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 27, 206 P. 653. The count here alleges that within two years last past defendants became indebted to plaintiff for certain personal services rendered by plaintiff at defendants' special instance and request, for which services defendants orally agreed to pay plaintiff 5% of all of defendants' billings on sales of units and in addition thereto 5% of all billings on sales of units made by defendants' successors and assigns; that the amount of the billings on such sales is unknown to plaintiff and cannot be ascertained without an accounting; and nonpayment by defendants. While the count contains extraneous and surplus matters and is not to be approved as an exemplar of model pleading, its averments are sufficient to meet the requirements of a common count cast in the form of *indebitatus assumpsit*. Where a common count for services rendered alleges they were performed at the request of defendants, that they promised to pay for them and failed to do so, such count is good. Preston v. Central Cal. Etc. Irr. Co., 11 Cal. App. 190, 193–196, 104 P. 462; Smith v. Bentson, 127 Cal.App.Supp. 789, 793, 15 P.2d 910; Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 26, 206 P. 653; Donegan v. Houston, 5 Cal.App. 626, 629, 90 P. 1073.

[11, 12] The second count of the amendment is one in *quantum meruit*. It is well-established that a plaintiff may, where he is seeking but one recovery, plead either upon an express contract or in *quantum meruit*. The count states plaintiff performed certain services for defendants, alleges their reasonable value, that they were rendered at the special instance and request of defendants, and are unpaid. This meets the requirements of a common count cast in the form of *quantum meruit*. Clark v. Dulien Steel Products, Inc., 54 Cal.App.2d 92, 96, 128 P.2d 608; Brown v. Crown Gold Milling Co., 150 Cal. 376, 382, 89 P. 86.

For the foregoing reasons, counts one and two of the amendment are not vulnerable to a general demurrer. Miller v. McLaglen, 82 Cal.App.2d 219, 223, 186 P.2d 48, and cases cited. The court, therefore, erred in granting defendants' motion to preclude evidence as to these counts.

[13] Defendants' demurrers to some of the counts were special as well as general. When a count states facts sufficient to constitute a cause of action, denial of leave to amend is an abuse of discretion even though the special demurrer is well taken. Toney v. Security First Nat. Bank, 108 Cal.App.2d 161, 168, 238 P.2d 645. We do not decide that counts one, two, and five of the first amended complaint were not subject to special demurrer, and the trial court may, in its discretion, require the clarification of uncertainties and ambiguities, if any, in those counts.

The judgment, in so far as it adjudges that plaintiff recover $1,796.74 with interest, from defendants, is affirmed. In all other respects, it is reversed for further

proceedings consistent with the views we have expressed.

SHINN, P. J., and PARKER WOOD, J., concur.



115 Cal.App.2d 476

CURRAN v. HESLOP et al.

Civ. 19225.

District Court of Appeal, Second District, Division 3, California.

Jan. 22, 1953.

Rehearing Denied Feb. 5, 1953.

Hearing Denied March 19, 1953.

Suit by purchaser against former owners of realty and realtor for rescission of contract to purchase the realty and for damages. The Superior Court, Los Angeles County, Kenneth C. Newell, J., entered judgment against the former owners, and they appealed. The District Court of Appeal, Vallée, J., held, inter alia, that evidence supported determination that appellants had fraudulently concealed the fact that certain conditions of the property were in violation of the building code.

Affirmed.

1. Fraud ⇐16

Concealment is classified as actual fraud in those cases where seller knows facts which materially affect the desirability of the property and which he knows are unknown to the buyer. Civ.Code, § 1572.

2. Vendor and Purchaser ⇐123

In purchaser's action for rescission of contract to purchase realty, vendors' knowledge as to existence of conditions in violation of building code and materiality of concealment of such conditions were questions of fact.

3. Vendor and Purchaser ⇐44

In purchaser's action for rescission of contract to purchase realty, evidence was sufficient to support trial judge's determination that vendors were aware of fact that certain conditions violated building code and that the concealment thereof from buyer was of a material fact. Civ.Code, § 1572.

4. Vendor and Purchaser ⇐36(2)

Where violations of building code and housing act were not apparent and vendors knew that certain conditions violated the code and act, vendors had duty to disclose such facts to purchaser, and on their failure to do so, purchaser was entitled to rescind the contract for purchase of the property. Civ.Code, § 1572.

5. Vendor and Purchaser ⇐33

It is sufficient to warrant rescission of contract for purchase of realty if evidence shows that fraudulent concealment by vendors as to violations of building code was an inducement to make the purchase, without showing that it was the sole inducement. Civ.Code, § 1572.

6. Appeal and Error ⇐1010(1)

Where there is substantial evidence to support findings with respect to any one material concealment by vendors from purchaser, judgment rescinding contract for purchase of realty must be affirmed.

7. Vendor and Purchaser ⇐44

In purchaser's action for rescission of contract for purchase of realty, evidence supported finding that purchaser had relied on erroneous fact that there were no violations of the building code. Civ.Code, § 1572.

8. Fraud ⇐21

An independent investigation or examination of property does not preclude reliance on representations of seller where falsity of statement is not apparent from an inspection, or person making representations has superior knowledge, or party relying thereon is not competent to judge the facts without expert assistance. Civ.Code, § 1572.

9. Vendor and Purchaser ⇐44

In purchaser's action for rescission of contract for purchase of realty because of alleged fraudulent concealment of fact that building violated building code, evidence showed that it was not apparent from inspection that closed porch was a violation of building code or that its enclosure made

bedroom and dining room violations, and that vendors had superior knowledge, and that purchaser was not competent to judge the facts without expert assistance.

10. Vendor and Purchaser ⇐36(2)

Where it was not apparent from inspection of premises to be purchased that certain conditions were in violation of building code, and vendors had knowledge of such violations, and purchaser was not competent to judge the facts without expert assistance, purchaser's independent examination of the property, consisting of walking through the building on two occasions, did not preclude rescission of contract of purchase of the property on ground that purchaser had relied on fact that there were no such violations. Civ.Code, § 1572.

11. Principal and Agent ⇐23(4)

In action by purchaser against joint owners of property for rescission of purchase contract, evidence showed that certain defendant acted as agent of other defendants so that other defendants were bound by the certain defendant's fraudulent nondisclosure of conditions existing in violation of building code. Civ.Code, § 1572.

12. Vendor and Purchaser ⇐123

In action by purchaser for rescission of contract for purchase of realty, evidence presented question for trier of fact as to whether purchaser had exercised such control, authority, and possession of the property in question after serving notice of rescission as to preclude any claim for rescission.

13. Vendor and Purchaser ⇐123

Judgment rescinding contract for purchase of realty and awarding purchaser recovery of escrow expenses was not objectionable as having awarded purchaser damages.

14. Appeal and Error ⇐877(5)

In action by purchaser against vendors and realtor for rescission of purchase contract and for damages, purchaser was only party aggrieved by judgment holding that realtor had not made any fraudulent representations or concealment, and vendors, on their appeal from judgment rescinding contract for purchase of realty because of fraudulent concealment, could not complain of judgment in favor of realtor.

Snyder & Fletcher, Owen E. O'Neil and W. Cloyd Snyder, So. Pasadena, for appellants.

John S. Bolton and F. V. Lopardo, Los Angeles, for respondent Bertha Curran.

Shatford & Shatford and Henry W. Shatford, Temple City, for respondent Herbert Hawkins.

VALLÉE, Justice.

Plaintiff brought this suit against Victoria Heslop, Hortense Low, and Mercedes L. Foster, former owners of a parcel of realty, and Herbert Hawkins, a realtor, for rescission of a contract to purchase the realty, and for damages. Judgment was for plaintiff against the former owners, and for Hawkins against plaintiff. The former owners appeal. They will be referred to as the defendants.

About November 10, 1950, plaintiff agreed in writing to purchase a parcel of realty owned by defendants. The property was improved with a dwelling. The complaint alleged, and the court found, the defendants falsely represented to plaintiff that 1) the dwelling was a duplex ready for immediate rental and occupancy; 2) the dwelling and the rooms, portions and parts thereof, were constructed in compliance with all building codes, ordinances, and laws; 3) the plumbing in the dwelling complied with all plumbing codes, ordinances, and laws pertaining thereto, and was in satisfactory and usable condition. The complaint also alleged, and the court found, that defendants knew the representations were false, made them to induce plaintiff to purchase, and that plaintiff relied on them. The complaint further alleged, and the court found, that defendant concealed the following material facts, which were in violation of the building code of Alhambra where the property is located, and of the state housing act: 1) the kitchens had no window openings; 2) one bathroom opened directly into a kitchen; 3) one bathroom was an inside room

with no windows; 4) the window area of one bedroom had less than the minimum window area; 5) another bedroom had less than the required ceiling height; 6) the laundry tray in a screen porch had no visible trap on the waste line.

Defendants' claim is that there is no substantial evidence to support the findings. While we find no evidence to support a number of the findings, we are satisfied there is sufficient substantial evidence to support one finding of fraudulent concealment. The house was an old one—at least fifty-five years old. The evidence is undisputed that at the time of the purchase there were various conditions which were violations of the Alhambra building code and the state housing act as they then existed. However, as to a number of the alleged violations, there was no evidence that at the time the work was done the conditions resulting constituted violations of the Alhambra building code or the state housing act in effect at that time. As will be developed, there was evidence that one of the alleged violations was a violation of the building code and the state housing act in effect at the time the work was done in 1949. It was undisputed that defendants did not tell plaintiff about any of the alleged violations. The questions are whether there is any substantial evidence to support the findings that defendants knew that the work done in 1949 was a violation of the building code or the state housing act, and whether, if they were under a duty to speak, they knowingly concealed the facts from plaintiff.

In 1944 defendants applied to the building department of Alhambra for a permit to add a bedroom on the southeast corner of the dwelling. The permit was issued and the room constructed. In 1947 they applied for a permit to construct a bedroom and a dining room with an open porch between them on the south side of the dwelling. The permit was issued and the construction done. In 1949, without obtaining a permit therefor, defendants enclosed the open porch and installed a laundry tray on the porch without a trap on the waste line. There was evidence that defendants knew in 1949 that enclosure of the porch without a permit was a violation of the then existing building code of Alhambra. There was evidence defendants knew that in order to make a structural alteration in the building, a building permit from the building department of Alhambra was required. There also was evidence that as a result of enclosing the porch a bedroom and a kitchen were left without a window opening directly into a street, public alley, yard, or court, as required by the building code and the state housing act.

Civil Code section 1572 provides: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * 3. The suppression of that which is true, by one having knowledge or belief of the fact".

[1] The Restatement says "there is no privilege of nondisclosure, by a party who * * * knows that the other party is acting under a mistake as to undisclosed material facts, and the mistake if mutual would render voidable a transaction caused by relying thereon." Rest.Contracts, § 472. In Comment b to section 472, it is said: "[I]f a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it, non-disclosure is not privileged and is fraudulent." Concealment is classified as actual fraud in those cases where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer. Dyke v. Zaiser, 80 Cal.App.2d 639, 653, 182 P.2d 344; Kuhn v. Gottfried, 103 Cal.App.2d 80, 86, 229 P.2d 137.

In Clauser v. Taylor, 44 Cal.App.2d 453, 454, 112 P.2d 661, 662, it is said: "It is the law that, where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee, and upon

his failure to do so, the vendee may rescind the transaction upon discovering the true state of facts." See also Herzog v. Capital Co., 27 Cal.2d 349, 353, 164 P.2d 8; Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 68–71, 113 P.2d 465; Barder v. McClung, 93 Cal.App.2d 692, 697, 209 P.2d 808; Milmoe v. Dixon, 101 Cal.App.2d 257, 261, 225 P.2d 273; Tatham v. Pattison, 112 Cal.App.2d 18, 245 P.2d 699. In Barder v. McClung, supra, it is said, 93 Cal.App.2d at page 697, 209 P.2d at page 811: "The suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud. Sec. 1572 of the Civil Code; Snyder v. Security First Nat. Bank [of Los Angeles], 31 Cal.App.2d 660, 664, 88 P.2d 760. 'Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false.'"

[2–6] Defendants' knowledge and the materiality of the concealment were questions of fact. The evidence is sufficient to support the conclusions of the trial judge that defendants were aware of the fact the porch was enclosed in violation of the building code and the state housing act and that, as a result of its enclosure, the bedroom and kitchen were without windows opening directly into a street, public alley, yard, or court, as required by the code and the housing act, and that the concealment was of a material fact. Since these violations were not apparent, which fact was also known to defendants, they were under a duty to disclose the facts to plaintiff; and on their failure to do so, she was entitled, on learning the true facts, to rescind the contract. It is sufficient if the evidence shows that the fraudulent concealment as to the violations of the building code in 1949 was an inducement to make the purchase, without showing that it was the sole inducement. Hewitt v. Klages, 92 Cal.App. 596, 597, 268 P. 694. If there is substantial evidence to support the findings with respect to any one material concealment, the judgment must be affirmed. Kuhn v. Gottfried, 103 Cal.App.2d 80, 84, 229 P.2d 137.

[7] It is suggested that plaintiff did not rely on the fact that there was no violation of the building code, in making the purchase. Plaintiff testified she would not have purchased the property had she known there were violations of the building code. This, in itself, is sufficient evidence to support the finding of reliance. Further, the court was warranted in inferring from the circumstances shown that plaintiff would not have purchased had the true facts been disclosed. Thomas v. Hawkins, 96 Cal.App.2d 377, 380, 215 P.2d 495.

[8–10] It is also suggested that plaintiff did not rely on and was not induced to purchase by the alleged fraud because she made an independent examination of the property before the transaction was consummated. The applicable rule is stated in Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935, 937: "An independent investigation or an examination of property does not preclude reliance on representations where the falsity of the statement is not apparent from an inspection, or the person making the representations has a superior knowledge, or the party relying thereon is not competent to judge the facts without expert assistance." The only examination made of the dwelling by plaintiff prior to receiving the deed was to walk through it on two occasions. The evidence supports the inference that it was not apparent from an inspection that the closed porch was a violation of the building code or that its enclosure made the bedroom and dining room violations, that defendants had a superior knowledge, and that plaintiff was not competent to judge the facts without expert assistance.

[11] Defendants were joint owners of the property. Defendant Foster conducted all the negotiations for the sale with plaintiff. It is argued that because defendants Heslop and Low did not participate in the negotiations, they may not be charged with any fraud of defendant Fos-

ter. It appears that defendants Heslop and Low entrusted defendant Foster with the negotiations for the sale and confirmed her acts by joining in the deed. Thus the evidence is sufficient to support the implied finding that defendant Foster acted as the agent of defendants Heslop and Low, and that they are bound by her nondisclosure. Lewis v. McClure, 127 Cal.App. 439, 445–447, 16 P.2d 166; Hancock v. Williams, 99 Cal.App.2d 80, 81, 221 P.2d 129.

[12] Defendants urge that plaintiff "exercised such control, authority, and possession of the property in question after serving the Notice of Rescission as to preclude any claim for rescission." After receiving the deed to the property, plaintiff moved some of her furniture into the house, but did not move in herself. A busy neighbor, knowing of plaintiff's controversy with defendants, undertook to effect a sale of the property in an effort to settle it. Plaintiff gave the neighbor the key and permitted her to place a "For Sale" sign on the house and to show the property. Plaintiff testified: "I told her [the neighbor] I couldn't do anything about it until this litigation was settled; I couldn't sell the property." Manifestly, we cannot say as a matter of law that plaintiff waived her right to rescind.

[13] Under the heading "Damages," defendants argue plaintiff was not entitled to damages. They misconceive the effect of the judgment. The judgment merely effects rescission of the transaction and restores plaintiff to the position she was in before she entered into the contract to purchase. The only damages awarded were $39.82 expended by plaintiff for escrow expenses, which were pleaded, testified to, and found.

[14] As we noted at the outset, the judgment was in favor of defendant Hawkins, the relator. Defendants say the evidence was equally strong as to Hawkins as it was against them, and therefore the judgment as to Hawkins should be reversed. Plaintiff did not appeal from the judgment in favor of Hawkins. She is the only one aggrieved by the judgment in his favor. Defendants may not complain because the court found Hawkins did not make any fraudulent representation or concealment.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



115 Cal.App.2d 593

PERRIN et al. v. COUNTRYMAN.

Civ. 4491.

District Court of Appeal, Fourth District, California.

Jan. 28, 1953.

Action for balance due for services performed, and on note representing amount of balance due. A default judgment was entered, and defendant moved to set same aside. The Superior Court of Orange County, Kenneth E. Morrison, J., denied defendant's motion, and defendant appealed. The District Court of Appeal, Griffin, J., held that where defendant did not deny the due execution of the note or that it was due and payable, or that work had been actually performed, there was no showing of a meritorious defense to complaint which would entitle defendant to the relief asked, and court did not abuse its discretion in denying motion, notwithstanding offer of defendant, alleged by plaintiff to be for purposes of delay, to file cross-complaint charging negligent performance of the work to defendant's damage.

Order affirmed.

1. Judgment ⇐145(4)

Defendant who sought to procure the setting aside of default judgment entered on note given to plaintiff for balance due for services performed by plaintiff, in absence of denial of due execution of note or that it was due and payable, or that work had actually been performed, had failed to show a meritorious defense to complaint on the note and for services performed, and no basis existed for granting relief asked.

2. Judgment ⇐161

In proceedings on motion to set aside default judgment entered on note given by defendant to plaintiff for services performed, wherein defendant did not deny due execution of note or that it was due and payable, or that work was actually performed, but offer was made to file a cross-complaint alleging performance of work in negligent manner, and plaintiff alleged that claim of cross-complaint was not made in good faith, but solely for purposes of delay, record disclosed no abuse of judicial discretion in denying defendant's motion.

Frank J. Keeney, Laguna Beach, for appellant.

Osborne, Solomon & Fitts, Laguna Beach, for respondents.

GRIFFIN, Justice.

This action was instituted by plaintiffs, general excavating contractors, against defendant alleging in the first cause of action of their complaint that there was due from defendant $598.23 for services performed, and in a second cause of action that on July 23, 1950, defendant executed his promissory note in favor of plaintiffs for $5,500 and failed to pay it when due. Defendant was served personally with process and a writ of attachment was levied on his real property. On January 29, 1952, default was entered by the clerk at plaintiffs' request, and on February first judgment by default was entered for the amounts claimed plus interest and reasonable attorneys' fees fixed at $750.

An affidavit of defendant's attorney, in support of a motion to set the judgment aside, recites that he was consulted by defendant after service upon him of the summons and complaint and that between said time and the entry of default there were no negotiations between him and counsel for plaintiffs except telephone contacts to verify extensions of time to answer which agreements were negotiated between plaintiffs and defendant personally; that on January 15, 1952, counsel for plaintiffs, at affiant's suggestion, wrote him a letter granting a continuance until 5 p. m. January 21st, and stated that he would declare a default if an escrow was not opened and certain funds deposited therein. A further continuance for the normal period of time of the escrow was to be granted if plaintiffs' attorney did not hear from affiant in time to comply with the above suggestion and it was agreed that if he did not so comply, plaintiffs' attorney was to feel free to apply for a default judgment. Affiant then alleged that the provisions of this letter were superseded by further negotiations between plaintiff Perrin and the defendant personally; that on January 21st, affiant contemplated the filing of a demurrer but it was not filed because of some agreed extension between plaintiff Perrin and the defendant; that on January 31st, counsel for the plaintiffs wrote defendant's counsel about paying the claim; that in this letter he stated that counsel for defendant agreed to call counsel for plaintiffs and notify him of the decision; that he since learned that instead of making the financial arrangements agreed upon, counsel for defendant did, on the same day, attempt to file an answer; that fortunately he had previously taken a default. He therein stated that he had given many extensions of time to accommodate his client upon a representation of immediate payment of the amount prayed for; that he concluded that the delaying tactics of defendant were not in good faith and were made for the purpose of delay; that he could not see what meritorious defense there was to the note, which was given in renewal of a former note for labor and materials; and that if defendant attempted to set aside the default he would oppose it. Affiant then stated that he replied to this letter on February 6th, reminding counsel for plaintiffs that virtually all of the negotiations in this respect were carried on by their clients personally, and claimed that there was some offset discussed by them resulting in a compromise figure; that the claim that affiant was about to file an answer was incorrect but that he did contemplate filing a demurrer but did not do so after some telephonic conversation with plaintiffs' counsel; that he endeavored to file it on January 30th,

since it was his understanding that no default would be taken until he was notified.

Defendant's affidavit recites that plaintiff had done over $50,000 worth of excavation work for him over a period of years and had extended considerable credit to him and that the note was given as evidence of the balance due on the obligation; that when the complaint was served on him, he contacted plaintiff Perrin and discussed the claim and defendant's claimed offset for alleged damages for negligence in the work performed; that a compromise was agreed upon and an extension of time was granted to complete negotiations; that when affiant was out of the county, default was entered without his knowledge.

Opposed to this is plaintiff Perrin's affidavit alleging that plaintiffs, prior to 1950, performed work for defendant and agreed that $10,000 was due after all credits were allowed; that defendant executed a 90-day note in payment thereof; that he paid $4,500 thereon and that on August 10, 1950, there was a balance due of $5,500; that plaintiffs demanded payment in full and defendant persuaded them to accept the note here sued upon for that balance; that at no time has defendant denied it was owing or that the sum of $598.23 was not a proper charge for the other services performed; that defendant expressly acknowledged to plaintiffs that they were due, and his only request was in respect to the amount of claim for attorneys' fees in reference to the collection of the note; that plaintiffs did all of their work for defendant under the direct supervision of defendant's engineers and that they approved it; and that defendant openly admitted that their work was satisfactory and that the sum specified was due without any offsets or counterclaims.

Defendant accompanied the motion with an unverified proposed answer to plaintiffs' verified complaint, in which he only denies, on information and belief, that plaintiffs are licensed contractors and that plaintiffs are now the lawful holders of the note. He denies that $750 is a reasonable sum for attorneys' fees.

[1] It should be here noted that defendant does not deny the due execution of the note or that it was not due and payable, nor does he deny that the work was actually performed. In this respect, defendant failed to show that he had a meritorious defense to the complaint, and failed to comply with the statute which could afford him any relief under his motion. Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 349, 49 P.2d 590; Williams v. Nieto, 98 Cal.App. 615, 618, 277 P. 513; Antonsen v. San Francisco Container Co., 20 Cal. App.2d 214, 216, 66 P.2d 716.

In connection with this proffered answer, defendant offered to file a proposed cross-complaint in which he alleges generally that plaintiffs, pursuant to an oral contract made within the past three years, undertook certain work in connection with excavation and grading for defendant, and in so doing violated their agreement by performing some of the work in a negligent manner, to defendant's damage in the sum of $10,000.

Plaintiffs prepared an answer to this cross-complaint and alleged that the claim was not made in good faith; that it was made solely for the purpose of delay, and that since plaintiffs would be entitled to a judgment on the pleadings as to the complaint and answer, no good purpose would be served in allowing defendant to file the proposed cross-complaint, citing Pacific Finance Corporation v. Superior Court, 219 Cal. 179, 180–181, 25 P.2d 983, 90 A.L.R. 384.

[2] The trial court, after full hearing, denied defendant's motion. The defendant cites such cases as Roehl v. Texas Company, 107 Cal.App. 708, 291 P. 262; and Melde v. Reynolds, 129 Cal. 308, 61 P. 932, to the effect that an application to set aside a default is addressed to the court's discretion, and when there is no question about what ought to have been done, the action of the trial court will be sustained, but that it is the practice of appellate courts to scan more carefully denials of such relief. No abuse of judicial discretion here appears. The court might well have believed that the actions of the defendant were not in good faith and that the representations and promises of payment were made for the purpose of delay and that the cross-complaint for claimed damages for work per-

formed a year or more before the cross-complaint was sought, was but an afterthought and that the claim was lacking in merit. The question of abuse of discretion of the trial court in refusing to set aside a default was fully considered by this court in Schreiber v. Duncan, 111 Cal.App.2d 261, 244 P.2d 465; and in Kester Motors, Inc., v. Haddad, 109 Cal.App.2d 369, 240 P.2d 1011. No good purpose would be served by reiterating the principles and rules there enunciated, which appear to be applicable to the facts in this case.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



115 Cal.App.2d 346

TRANSAMERICA CORP. v. PARRINGTON.

TRANSAMERICA CORP. v. SHEPHARD.

TRANSAMERICA CORP. v. MUSICK.

Civ. 19025.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1953.

Hearing Denied March 12, 1953.

Action for specific performance of an agreement by which plaintiff, as principal shareholder of bank, was given option to purchase shares held by defendant directors upon their resignations. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Patrosso, J., held that the options to buy did not, if considered enforceable, have effect of making directors other than owners in their own right of the shares held by them, within meaning of statute requiring ownership in their own right as a prerequisite to acting as directors, and same were consequently not violative of the public policy of statute prescribing qualifications of directors.

Judgment affirmed.

1. Banks and Banking ⇐251

Under statute requiring every director of a national bank to "own in his own right" shares of capital stock of bank, the words, "own in his own right", mean only that in order to be qualified as a director one must be the beneficial as well as the legal owner of the minimum number of shares specified, and mere fact that owner has granted to another the right or option to acquire same at some future date does not preclude him from being owner "in his own right". 12 U.S.C.A. §§ 72, 73.

2. Sales ⇐3

An option contract relating to the sale of property is not a sale thereof, but merely a sale of a right to purchase, at the election of the optionee, without imposition of obligation to purchase.

3. Contracts ⇐172

An option is a mere offer, and, unless it is accepted within the time limited, it is of no force for any purpose.

4. Banks and Banking ⇐251

The giving by directors of national bank of option to controlling stockholder to buy directors' shares at time of their resignation as directors was not a hypothecation or pledge of stock of such directors for any loan or debt, within statute requiring oaths by director at time of appointment or election, stating that he is owner in good faith, and in his own right, of the number of shares required by statute, and that same are not hypothecated, or in any way pledged as security for any loan or debt, and directors did not, by giving of options, disqualify themselves from acting as directors. 12 U.S.C.A. §§ 72, 73.

5. Banks and Banking ⇐251

Agreement by which directors of national bank gave option to controlling stockholder to buy shares held by directors upon their resignations which contained provision whereby option price plus interest was to be reduced by amount of dividends paid to directors during period prior to exercise of the option, was not contrary to the public policy reflected by statute pertaining to oath of directors and stock ownership by them, on theory that incentive to act in best interests of bank was lessened

by reduction of option purchase price by dividends paid thereon. 12 U.S.C.A. § 73.

6. Banks and Banking ⇐243

Agreement by which directors in national bank gave option to principal shareholder to buy their stock at stated price upon their resignation as directors was not rendered unenforceable by fact that principal shareholder made suggestions and recommendations to board of directors with respect to operation and management of bank, when the agreement did not purport to lay any obligation upon the directors to accede to the will of the principal shareholder, and when their actions did not indicate subservience. 12 U.S.C.A. §§ 72, 73.

7. Specific Performance ⇐121(8)

In action by principal shareholder in national bank for specific performance of agreement executed by two directors which gave plaintiff shareholder the option to purchase the shares held by such directors upon their resignations, evidence sustained finding that the option agreement did not tend to require, cause, or induce the defendant directors to violate their respective oaths or to in any manner abandon their rights or obligations as directors. 12 U.S.C.A. §§ 72, 73.

8. Banks and Banking ⇐243

There is nothing inherently unlawful or contrary to public policy in an agreement whereby the sole stockholder of a national bank sells some of its shares to those who are to be connected with its operation or management as officers, with a reservation of the right to repurchase the shares at a stipulated price should the purchasers cease their connection with the corporation. 12 U.S.C.A. §§ 72, 73.

9. Banks and Banking ⇐243

Although neither pure motives nor honest belief in the validity of an illegal bargain will save it from condemnation, the attitude of directors of national bank who had given options to principal shareholder to buy their shares upon their resignations as directors, and fact that they took their annual oaths as directors when seemingly not regarding the option agreements as violative of statute or public policy, could be considered when determining validity of such agreements for purpose of specific performance suit of principal shareholder. 12 U.S.C.A. § 73.

10. Monopolies ⇐20

Where specific performance was sought of agreement whereby directors of national bank gave option, exercisable upon their resignations, to principal shareholder to buy their shares which had originally been purchased from shareholder, even if court took notice of order of Board of Governors of Federal Reserve System that shareholders had violated anti-trust laws by acquiring numerous banks, when such order did not establish invalidity of the agreements in question, and same was not final, order did not render agreements unenforceable as violative of Clayton Act. Clayton Act, § 7, 15 U.S.C.A. § 18.

11. Specific Performance ⇐121(8)

In action by principal shareholder in national bank for specific performance of agreement whereby directors had given options, exercisable upon their resignations, permitting shareholder to buy their shares which had originally been purchased from shareholder, evidence was not such as to warrant finding that the acquisition of the stock of the directors by the shareholder had effect of substantially lessening competition or creating a monopoly or that the agreement in any manner had such effect. Clayton Act, § 7, 15 U.S.C.A. § 18.

Vaughan Brandlin & Wehrlé, Warren J. Lane and Pat B. Trapp, Los Angeles, for appellant.

Bodkin, Breslin & Luddy, Michael G. Luddy, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Plaintiff instituted these three separate actions seeking specific performance of an agreement executed by each of the defendants for the sale of corporate shares. The causes were consolidated and pursuant to stipulation were disposed of by a single set of findings and judgment. Defendants appeal from the judgment rendered in favor of the plaintiff upon the sole ground

that the agreements in question are illegal and hence unenforceable.

In May, 1941, respondent (hereinafter sometimes referred to as Transamerica) acquired all of the stock, both common and preferred, of the Temple City National Bank (hereinafter referred to as the bank) including that then owned by appellants Shephard and Musick. For the shares acquired from Shephard respondent paid $317.15 a share and for those acquired from Musick $405.66 a share. Following the acquisition of the stock of the bank Transamerica sold to the appellants Shephard and Musick ten shares each of the common stock at a price of $150 per share and they continued to serve as directors of the bank until their resignation in 1950. At the time of the sale of these shares to the appellants Shephard and Musick each executed a separate agreement with Transamerica agreeing that he would, upon ceasing to be a director of the bank, sell the said shares to Transamerica on its written requisition therefor at the price of $150 per share plus 5 per cent interest from the date thereof to the date of purchase less the amount of any dividends paid on said shares. The agreement further provided that Transamerica was given the right of first refusal in the event that these appellants desired to dispose of their shares. It was also provided that the purchase price to be paid by Transamerica upon the purchase of the shares would entitle it to receive without additional payment all shares derivative therefrom by way of split, stock dividend or otherwise. Shortly after acquiring all the stock of the bank as stated Transamerica transferred to the bank for cancellation all of the preferred stock, and thereafter it continued to be the owner of all the outstanding shares thereof except 50 shares of common stock, 20 of which were owned by appellants Shephard and Musick and 10 each owned by the three other directors who had executed a similar agreement with Transamerica with respect to their shares. As a result of a declaration of a 50 per cent stock dividend Shephard and Musick received five shares of common stock at which time they entered into a new agreement with Transamerica identical in form with that previously executed except that the share price was reduced to $102.42, and at the same time Shephard and Musick sold to Transamerica five shares and received therefor the sum of $512. Subsequently, in order to file a vacancy on the board caused by the death of one of the other directors Transamerica sold ten shares of the stock of the bank to the appellant Parrington for $100 a share who executed a similar agreement with Transamerica except that the price at which Transamerica had the right to purchase was $100 per share. At a still later date Transamerica donated $75,000 in cash to the bank which was credited to the bank's surplus account, and in October, 1949, the bank declared a 300 per cent stock dividend resulting in each of the appellants receiving 30 additional shares. Following this new agreements were separately executed by the appellants and Transamerica containing the same terms and conditions as their prior agreements except that in the case of Shephard and Musick the purchase price was reduced to $25.61 per share and in the case of Parrington the price was reduced to $25.44 per share.

Appellants Musick and Shephard were elected and served as directors of the bank for each year from 1942 to 1950, and appellant Parrington was elected and served as a director for each year from 1943 to to 1950. On each occasion of being elected as such director each of the appellants took an oath as required by the National Banking Act, 12 U.S.C.A. § 73, that he would, so far as the duties devolved upon him, diligently and honestly administer the affairs of the bank, and would not knowingly violate or willingly permit to be violated any of the provisions of the statutes of the United States under which the bank had been organized; that he was the owner in good faith and in his own right of the number of shares of stock of the aggregate par value required by statute and that the same was not hypothecated or in any way pledged as security for any loan or debt. In June, 1950, each of the appellants resigned as directors of the bank, and thereupon notified respondent that the

offers contained in the option agreements before referred to were revoked, and thereafter, although tendered the purchase price for their shares in accordance with the terms of such agreements by respondent, the appellants refused to transfer the same, whereupon these actions were instituted.

Appellants' primary contention here is that the agreements previously described which were enforced by the judgment appealed from are violative of the provisions of section 10 of the National Banking Act, 12 U.S.C.A. § 72, prescribing the qualifications for directors of the national banks which, in part, reads as follows:

> "*Qualifications* * * * Every director must own in his own right shares of the capital stock of the association of which he is a director the aggregate par value of which shall not be less than $1,000, unless the capital of the bank shall not exceed $25,000, in which case he must own in his own right shares of such capital stock the aggregate par value of which shall not be less than $500. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."

Reference is also made to section 73 reading as follows:

> "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this chapter, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this chapter, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. * * *"

It is to be noted at the outset that section 72 does not denounce the purported election to the office of director of one who is not the owner of the specified number of shares or the act of serving as such director as a crime nor does it prescribe any penalty therefor. It merely declares that such a person is not qualified to act as a director and as a necessary consequence his election to the office is void or ineffectual. In this respect it would appear to differ in no manner from the statute formerly in effect in this state requiring directors of private corporations to be shareholders thereof, which was construed as not prohibiting the transfer to one of shares for the express and avowed purpose of qualifying the transferee for election to the office of director, Webster v. Bartlett Estate Co., 35 Cal.App. 283, 286, 169 P. 702, and under which it was also held that one elected as such a director who was not a shareholder, while not a director de jure, was at least one de facto. O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 69, 97 P. 1.

[1] Directing our attention specifically to the provisions of section 72 of the statute here in question, the necessary effect of appellants' contention is that the owner of shares in a national bank who has granted to another the right or option to acquire the same at some future date is not the owner of such shares "in his own right". We see no basis in law or logic for such conclusion. The words "in his own right" as employed in the statute can mean nothing more nor less than that, in order to be qualified as a director, one must be the beneficial as well as the legal owner of at least the minimum number of shares specified as distinguished from one who, though a stockholder of record, holds the share for the benefit of another, such as an executor or trustee. Here each of appellants purchased and paid for the shares of stock in the bank standing in their respective names and each therefore was the owner thereof "in his own right".

[2, 3] Neither did the appellants cease to be the owners of such shares in their own right by reason of the fact that they executed the agreements in question whereby in certain contingencies they granted

respondent the right at its option to reacquire the shares for the price and upon the terms therein stated. As said in Warner Bros. Pictures v. Brodel, 31 Cal.2d 766, 772, 192 P.2d 949, 952, 3 A.L.R.2d 691: "* * * An option contract relating to the sale of land is therefore 'by no means a sale of property, but is a sale of a right to purchase' Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395, 397; see Smith v. Bangham, 156 Cal. 359, 365, 104 P. 689, 28 L.R.A.,N.S., 522; Ware v. Quigley, 176 Cal. 694, 698, 169 P. 377; Ludy v. Zumwalt, 85 Cal.App. 119, 130, 131, 259 P. 52; Alegretti v. Gardner, 74 Cal.App. 564, 566, 241 P. 408; Howard v. D. W. Hobson Co., 38 Cal.App. 445, 455, 176 P. 715; Menzel v. Primm, 6 Cal.App. 204, 209, 91 P. 754, or, as stated in Shaughnessy v. Eidsmo, 222 Minn. 141, 23 N.W.2d 362, 363, 166 A.L.R. 435: '* * * A contract conferring an option to purchase is * * * an irrevocable and continuing offer to sell, and conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his election' ".

"An option is by no means a sale of property, but is the sale of a right to purchase." Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395, 397. "An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed." Ware v. Quigley, 175 Cal. 694, 698, 169 P. 377, 378. "An 'option' is neither a contract of sale and purchase nor an agreement to sell and purchase land or other property. An 'option' is a contract by which the owner of property invests another with the exclusive right to purchase such property at a stipulated sum within a limited or reasonable time in the future, and, unlike an agreement to sell and purchase, imposes no obligation to purchase upon the party to whom it is given." Howard v. D. W. Hobson Co., 38 Cal.App. 445, 455, 176 P. 715, 720; "An option is a mere offer, and, unless it is accepted within the time limited, it is of no force for any purpose." Upton v. Travelers' Ins. Co., 179 Cal. 727, 729, 178 P. 851, 852, 2 A.L.R. 1597.

In Western Union Tel. Co. v. Brown, 253 U.S. 101, 40 S.Ct. 460, 462, 64 L.Ed. 803, the Supreme Court of the United States says: "An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy".

As related directly to the provisions of section 72, in Paton's Digest of Legal Opinions (1940 edition), p. 211, it is said: "A director of a national bank gives an option on all the stock owned by him in the bank. Does the granting of this option disqualify the director from continuing in office?

"Opinion: A director by merely granting an option to a third person to buy his stock does not disqualify himself from acting as director.

"Until the third person exercises his option to buy the stock, the director owns the stock in his own right as required by statute, * * *"

[4] It is equally apparent that by the agreements with which we are here concerned the appellants' shares were "not hypothecated, or in any way pledged, as security for any loan or debt" within the meaning of the language in section 73 of the statute. There is no suggestion that appellants were at the time of their execution or any time subsequent thereto indebted in any amount to the respondent. In the absence of such indebtedness there could be no hypothecation or pledge of security.

[5] The real contention of counsel for appellants would appear to be that, while the fact that a director of a national bank who grants an option to another to acquire the shares held by him does not in all circumstances operate to disqualify him from continuing to serve as a director, a different result follows here because of the terms of the option agreement. The argument is that, inasmuch as the option price plus 5 percent interest was to be

reduced by the amount of dividends paid to appellants during the period prior to the exercise of the option, the "public policy" reflected by the statute, if not the terms thereof, is violated. In support of this it is said that directors of national banks have a public duty not only to the shareholders but to the depositors; that the purpose of requiring directors to be shareholders is that their own interests, springing from the investment therein, will induce them to act in a manner most beneficial to the interests of the bank, and, inasmuch as under the terms of the agreements here the price which they would receive upon the exercise of the option might be greatly reduced below the then true value of the shares by the dividends paid thereon prior to the exercise thereof, their incentive to act in the best interests of the bank was thereby destroyed or lessened. The argument to say the least is a strange one coming as it does from the appellants. They were under no duty to continue as directors, and by the simple act of resigning as such the respondent would have been obligated to exercise its option or failing to do so appellants would be at liberty to dispose of their shares to others at whatever price they might obtain therefor. The same result which appellants profess to believe renders the agreements contrary to public policy would occur if a *definite price* were fixed in the option without deduction for dividends paid, for it is entirely possible that at the time of the exercise of the option the market value of the shares might be considerably greater than that specified in the option.

[6] Nor do we see any force in the further argument that because respondent was the only shareholder of the bank other than appellants and the two other directors, the agreement had the necessary effect of making the appellants subservient to the respondent in the discharge of their duties as directors. The answer is that the agreements do not purport to lay any such obligation upon the appellants. As a majority of the board of directors they had full freedom of action. The fact, as they purported to testify, that they usually followed suggestions and recommendations made by the respondent is of no significance in determining the validity of the agreements in question. We see nothing legally or morally wrong in the fact that one who owns all or the great majority of the outstanding shares in a banking corporation makes suggestions and recommendations to the board of directors thereof with respect to its operation and management. Unless appellants desire to be understood as saying that they were so recreant to their duty as directors of the bank that they wilfully acted upon the suggestions of respondent when convinced that such action was inimicable to the best interests of the bank, no odium attaches to them by reason of the fact that they may have acted from time to time in accordance with respondent's suggestions. If on the other hand they wilfully violated their trust as directors they may hardly be heard to plead in justification that they were induced so to do by respondent when neither under the terms of the agreements nor otherwise were they under compulsion to do so.

It may be noted however that despite appellants' attempts to make it appear that they were subservient to the wishes of and dominated by the respondent in the discharge of their duties as directors of the bank, they did not hesitate to act contrary thereto when their own interests dictated otherwise. When in June, 1950, respondent was desirous of selling the assets of the bank to the Bank of America, defendants strenuously objected thereto until respondent acceded to their demand that the purchaser pay to the bank for distribution to its stockholders at least $305,000; appellants frankly admitting that their insistence upon this requirement was solely by reason of the fact that they then had determined to repudiate their agreement with respondent, which, if successful, would result in each of the appellants receiving an additional sum of $312.50 per share by reason of this additional payment alone. Similarly on a previous occasion when respondent suggested to the directors of the bank the desirability of increasing the dividend rate upon its stock, appellants refused to accept this suggestion because each of them believed that such increase

would be contrary to his best financial interest in the event respondent should exercise its rights under the option agreements.

It is not surprising that the testimony of appellants Shephard and Musick (appellant Parrington did not testify) whereby they undertook to cast aspersions upon their conduct as directors did not impress the trial judge who, when rendering his decision, remarked: "In view of their long experience in the banking business, and particularly in this particular bank, I couldn't help but wonder if they were not attempting to disparage themselves by their conduct with the hope that thereby they would be successful in this lawsuit and make a financial gain."

[7] The trial court found, and the finding is amply supported by the evidence, that "The written agreements * * *—neither in nor of themselves, nor when the same are considered in the light of the circumstances under which they were executed and delivered, or considered in view of the conduct of the parties thereto after the execution and delivery thereof and during the time after 1941, when the defendants were directors of The Bank—did not require, cause, or induce, nor did any of such written agreements tend to require, cause, or induce, the defendants, or any of them, to violate their respective oaths as directors of The Bank, or, in any manner, to abandon or surrender their respective independent rights, duties, or obligations as such directors, nor did said or any of said agreements, the said circumstances of the execution and delivery thereof, nor the acts or conduct of the parties thereto after the execution and delivery thereof, in any manner, require, cause, or induce or tend to require, cause or induce, the or any of the defendants, as such directors, to neglect, abandon, surrender, or delegate their respective independent rights, obligations, duties, votes, or actions, or any thereof, in or about the affairs of The Bank."

Not only, as indicated by the foregoing finding, was there nothing in the agreements themselves to induce or tend to induce the appellants to act contrary to their duties as directors, but the court further found that they were not induced or caused so to do by any recommendation or suggestion of respondent. The trial court's finding in this respect, also supported by the evidence, is as follows:

"In the operation and the conducting of the usual and ordinary affairs of The Bank, such as—by way of illustration—investments, discounts, making of loans, employment of personnel, fixing of salaries of officers and employees, fixing of directors' fees, for attendance at regular or special meetings of the Board of Directors, or acting as a member of the examining committee, plaintiff, during the period from June, 1941, to the time when the defendants resigned as directors of The Bank, did not in any manner make any requests or suggestions respecting the acts or conduct of the defendants, or any of them, as such directors. In certain limited instances involving matters of high level policy—such as adoption by the Board of Directors of (a) a group life insurance and group medical insurance plan covering the employees of The Bank; (b) a contract employing specialists on the staff of the Bank of America National Trust and Savings Association to conduct audits and give assistance to the officers and employees of The Bank; (c) a retirement plan for The Bank's employees; and (d) construction of a new banking quarters, including the exchange of real property in connection with acquiring a site for the construction of a new building and a parking lot for customers of the Bank adjoining same, plaintiff initiated the programs and suggested and recommended to the Board of Directors of The Bank that favorable action be taken thereon, and such requested or suggested action was taken. * * * That in each instance where favorable action was taken by the Board of Directors with respect to the high level policy matters above referred to, as suggested or requested by plaintiff, such action was in the best interest

of the Bank and the request or suggestion of the plaintiff in such instances was in all respects proper."

[8] We fail to see anything inherently unlawful or contrary to public policy in an agreement whereby the sole stockholder of a corporation sells some of its shares to those who are to be connected with its operation or management as officers or employees with a reservation of the right to repurchase the shares at a stipulated price should the purchasers cease their connection with the corporation. Indeed this is now a common practice in both large and small corporations. As was said in Halsey v. Boomer, 236 Mich. 328, 210 N.W. 209, 210, 48 A.L.R. 622, 624: "When a man, as here, owns the entire interest at the time of incorporation and is willing or desirous that an employee purchase a few shares of its stock, we think no question of public policy will prevent him from so providing on the issuance of such stock to an employee that he shall have the right to secure its return to him should such person leave the employ of the corporation. He thus prevents any person not directly interested in the work of the corporation from securing an interest therein, and we know of no reason why this may not be done."

In this same connection the following language from the opinion in Smith v. San Francisco and N. P. Ry. Co., 115 Cal. 584, 600, 47 P. 582, 588, 35 L.R.A. 309, is apposite here: "'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.' It is not in violation of any rule or principle of law for stockholders who own a majority of the stock in a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies, who shall vote in such a way as will carry out their plan."

[9] While it is true that neither pure motives nor honest belief in the validity of an illegal bargain will save it from condemnation, it is not without significance that the appellants here, two of whom are experienced bankers and the other is a member of the Bar, at all times prior to their resignation from the bank (a period of nine years in the case of the former and seven and a half years in the case of the latter) seemingly did not regard the agreements as violative either of the statute or the public policy evidenced thereby in view of the fact that annually upon their election as director each took the statutory oath prescribed by section 73 that he would diligently and honestly administer the affairs of the bank and not knowingly violate or willingly permit to be violated any provisions of the statute and that he was the owner in good faith and in his own right of the requisite number of shares and that the same were not hypothecated or in any way pledged as security for any loan or debt for otherwise each was clearly guilty of perjury.

Appellants place principal reliance upon the case of Tooker v. Inter-County Title etc. Co., 295 N.Y. 386, 68 N.E.2d 179, 180, 167 A.L.R. 385 which involved a similar statute of New York. While the statute there was somewhat more comprehensive in its terms and the language of the opinion is, to say the least, obscure, the case is distinguishable. There by the terms of the contract between the plaintiff who had purchased the shares from the defendant the former unconditionally agreed to sell and the latter unconditionally agreed to buy the shares in the event plaintiff should cease to be a director of the bank. Inasmuch as the price to be paid in such event was to be the then book value of the shares but not less than the amount paid therefor by the plaintiff, the court concluded that the latter thereby "was equipped to free himself in a substantial degree from the chance of financial loss incident to record ownership of his qualifying shares, with the result that his sense of the character of his duty as a director may well have been reduced in like measure."

While the reasoning of the court is somewhat tenuous, the agreements here are quite different from that involved in the cited case. Appellants had no assurance that in the event they should cease to be directors respondent would exercise its option or right to purchase their shares, and if it did not do so and appellants then desired to sell their shares the price which they could reasonably expect to receive therefor was the then market value, if any, of the shares. There was no guarantee against loss. It is to be noted also that while, as stated, the statute there involved was somewhat more comprehensive than that with which we are here concerned, the court expressly said: "Manifestly, the transaction was designed to qualify the plaintiff for election as a director of the bank. Transfer of bank stock for the purpose of so qualifying the transferee is not obnoxious to the statute. Cf., Matter of Ringler & Co., 204 N.Y. 30, 37, 97 N.E. 593, 595, Ann.Cas.1913C, 1036."

[10] Appellants also contend that the agreements constitute a violation of the so-called Clayton Act, 15 U.S.C.A. § 18, which provides generally that no corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock of another corporation engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition * * * may be substantially to lessen competition, or to tend to create a monopoly."

This contention was not presented to the trial court and is advanced for the first time upon appeal. The record is devoid of any evidence that the acquisition by respondent of the stock of the bank operated "substantially to lessen competition or to tend to create a monopoly". In seeming recognition of this appellants ask this court to take judicial notice of the order of the Board of Governors of the Federal Reserve System in the matter of Transamerica Corporation rendered after the trial of the instant proceeding. To this end they have included in an appendix to their opening brief a copy of the certain portions of the order in question. Assuming without deciding that we may properly take judicial notice of this action of the federal reserve board, there are several reasons why it cannot affect the judgment herein. First and foremost, it is conceded that the board order is not final inasmuch as it is now pending upon appeal in the U. S. Circuit Court of Appeals for the Third Circuit. Secondly, an examination of the portions of the order to which counsel direct our attention does not disclose that the federal reserve board undertook to determine the validity of the agreements here involved. True in the course of its order or opinion mention is made of the fact that respondent followed the practice disclosed by these agreements in the acquisition of the stock of other banks, but we fail to find therein any suggestion that this in and of itself constituted a violation of the Clayton Act. What it did determine was that by acquiring the stock of the numerous banks in the States of California, Oregon, Nevada, Arizona, and Washington enumerated in the order, the effect thereof was to materially lessen competition and hence the acquisition of the stock of such banks was in violation of the act. We are not here concerned with the question as to whether or not the respondent in acquiring the stock of a large number of banks, including that here involved, was guilty of a violation of the Clayton Act. Rather the question here is whether after having acquired such stock respondent could sell certain of the shares to the appellants under the terms of the agreements here involved. Moreover, it is not the acquisition of stock in other corporations or the means employed in doing so that is denounced by the Clayton Act but only when the effect thereof is to substantially lessen competition or tends to create a monopoly. This is clearly pointed out in Aluminum Co. of America v. Fed. Trade Commission, 3 Cir., 284 F. 401, 405, certiorari denied, 261 U.S. 616, 43 S.Ct. 362, 67 L.Ed. 828, where it is said: "Clearly, the object to which the section is directed is not the mere acquisition of stock of one corporation by another. It is the 'effect' of such acquisition upon commerce."

[11] Not only is there no evidence here that the acquisition of the stock of the

bank in question had the effect of substantially lessening competition or creating a monopoly but, what is more important, there is no evidence that such was the effect of the agreements here in suit.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



115 Cal.App.2d 498

PEOPLE v. SIERRA.

Cr. 857.

District Court of Appeal, Fourth District, California.

Jan. 23, 1953.

Defendant was convicted in the Superior Court of Fresno County, Edward L. Kellas, J., of second degree robbery, and he appealed. The District Court of Appeal, Mussell, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law ⇐569

Evidence sustained second-degree robbery conviction of defendant who contended that he had acted under duress.

2. Criminal Law ⇐1159(2)

Where there was substantial evidence to support jury's verdict that defendant was guilty of second-degree robbery, jury's determination was required to be upheld by the District Court of Appeal on appeal.

Tom Okawara, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant, Frank M. Sierra, and Albert Sequieros were charged with the crime of armed robbery. The Information also charged defendant Sequieros with three prior felony convictions. A jury trial was had and Sierra was found guilty of robbery in the second degree. He appeals from the judgment of conviction on the sole ground that the evidence is insufficient to support the judgment in that he was acting under such fear from the threats of his codefendant that the acts which he committed were in fact not his acts but those of his codefendant. Defendant Sequieros was found guilty of robbery in the first degree and has not appealed from the judgment.

On February 23, 1952, Frank Sierra, Albert Sequieros and Carolina Ruiz, the common-law wife of Sequieros, drove in an automobile belonging to Sequieros to the home of Cruiz Ramirez near Huron in Fresno county. Ramirez testified that the defendants asked him to show them the way to Huron; that he got in the front seat of Sequieros' car with defendant Sierra and Carolina Ruiz; that Sierra proceeded to drive toward Huron; that he stopped at an intersection a few miles out on the road and Ramirez, perceiving that the driver was about to turn off the Huron road, attempted to get out of the car; that thereupon Sequieros, who was in the rear seat, "put a knife to his (Ramirez') neck" and told the driver in Spanish to drive "on and fast"; that Sierra then proceeded on a side road for about a mile and stopped near a cotton field; that Sequieros (the man in the back seat) said "let's search him and see what we can find on him"; that the "lady" took his money (about $20) out of the pocket of his sweater; that defendant Sierra took the witness' shoes off, searched them for money, and threw them away; that the defendants then left in the car.

Frank Sierra testified that he was driving the car and Sequieros was in the back seat; that he slowed down and stopped at the intersection on the road to Huron; that Sequieros then "put a knife on Cruiz' throat", told him to keep quiet and ordered Sierra to keep on driving; that when they reached the cotton field Sequieros ordered Sierra to stop and ordered his wife to take

the money; that Carolina searched the complaining witness and took his wallet and change; that Sierra, on orders from Sequieros, also searched the complaining witness, took his shoes off and threw them in front of the car; that he then drove away with Sequieros and his wife.

Sequieros and Carolina both testified that when they reached the intersection on the Huron road, defendant Sierra was in the back seat of the car and applied the knife to the throat of the complaining witness. Carolina testified that Sierra held the complaining witness while she and Sequieros searched him and took his money; that Sequieros removed the victim's shoes; that she gave the money to Sequieros.

Defendant Sequieros testified that he was driving the car; that Sierra was in the back seat and used the knife on the complaining witness; that Carolina searched the victim and that Sequieros removed his shoes; that the money obtained from the victim was split with defendant Sierra.

[1] All of the witnesses testified that the complaining witness was robbed. The only substantial conflict in the testimony is as to who drove the car and who wielded the knife. The jury evidently believed the testimony of the complaining witness and the defendant Sierra in this connection and therefore found Sierra guilty of robbery in the second degree. There is ample evidence in the record to sustain the verdict and the judgment.

[2] The claim that defendant Frank Sierra was acting solely under duress and fear in the presence of a deadly weapon and therefore not accountable for his actions is without merit. The record shows that he stayed with Sequieros and his wife for some time after the robbery and steadily drank beer with them; that Sierra was in contact with the Hanford police on the same day and made no mention to them of the robbery; that Sequieros made no attempt to use the knife on defendant Sierra and did not threaten to harm him in any way. The evidence is quite clear that the defendants planned the robbery and took and divided the money obtained from the complaining witness. There was substantial evidence to support the verdict of the jury and its determination must be upheld. People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 1; People v. Cullen, 37 Cal. 2d 614, 625, 234 P.2d 1.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



115 Cal.App.2d 495

In re RILEY'S ESTATE.

RILEY v. RILEY et al.

Civ. 4495.

District Court of Appeal, Fourth District, California.

Jan. 23, 1953.

Hearing Denied March 23, 1953.

Proceeding on petition of executrix for authority to borrow money to pay inheritance taxes and claims against estate and to execute a trust deed on estate's interest in a building as security for the loan. The Superior Court of Orange County, Raymond Thompson, J., entered an order denying the petition, and the executrix appealed. The District Court of Appeal, Barnard, P. J., held that necessity for the loan or its advantage to estate must be shown, even though will gave executrix authority to sell or encumber any part of estate.

Order affirmed.

1. Executors and Administrators ⇐138(1), 319

All proceedings for sale of decedent's property under direction of a will or for authority to borrow money upon the security of the estate are statutory. Probate Code, §§ 757, 830–832.

2. Executors and Administrators ⇐138(4, 9)

Where property is sold under direction of a will, the necessity for sale or its advantage to estate need not be shown, but confirmation of sale by court must be had, giving court opportunity to see that full value for the property is received,

and no title passes unless sale is confirmed by the court. Probate Code, § 757.

3. Executors and Administrators ⇐323

In proceeding by executrix for authority to borrow money to pay inheritance taxes and claims against estate and to execute a trust deed on estate's interest in a building as security for the loan, necessity for the loan or its advantage to estate must be shown, though will gave executrix authority to sell or encumber any part of estate. Probate Code, §§ 757, 830–832.

Bertram H. Ross, Los Angeles, for appellant.

No appearance for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order denying the petition of the executrix for authority to borrow $43,000 and to execute a trust deed on the estate's one-half interest in a building in Los Angeles, as security for the loan.

The petition alleged that the appraised value of the estate was $274,320.10; that there was about $3,000 in cash on hand; that the estimated federal and state inheritance taxes amounted to about $62,000, of which $12,000 had been paid; that unpaid claims amounted to about $28,000; that petitioner had theretofore been authorized to borrow $20,000 upon other property; that the will gave the executrix authority to sell or encumber by mortgage, deed of trust or otherwise any part of the estate; that in order to pay the balance of taxes and claims the petitioner has negotiated a loan of $43,000, secured by a deed of trust on the estate's half interest in this building, to be repaid in installments of $1,000 a month together with interest at 6% payable monthly; and that it is for the best interest of the estate to make this loan.

Objections were filed by the former wife of the deceased, personally and as guardian of the three minor children of the deceased who were named in the will as legatees, alleging that the estate had been over-appraised; that the state and federal inheritance taxes were due from individuals and not from the estate; that the executrix had used certain estate monies to pay her own obligations; that the previous order authorizing the executrix to borrow $20,000 had been made without notice; that the estate was being unnecessarily put to great expense in maintaining another piece of real property, which should be sold instead of borrowing money upon this building; that the estate did not have sufficient income to make the proposed monthly payments of principal and interest on the loan if it were made; that the making of this loan would probably result in a complete loss to the estate of the property on which the lien was placed; and that it was not to the best interest or advantage of the estate to make the proposed loan.

The court found that while most of the allegations of the petition were true, it was not for the best interest of the estate to borrow this money; that there is serious danger that in the event this loan is made the estate would not have sufficient income to meet the proposed monthly payments thereon; and that the estate owns another parcel which can and should be sold for the purpose of acquiring the necessary funds.

It is not contended that the order appealed from is not sufficiently supported by the facts presented to the court. No evidence was received, and the hearing consisted entirely of statements made by counsel for the respective parties. No attempt was made to prove that the estate's income was sufficient to meet the payments on the proposed loan and the other obligations of the estate.

The sole contention is that since the will authorized the executrix to encumber any part of the estate by a deed of trust the court was not concerned with whether or not the loan was necessary, or whether the making of the loan was for the best interest of the estate, and that "the court cannot substitute its judgment for that

granted to the executor." It is argued that section 757 of the Probate Code provides that in the sale of real property, where authority to sell is given in the will, no necessity for the sale or advantage to the estate need be shown; that since section 830 of the Probate Code, dealing with the borrowing of money, is silent as to the effect of a provision in a will authorizing the borrowing of money, the same rule should be applied; and that it has been held in some Eastern states that such a provision in the will relieves the court of any discretion in the matter.

[1, 2] All proceedings of this nature in this state are statutory. Under section 757 of the Probate Code, where property is sold under direction of a will, the necessity for the sale or its advantage to the estate need not be shown, but confirmation must be had and no title passes unless the sale is confirmed by the court. No such provision, relieving the executor from showing the necessity or advantage of making such a loan, is contained in sections 830 to 832 of that code, providing how money may be borrowed upon the security of the estate. Not only is this omission significant, but those sections contain provisions which must be followed, including a definite requirement that a showing must be made which satisfies the court that the making of the order sought will be to the advantage of the estate. Good reasons appear for this requirement. In the case of the sale of property the court has an opportunity, upon confirmation proceedings, to see that full value for the property is received. If the matter of borrowing money on a trust deed were left entirely to the discretion of the executor, the court would have no control over the matter and, except for an inadequate consideration received from the loan, the property might be lost to the estate. Under such a rule, as suggested in Estate of Pforr, 144 Cal. 121, 77 P. 825, an executor would be able to do indirectly what he is forbidden to do directly.

[3] The appellant's contention that no showing was necessary, as to the necessity for or the advantage of the loan in question, cannot be sustained. The order is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



115 Cal.App.2d 360

HORTON et ux. v. HORTON et al.

Civ. 8197.

District Court of Appeal,
Third District, California.

Jan. 14, 1953.

Rehearing Denied Feb. 10, 1953.

Hearing Denied March 12, 1953.

Action to quiet title to realty. The Superior Court, Amador County, Ralph McGee, J., rendered a judgment adverse to the defendants and the defendants appealed. The District Court of Appeal, Schottky, J., held that right of husband to alone execute deed to community realty without wife's consent could be determined in a quiet title action filed by such husband and wife against heirs of husband's grantee.

Judgment affirmed.

1. Husband and Wife ⇐267(1, 7)

Under Code section declaring interests of husband and wife in community realty to be present, existing and equal interests under management and control of husband, and under section requiring wife to join husband in executing conveyance, wife has vested legal interest in community realty and conveyance executed by husband alone only conveys legal title if wife fails to commence action to avoid deed within one year after date of its recordation, and husband's deed merely serves as cloud upon wife's title and does not ripen into effective conveyance unless wife fails to take steps to avoid it within statutory time. Civ.Code, §§ 161a, 172a.

2. Fraud ⇐41

Fraud must be specifically pleaded.

3. Husband and Wife ⇐267(1)

Right of husband to alone execute deed to community realty without wife's consent could be determined in a quiet title action filed by such husband and wife against heirs of husband's deceased grantee. Civ.Code, §§ 161a, 172a.

4. Pleading ⇐1

Counsel and court should cooperate in having pleadings so shaped that controversy between parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice.

5. Pleading ⇐1

Office of pleadings is to outline issues so that parties may know what is involved in litigation and pleadings should be made as clear as possible, but are not intended to serve as a trap for inexperienced or unwary.

6. Appeal and Error ⇐183

Judgment for plaintiffs in quiet title action brought by husband and wife against heirs of deceased grantee of community realty under deeds executed by plaintiff husband without consent of plaintiff wife, would not be reversed on defendants' appeal on ground that deeds could not be attacked in quiet title action where defendants did not raise such point during trial and understood deeds were what plaintiffs were attacking although form of action was not to avoid deeds, and if such contention had been made during trial court would have permitted pleadings to be amended so as to remove doubt as to their sufficiency.

Mazzera, Snyder & DeMartini, J. Calvert Snyder, and Loraine B. Early, Stockton, for appellants.

Harry J. Englebright, Sacramento, for respondents.

SCHOTTKY, Justice.

Plaintiffs commenced an action to quiet their title to certain real property, the complaint being in the usual short form under section 738 of the Code of Civil Procedure, alleging ownership and possession in plaintiffs, and that defendants, without right, claimed an adverse interest.

The amended answer of defendants admitted plaintiffs' ownership and possession, subject to defendants' rights of ownership and possession as established by deeds from plaintiff B. F. Horton to F. A. Horton, copies of said deeds being appended as exhibits to the answer. Said answer admitted that defendants claimed an estate and interest in the property under said deeds, and affirmatively alleged that F. A. Horton died on August 29, 1949, and that defendants were his sole heirs at law. The prayer of the answer was that defendants' right, title and interest be declared under the deeds and quieted as to any claim of plaintiffs.

The evidence showed the following facts: Plaintiffs are husband and wife; defendants are brothers and sisters, the surviving issue of F. A. Horton, the deceased twin brother of plaintiff B. F. Horton. The two pieces of property involved are identified as the "Ione Property" and the "Ranch Property." Plaintiffs were married on March 18, 1928; plaintiff B. F. Horton had acquired the Ione property prior to his marriage, and he had acquired the ranch property after his marriage. On May 18, 1938, plaintiff B. F. Horton executed his deed of gift conveying the Ione property to his twin brother; on November 16, 1942, B. F. Horton conveyed the ranch property, by gift deed, to his twin brother and his wife, reserving a life estate in himself. B. F. Horton's wife, Elna Horton, was not named as a grantor in either of these deeds, nor did she join in their execution; her husband testified that he had executed the deeds to save probate costs. F. A. Horton died on August 29, 1949; his safe-deposit box was opened the following day, and the deed to the ranch property was found therein. Some thirteen months after F. A. Horton's death, his son, defendant Allen Horton, found the deed to the Ione property in a desk in the room where his father slept. This action to quiet title was filed on September 11, 1950, but the deeds were not recorded until after its commencement, the

deed to the Ione property being recorded on October 2, 1950, and the deed to the ranch property being recorded on September 20, 1950.

The trial court found that the allegations of plaintiffs' complaint were true and that plaintiffs are the owners in fee of the property in controversy. The trial court further found as follows:

"2) That it is true that said deeds, Exhibits A and B as contained in defendants' amended answer, were executed by B. F. Horton, one of the plaintiffs herein, without the knowledge or 1 signature of plaintiff Elna H. Horton, wife of plaintiff B. F. Horton, and said deeds were delivered;

"3) That as to the property hereinafter described, and as contained in defendants' Exhibits A, said property was acquired after the marriage of plaintiff B. F. Horton and Elna H. Horton, and was therefor[e] the community property of the plaintiffs herein; that as to the property described, as contained in defendants' Exhibits B, that the community funds of plaintiffs were used in an undetermined amount to improve and maintain said property, and was therefor[e] the community property of the plaintiffs herein.

"4) That plaintiff Elna H. Horton has the right to void said deeds as contained in defendants' amended answer as Exhibits A and B; that plaintiff Elna H. Horton had no knowledge of the execution of said deeds sufficient to constitute laches."

From these findings of fact the trial court concluded that the plaintiffs were the owners in fee simple of the said real property and entitled to the possession thereof, and that the defendants had no right, title or interest therein and that the said deeds should be cancelled in their entirety. Judgment followed in accordance with said findings and conclusions, and this appeal is from said judgment.

The principal contention upon which appellants rely for reversal of the judgment is that the plaintiffs were not the owners of the legal title and therefore were not in a position to maintain an action to quiet title. They argue that the legal title to the property passed to the grantee upon the execution of the deeds, leaving in the grantor, until the recordation of the deeds, a mere record title subject only to the life estate reserved by the grantor in the ranch property. In support of this contention appellants cite a number of cases which lay down the rule that an action to quiet title cannot be maintained by the owner of an equitable title against the owner of the legal title. Among the cases cited by appellants upon this point are Aalwyn's Law Institute v. Martin, 1916, 173 Cal. 21, 159 P. 158; Robinson v. Muir, 1907, 151 Cal. 118, 90 P. 521; County of Los Angeles v. Hannon, 1910, 159 Cal. 37, 112 P. 878; Strong v. Strong, 1943, 22 Cal.2d 540, 140 P.2d 386; Botchford v. Alt, 1945, 71 Cal. App.2d 340, 162 P.2d 984.

Respondents in reply argue that respondent B. F. Horton was the record holder of the title and that respondent Elna H. Horton had, by virtue of section 161a of the Civil Code, a vested or legal interest in the property, which interest they contend is sufficient to support an action to quiet title.

Section 161a of the Civil Code reads as follows:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Section 172a of the Civil Code provides that while the husband has the management and control of the community real property, the wife must join him in executing any instrument by which such community real property or any interest therein is conveyed. Said section provides further that no action to avoid any instrument mentioned in the section, affecting any property standing of record in the name

of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situated.

[1] We believe that under these sections the wife has a vested legal interest in community real property and that an instrument of conveyance executed by the husband alone only serves to convey the legal title to the property if the wife fails to commence an action to avoid it within one year after the date of its recordation. The deed executed by the husband merely serves as a cloud upon the title of the wife and does not ripen into an effective conveyance unless the wife fails to take steps to avoid it within the period specified in said section 172a. This being so, the authorities cited by appellant in support of the contention that the owner of the equitable title cannot maintain an action against the owner of the legal title are not in point because none of them dealt with a factual situation where a wife was seeking to set aside a deed to community property executed by the husband alone and without her consent. The case relied on most strongly by appellant is Strong v. Strong, supra, in which the court said, 22 Cal.2d at page 545, 140 P.2d at page 389:

"Defendant contends that the judgment quieting title in her should be affirmed on the ground that she was induced by her husband's false representations to sign the deed. Defendant did not plead fraud, however, although the general rule that fraud must be specifically pleaded (see cases cited in 12 Cal.Jur. 800, et seq.) applies particularly to quiet title actions. Thompson v. Moore, 8 Cal.2d 367, 372, 65 P.2d 800, 109 A.L.R. 1027; Maison v. Puntenney, 212 Cal. 134, 137–139, 298 P. 33; Carpenter v. Smallpage, 220 Cal. 129, 133, 29 P.2d 841; Id., Cal.Sup., 30 P.2d 995; Burris v. Adams, 96 Cal. 664, 667, 668, 31 P. 565; Davies v. Symmes, 49 Cal.App. 2d 433, 445, 446, 122 P.2d 102. Defendant, moreover, is not the legal owner, for title passed on execution of the deed. See cases cited in 12 Cal. Jur. 723. Any rights that she might have to the cancellation of the deed or to the declaration of a constructive trust are entirely equitable (Rocha v. Rocha, 197 Cal. 396, 240 P. 1010; Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707; Freligh v. McGrew, 95 Cal.App. 251, 272 P. 791; Walsh, Equity, 492), and it is settled that such rights cannot be established in an action to quiet title when the pleadings contain merely general allegations asserting defendant's ownership and denying that of plaintiff. [Citing cases.]"

[2, 3] It is apparent that in the Strong case the wife had signed the deed and hence the legal title was conveyed, and the basis upon which the wife sought to set aside the deed was that she had been induced to sign it by fraudulent representations. It is elementary that fraud must be specifically pleaded and the court held that the wife was not entitled to have the deed canceled on the ground of fraud when she sought to quiet her title under pleadings which contained merely general allegations of her ownership and denying that of the grantee under the deed. In the instant case no question of fraud is involved and while it would no doubt have been better for the deeds to have been attacked by a pleading stating so in direct language, we do not believe that either reason or authority compels the conclusion that they could not be attacked in a simple quiet title action.

However, even if the contention of appellant that respondents husband and wife could not by an action to quiet title avoid deeds executed by the husband alone were correct, we are convinced from a study of the entire record that the judgment of the court below should be affirmed. Section 4½ of article VI of our state Constitution provides that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the

error complained of has resulted in a miscarriage of justice."

The reporter's transcript in the instant case shows that at the very beginning of the trial the following occurred:

"The Court: I notice, in glancing through the file, the complaint is in the ordinary form of a quiet title action and there are on file an Answer and an Amended Answer. Was there a demurrer?

"Mr. Snyder: I don't believe there was any demurrer, your Honor.

* * * * * *

"Mr. Shepard: * * * The defendants have alleged and attached to their answer two deeds from which they claim to have derived title. The plaintiffs' contention is two-fold. We recognize the general rule as to a presumption of delivery and so forth, but one question is the question of delivery. The second question is that both deeds put in by the defendants are signed by B. F. Horton alone, and not by his wife. The provisions of Section 172 and 172a of the Civil Code are invoked.

"Mr. Snyder: Ordinarily, the burden would be upon us to proceed, but what if we should just offer our two deeds in evidence?"

The trial then proceeded and evidence was introduced by both parties bearing on the execution and delivery of the deeds and the nature of the property. It is clear from the findings that the learned trial judge regarded the trial as one involving the issues of the delivery of the deeds, whether the property was separate or community and whether the respondent wife consented to the execution and delivery of the deeds. At one point in the record the then counsel for respondents asked respondent Elna H. Horton the following question: "Did you ever at any time authorize your husband to execute those deeds,—in writing?" Counsel for appellants made the following objection: "We object to that as incompetent, irrelevant and immaterial." Counsel for respondents then withdrew the question and asked the following question: "Did you ever give a writing to your husband relative to the execution of those deeds?" This question was not objected to by appellants, and said respondent answered, "No. Never."

Nowhere in the record in the proceedings at the trial does it appear that counsel for appellants made any statement or contention that the issue as to the right of the husband to execute the deed could not be determined in the quiet title action filed by respondents. Appellants in their opening brief state:

"Defendants have conceded throughout this action and before the trial Court that the plaintiff Elna H. Horton had a right to bring an action to avoid the deeds in question, *but that she did not exercise it.* Instead, the plaintiffs instituted an action to quiet title. At most, under the pleadings, the plaintiffs could introduce evidence, not of the validity or invalidity of the deeds, but that said deeds were void. This they could not do."

[4] However, appellants at no time during the trial before the Superior Court made any such statement to the court, and we entertain no doubt that if such a statement had been made the court would and should have insisted that the pleadings be so amended and framed as to remove any doubt as to their sufficiency, for, as we said in Feigin v. Kutchor, 105 C.A.2d 744, 748, 234 P.2d 264, 267:

"* * * A trial is more than a contest between opposing counsel, and a trial judge is more than an umpire in a battle of wits between opposing counsel. The administration of justice is not improved by slavish adherence to technical rules of pleading, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice." See, also, Miller v. Republic Grocery, Inc., 110 Cal.App. 2d 187, 242 P.2d 396.

[5, 6] The office of pleadings is to outline the issues so that the parties may know

what is involved in the litigation. They should, of course, be made as clear as possible, but are not intended to serve as a trap for the inexperienced or the unwary. In the instant case it is apparent that the parties, the court and counsel understood that what plaintiffs were attacking was the two deeds. If appellants desired to raise the point that the deeds could not be attacked in a quiet title action they should have raised the point at the trial in a clear and unmistakable manner. Instead, they permitted the trial to go forward along the lines stated by counsel for plaintiffs in his opening statement. So, even if appellants' contention that a wife could not in an ordinary quiet title action attack deeds of community real property executed by her husband alone could be sustained, we feel that to reverse the judgment in the instant case upon the record here would unreasonably subordinate substance to form and would fly directly in the face of the plain and meaningful words of section 4½ of article VI of our state Constitution heretofore quoted. If the law should compel a reversal in such a case the following quotation from Dickens' Oliver Twist would be applicable: "If the law supposes that," said Mr. Bumble, "then the law is an ass, an idiot."

No question is raised as to the sufficiency of the evidence to sustain the findings of the trial court that the real property was the community property of respondents and that B. F. Horton executed the deeds without the knowledge or consent of respondent Elna H. Horton. Counsel for appellants does assert, however, that because of the form of the pleadings they were not prepared to litigate the issue of the character of the property in issue, and permitted testimony as to expenditures on the Ione property to go in without objection. However, the record nowhere shows any request by appellants for a continuance to enable them to adduce further testimony or any statement that they had further testimony to present. The record does show that counsel for appellants, in response to a question from the court as to whether or not the testimony was concluded, answered, "Yes your Honor."

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.



H. J. HEINZ CO. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.*

Civ. 15380.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1953.

Rehearing Denied Feb. 13, 1953.

Hearing Granted March 12, 1953.

Certiorari proceeding to review order of the Superior Court, Alameda County, adjudging licensee guilty of contempt of court, awarding compensatory damages to patent holder, and ordering destruction of generators licensee constructed allegedly in violation of the Superior Court's order cancelling the license to build and operate the patented vinegar generators and enjoining licensee's use of the invention. The District Court of Appeal, Jones, J., pro tem., held that the court had followed a course of proceeding in civil contempt at common law and not procedure prescribed by the codes for prosecution of an ordinary civil action for recovery of damages and, therefore, acted without jurisdiction.

Judgment annulled.

1. Courts ⇐25

Before one can submit himself to the jurisdiction of a court, the court must have jurisdiction over the subject matter of the action.

2. Courts ⇐290, 489(3)

Patent holder's action to cancel defendant's license to build and operate the patented vinegar generators and to enjoin defendant from using the invention was one of general equitable jurisdiction which did not arise under the patented laws but under the equity branch of the state law,

* Subsequent opinion 266 P.2d 5.

and jurisdiction over the action was vested in the state court.

3. Judgment ⇐650

Where decree enjoining use of plaintiff's vinegar generator patent was not appealed from and became final, the District Court of Appeal would accept it as conclusive.

4. Contempt ⇐40

A defendant may be proceeded against in the event of a completed act of contempt and punished to vindicate the authority of the law, or a civil contempt proceeding may be had against him for damages resulting from the contumacious act.

5. Contempt ⇐40

Civil contempt proceedings are between the original parties and are instituted and tried as part of the main issue, but criminal contempt proceedings are between public and defendant and are not a part of the original cause.

6. Contempt ⇐66(1), 67

Common law proceedings in civil contempt are subject to right of appeal, but punitive and coercive contempt proceedings are subject only to review.

7. Contempt ⇐40

The only recourse of a person injured by a contumacious act is through an ordinary civil action. Code Civ.Proc. §§ 307, 1209 et seq., 1218, 1219.

8. Common Law ⇐13
Constitutional Law ⇐257, 304

A state has full control over procedure of its courts, both in civil and criminal cases, subject only to qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal Constitution, but the state is not limited by any provision of the federal Constitution to the practice and procedure which existed at common law.

9. Common Law ⇐11

The codes establish state law respecting subjects to which they relate, but, where the code and other statutes are silent, and there is no other positive law, the common law governs.

10. Statutes ⇐239

Statutes intended to supplant the common law are to be construed liberally and applied where doing so does not violate reason and justice.

11. Injunction ⇐230(1)

When a person has sustained private injury by an act which may also be in contempt of an injunction, he is confined to an ordinary civil action and may not proceed in civil contempt at common law.

12. Constitutional Law ⇐70(1)

When the Legislature establishes a procedure in accordance with which a court is required to act, the court has no power to follow a different course even though it may have jurisdiction over the parties and the subject matter of the action.

13. Certiorari ⇐27

A writ of certiorari may be used to question exercise of unauthorized power in case where the court had jurisdiction of the parties and the subject matter.

14. Injunctions ⇐230(4)

In contempt proceeding by patent holder for defendant's alleged violation of order cancelling defendant's license to build and operate patented vinegar generators and enjoining his use of the invention, awarding compensatory damages and directing destruction of generators built by defendant was improper and beyond court's jurisdiction, since the code limits patent holder's remedy to bringing of an ordinary civil action for injuries resulting from the violation. Code Civ.Proc. §§ 307, 1209 et seq., 1218, 1219.

Brobeck, Phleger & Harrison, San Francisco, Christy, Parmelee & Strickland, Pittsburgh, Pa., Paul M. Duff, Pittsburgh, Pa., for petitioner.

Morris Lowenthal and Juliet Lowenthal, San Francisco, for respondent.

JONES, Justice pro tem.

This proceeding in certiorari is to review an order of the Superior Court of Alameda County adjudging petitioner guilty of con-

tempt of court and awarding compensatory damages to respondent on account of an alleged violation of an injunction against the use of a patent.

In 1937, Owens, the respondent, was granted a patent by the United States covering the construction and operation of a giant vinegar generator. The Heinz Company, the petitioner, is engaged in the business of processing foods, and in this business uses large quantities of vinegar. On November 25, 1941, it obtained from Owens a license to build and operate vinegar generators of the type and kind covered by his patent. A dispute later arose as to the rights of the company under the license contract and Owens filed suit for declaratory relief, to cancel the contract, and for an injunction against the use of his invention by the company. The grounds urged for cancellation were fraud and lack of consideration. Owens was granted a decree cancelling the license and enjoining the Heinz Company against further use of the patent. No appeal was taken from the judgment and, if valid, it is now final.

The record discloses that after the entry of the decree, and in alleged violation thereof, the Heinz Company built and was operating sixteen giant generators in this and other states. The combined average output of these generators exceeded twenty-six thousand gallons of vinegar per day. On September 8, 1949, Owens filed an affidavit in the case charging the Heinz Company with violation of the injunction. An order was issued directing the petitioner and its employee, O. R. Hayes, to show cause why they should not be held in contempt of court. Both the company and Hayes demurred to the affidavit, and to the order to show cause. At the same time they filed an answer to the order to show cause. A motion was then made to dismiss the order, which motion was denied. This left the pleadings in the contempt proceeding in that state where there was a demurrer to the affidavit and an answer to the order to show cause. Before the matter was brought on for hearing an amended answer to the order to show cause was filed, which amended answer denied the allegations of the Owens' affidavit, set up numerous affirmative allegations of fact and carried with it a prayer for affirmative relief.

[1] Petitioner has consistently contended by its demurrers as well as by its answers that the charging parts of respondent's affidavit which read, "* * * affiant *is informed* that the H. J. Heinz Company has built, constructed and installed vinegar generators of the type, kind or character covered by the Letters Patent of the United States owned by affiant, Charles H. Owens, other than the one generator installed by affiant at the H. J. Heinz Company factory in Berkeley, California in 1941; affiant *is informed* that said H. J. Heinz Company has installed said generators in its Berkeley factory, as well as in other factories of the company in other parts of the United States", and "That your *affiant believes* that the H. J. Heinz Company has appropriated the invention covered by affiant's Letters Patent on the vinegar generator, etc." are insufficient to charge a contempt. (Emphasis added.) Respondent on the other hand advances the argument that notwithstanding any defect in the affidavit petitioner appeared and submitted itself to the jurisdiction of the court and became an affirmative actor in the proceedings. This contention is, of course, of no force unless the court were empowered to act in the matter. It stands to reason that before one can submit himself to the jurisdiction of a court, the court must have jurisdiction over the action. Without jurisdiction over the subject matter in the court, there is nothing in the way of jurisdiction to which an appearing party can submit himself. The question of jurisdiction over the person, therefore, need not be considered unless it appears that the court had power to render the judgment which is here under review.

A mass of evidence was admitted into the record and the court also viewed the generator allegedly built in violation of the decree located at the Berkeley plant of the petitioner. Counsel stipulated that the fifteen generators in the other plants of petitioner were of the same type and kind as the one in the plant at Berkeley. The evi-

dence was, by this stipulation, made applicable to all of the generators.

From its inspection, and other substantial facts before it, the court found that the Heinz Company was using the Owens' patent in the sixteen generators, and that the use so being made was in violation of the injunction. The company was accordingly adjudged in contempt of court and fined $375,934.66, which said sum the court directed the company to pay to Owens as a compensation for the unwarranted use of his patent.

As a further award, the company was directed to pay Owens $526 per day for each day that the generators were in use after the contempt order, and, to prevent their further use in violation of the injunction, the company was ordered to destroy the generators.

The compensatory award made by the court was based on what it determined was the saving which the Heinz Company made by the use of the Owens' patent over other generators available to it. Production figures were submitted in evidence and from the facts produced it was demonstrated to the satisfaction of the court that the company was making at least two cents per gallon on each gallon of vinegar manufactured by using Owens' patent. The court concluded that this profit was the product of Owens' property and in equity belonged to him, and made its remedial award accordingly.

The judgment of contempt is first challenged by the petitioner on the ground that the injunction is void. It is argued that the action out of which it issued involves patent rights, and that the jurisdiction to decide the questions raised in the case vested in the Federal Courts under the rule that the Federal Courts take jurisdiction of all cases arising under the patent laws. This, however, is not the situation confronting us here. The action was brought by Owens to cancel a contract on the ground of fraud, and to enjoin the further use of his patent. The charge against the defendant was not that it had violated the patent laws, but to set aside the license on the ground that it had been fraudulently and inequitably obtained. A situation similar in many respects was presented in the case of Pendleton v. Ferguson, 15 Cal.2d 319, 326, 101 P.2d 81, 85, 688, where the Court said. "It appears to be the settled rule that while the federal courts have exclusive jurisdiction of all cases arising under the patent laws, such jurisdiction does not extend to all questions in which a patent may be the subject-matter of the controversy, for courts of a state may try questions of title, and may construe and enforce contracts relating to patents."

And in Luckett v. Delpark, 270 U.S. 496, 46 S.Ct. 397, 402, 70 L.Ed. 703, 708, cited in Pendleton v. Ferguson, supra, it is said, "that where a patentee complainant makes his suit one for recovery of royalties under a contract of license or assignment, or for damages for a breach of its covenants, or for a specific performance thereof, or asks the aid of the court in declaring a forfeiture of the license, or in restoring an unclouded title to the patent, he does not give the federal District Court jurisdiction of the cause as one arising under the patent laws. Nor may he confer it in such a case by adding to his bill an averment that after the forfeiture shall be declared, or the title to the patent shall be restored, he fears the defendant will infringe, and therefore asks an injunction to prevent it."

[2, 3] It is also pointed out in Wilson v. Sandford, 10 How. 99, 13 L.Ed. 344, that an injunction cannot issue unless the contract is set aside, the court saying, "The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court', and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside." Since Owens' case was of general equitable jurisdiction it did not arise under the patent laws but under the equity branch of the state law and jurisdiction over it vested in the state court. Luckett v. Delpark, 270 U.S. 496, 46 S.Ct. 397, 70 L.Ed. 703, 705; New

Marshall Engine Co. v. Marshall Engine Co., 223 U.S. 473, 480, 32 S.Ct. 238, 56 L.Ed. 513, 516. Nor can it be said that the language of the decree is not sufficient to enjoin the use of the patent, H. J. Heinz Co. v. Owens, 9 Cir., 191 F.2d 257, and no appeal having been taken, and the decree having become final, we must accept it as conclusive.

We now pass to a consideration of the question as to whether a court in this state has the power to make a compensatory award in a contempt proceeding. The court below proceeded upon the theory that in the exercise of the inherent powers vested in the courts at common law it could award compensatory damages in a proceeding in civil contempt. Petitioner, on the other hand, takes the position that there is but one form of action in this state for the redress of a private wrong even though the act by which the wrong is occasioned is in direct violation of a decree of the court, and that the Legislature has provided the machinery for such redress in the statutes authorizing the prosecution of ordinary civil actions.

In those jurisdictions in which the common law prevails three principal procedures are followed by the courts in giving efficacy to their decrees. The distinction between these procedures is pointed out in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797, 806, where it is said: "Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' Bessette v. W. B. Conkey Co., 194 U.S. [324] 329, 24 S.Ct. 665, 48 L.Ed. [997] 1002. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

[4–6] In distinguishing between a refusal to do that which is required by the decree, and doing something which is in violation of it the court said: "On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. * * * Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." And with respect to the remedial aspect attendant upon a completed act of contempt it is said, 221 U.S. 418, 31 S.Ct. 492, 499, 55 L.Ed. 807, "The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience." As the case holds, the defendant may be proceeded against in the event of a completed act of contempt and punished to vindicate the authority of the law, or a civil contempt proceeding may be had against him for damages resulting from the contumacious act. "Proceedings for civil contempt" as the court said, 221 U.S. 418, 31 S.Ct. 492,

499, 55 L.Ed. 807, "are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause." The right of appeal is another characteristic of the common-law proceeding in civil contempt, Penfield Co. v. Securities Exchange Comm., 330 U.S. 585, 67 S.Ct. 918, 91 L. Ed. 1117; Gompers v. Bucks Stove & Range Co., supra, which distinguishes it from the punitive and coercive proceedings which are subject only to review, and which right adds weight to its role as a civil action for the redress of a private wrong.

In Field's draft of the proposed Code of Civil Procedure for the State of New York provision was made for each of the three remedies afforded at common law for proceedings in contempt, but the legislature of this state selected and incorporated into the Practice Act of 1851 and the Codes of 1872, only two of the Field provisions, namely, the remedial proceeding for coercing obedience, now appearing as section 1219 of the Code of Civil Procedure, and that punishing criminally for defiance of the law as set out in section 1218 of the same code.

The section of the Field Code of Civil Procedure—section 1479—dealing with civil contempts which the legislature did not incorporate either in the Practice Act or the Codes reads: "If an actual loss or injury, to a party in an action or special proceeding prejudicial to his rights therein, have been caused by the contempt, the court or officer, in addition to the fine or imprisonment imposed for the contempt, may order the person proceeded against to pay to the party aggrieved a sum of money sufficient to indemnify him, and to satisfy his costs and expenses which order, and the acceptance of money under it, is a bar to an action by the aggrieved party for such loss or injury."

The omission of the Legislature to incorporate the foregoing section of the Field Code into Title V of Part III of the Code of Civil Procedure, which is the Title dealing with contempts, can not be charged to anything but evident intent. When the codes were adopted the Legislature had in mind a simple and direct procedure for all civil actions. It proceeded to enact section 307 of the Code of Civil Procedure, providing that, "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." The alternative choice of proceeding in civil contempt in the action producing the violated decree as was the right at common law, and outlined in the Field draft, was eliminated and the single substitute given of an ordinary civil proceeding. If section 1479 of the Field Code had been adopted, a conflict with other sections of the code would have been produced. Two forms of action would have been permitted to one injured by a contumacious act, while only one form of action would have been available to one injured by an act not a contempt. But by providing a single form of action for the redress of all private wrongs the Legislature created a vehicle by means of which all persons alike might pursue this remedy for a private wrong whether it be occasioned by an act of contempt or any other injurious act.

By limiting a person injured by a contumacious act to recourse through an ordinary civil action the Legislature in nowise deprived him of his remedy. It is only the procedure by which he may secure his right that is changed and limited to the one form of action.

[8] That the Legislature is empowered to so regulate such procedure is not open to question for as is stated in People v. Hickman, 204 Cal. 470, 478, 268 P. 909, 913, 270 P. 1117, "A state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal Constitution. It is not tied down by any provision of the federal Constitution to the practice and procedure which existed at common law. Subject to

the limitations noted, it may avail itself of the wisdom gathered by experience to make such changes as may be necessary", citing Brown v. State of New Jersey, 175 U.S. 172, 175, 20 S.Ct. 77, 44 L.Ed. 119. This rule that the Legislature is invested with the power to regulate the procedure by which the jurisdiction of a court may be exercised also finds expression in the cases of Sacramento & San Joaquin Drainage Dist. v. Superior Court, 196 Cal. 414, 238 P. 687, and In re Garner, 179 Cal. 409, 177 P. 162.

[9, 10] Although, as is said in Re Estate of Wickes, 128 Cal. 270, 274, 60 P. 867, 868, 49 L.R.A. 138, "The common law is the rule of decision in this state, where no positive law, state or national, obtains", yet as the court states in Burlingame v. Traeger, 101 Cal.App. 365, 371, 281 P. 1051, 1053, "It must also be borne in mind that 'our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein' ([In re] Estate of Carragher [Carraghar], 181 Cal. 15, 183 P. 161, 163 [164]), and that their provisions establish the law of this state respecting the subjects to which they relate. (In re Apple, 66 Cal. 432, 6 P. 7; McLean v. Blue Point Gravel Min. Co., 51 Cal. 255). It is only when the Code and other statutes are silent that the common law governs." Statutes intended to supplant the common law are to be construed liberally and applied where it can be done without violating reason and justice for as is said in Re Estate of Paterson, 34 Cal.App.2d 305, 315, 93 P.2d 825, 831, "Section 4 of the Code of Civil Procedure now reads, and has so read since 1872, that: 'The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.'"

With respect to the contempt sections of the Code the Supreme Court in the case of In re Morris, 194 Cal. 63, 69, 227 P. 914, 916, said that "It was the plain intent of the Legislature expressed in the cited code sections to give a double aspect to the wrongful acts there enumerated. In one aspect they are to be regarded as offenses against the dignity and authority of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure. In the other aspect they are to be regarded as offenses against the peace and dignity of the people of the state of California, and remediable as such in accordance with the rules prescribed in the Penal Code." And in that case the court further stated that, "It is apparent upon reflection that the same act may at the same time take on a third aspect in which it is to be regarded as an offense against private rights, and remediable as such by an ordinary action at law."

This procedure was followed in Kirby v. San Francisco Sav. & Loan Soc., 95 Cal.App. 757, 273 P. 609, where plaintiff sought to recover damages in an ordinary civil action for a loss resulting from the violation of an injunction. The trial court sustained a demurrer to the complaint on the theory that such an action was not the proper course to pursue. On appeal the order sustaining the demurrer was reversed.

[11] The statutes and the decisions firmly establish the rule in this state that when a person has sustained a private injury by an act which may also be in contempt of an injunction he is nevertheless confined in the pursuit of his remedy to an ordinary civil action, and is not authorized to proceed in civil contempt at common law.

[12, 13] When the Legislature has established a procedure in accordance with which a court is required to act, the court has no power to follow a different course for to do so would be to trespass upon the legislative function. This is true even though the court may have jurisdiction over the parties and the subject matter of the action. As is said in Fortenbury v. Superior Court, 16 Cal.2d 405, 407, 106 P. 2d 411, 412, "A court may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power

to act in the case except in a particular way. Under such circumstances, it is now generally held that the court had no jurisdiction. As pointed out in the case of Spreckels S[ugar] Co. v. Industrial Acc. Comm., 186 Cal. 256, 260, 199 P. 8, 9, 'the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has * * *.'" And again in the Fortenbury case 16 Cal.2d at page 408, 106 P.2d at page 413, the court said, "More recently, this court again recognized the confusion which exists in determining whether, in a given situation, there was a lack of jurisdiction or mere error in the exercise of jurisdiction. Upon the authority of the Spreckels case and other decisions, it held 'that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and *certiorari* will lie to correct such excess'. Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112. In other words, under the modern practice, the writ of *certiorari* may properly be used to question the exercise of unauthorized power in a case where the court had jurisdiction of the parties and the subject matter."

[14] In the case before us the court proceeded, not in accordance with the procedure prescribed by the codes for the prosecution of an ordinary civil action for the recovery of damages but contrary thereto. It followed the course of a proceeding in civil contempt at common law, and awarded compensatory damages for the alleged wrong. Since there is no authority for such a proceeding in contempt in this state, the court acted without jurisdiction in making the remedial award and directing the destruction of the generators.

The judgment is annulled.

NOURSE, P. J., and DOOLING, J., concur.

PEOPLE v. SPINOSA.

Cr. 2834.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1953.

Rehearing Denied Feb. 14, 1953.

Hearing Denied Feb. 26, 1953.

Defendant was convicted in the Superior Court, City and County of San Francisco, Twain Michelsen, J., of illegal possession of heroin, and he appealed. The District Court of Appeal, Peters, P. J., held that it had been error to refuse defendant instructions on his theory of the case supported by the evidence.

Reversed.

1. Criminal Law ⇐791

Where defendant, in prosecution for illegal possession of heroin, supported with evidence his theory that at time of his arrest two officers, in plain clothes and without disclosing that they were officers, had broken into room and attacked him, he was entitled to have jury told that, under those circumstances, he had lawful right to resist the attack, and that no adverse inferences should be indulged in because of such resistance. Pen.Code §§ 836, 841, 843.

2. Witnesses ⇐321

To permit impeachment of one's own witness, three elements must exist: (1) damage to party calling witness; (2) materiality of evidence; and (3) surprise at his present testimony.

3. Witnesses ⇐380(5)

In prosecution for illegal possession of heroin, where basis of defense was that another occupant of hotel room at time of defendant's arrest had placed heroin where it was found, and such person, upon being called as witness for defendant, testified that he had not placed heroin where it was found, it was error to refuse to permit defendant to show, by way of impeachment, that witness had testified, at a prior hearing, that he had placed heroin where it was found, notwithstanding fact that witness had made contradictory statement at such prior hearing. Code Civ.Proc. § 2049.

4. Witnesses ⇐321

The purely formalistic concept, that party producing a witness vouches for him and is bound by his testimony, should not preclude impeachment where fairness requires it, and trial court should be liberal in permitting such impeachment, resolving all doubts in favor of allowing testimony.

Nathan C. Coghlan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Charles E. McClung, Deputy Atty. Gen., for respondent.

PETERS, Presiding Judge.

Joseph E. Spinosa appeals from the order denying his motion for a new trial and from the judgment finding him guilty of illegal possession of heroin.

Appellant pleaded guilty to the charge of four prior state and federal narcotic convictions. On January 4, 1951, the date of the offense here involved, he was on federal parole. He testified that on January 3, 1951, he had met on the street one Severson, an old friend whom he had not seen for ten years, and that Severson had invited him to visit him at the hotel in San Francisco where he was living. The next day, being in the vicinity of the hotel, he called upon Severson, testifying that, although he knew that Severson in the past had "fooled around" with narcotics, the purpose of this visit was purely social. When appellant arrived at Severson's room one Morgan, who lived with Severson, was also there. Morgan immediately left.

Morgan and Severson had been under surveillance by two federal narcotic officers, Mulgannon and Traynor by name. When Morgan left the hotel he was taken into custody by these two officers, and the three men then returned to the room occupied by Severson. Morgan refused to seek admittance, so one of the officers knocked on the door, simulated Morgan's voice, and asked to be admitted. The two officers did not then know that appellant was in the room.

Appellant testified that this knock on the door occurred about five minutes after he had arrived. During that period he told Severson that he was out on parole and wanted to stay out of trouble. Severson told him that he, Severson, was not "fooling around" with narcotics.

Although appellant's testimony is somewhat confusing as to what happened when the agents knocked on the door, appellant finally testified that Severson jumped up, ran to the bathroom door, opened it, and then insisted that appellant go in the bathroom because he, Severson, wanted privacy with the visitors. There is also some confused testimony by appellant about a prior visit to the bathroom during the five-minute interval when some unidentified visitor called and Severson insisted that appellant retire to the bathroom. Although the trial court twice characterized appellant as an "evasive" witness, some of the inconsistencies appearing in his testimony can be explained by the fact that the record shows that appellant was not too bright and, on occasion, did not understand some of the long and involved questions asked him.

Mulgannon testified that when Severson opened the door he, Mulgannon, pushed the door fully open and saw a figure, later identified as appellant, rushing towards a door, which it later was discovered was the bathroom. The witness stated that he and appellant pushed back and forth on the bathroom door until Traynor came and lunged against it pushing it inward. A wrestling struggle took place between Traynor and appellant, and finally appellant was forced out into the bedroom and required to lie face down on the floor. Mulgannon, who had followed Traynor into the bathroom, testified that as he rushed into the bathroom he observed something floating in the toilet bowl. He removed a pink package that turned out to contain 9 grains of heroin. This bindle was only wet on one side when removed from the toilet. It is this bindle that constitutes the basis of the charge here involved.

The appellant's testimony depicts the facts quite differently. He testified that he

was in the bathroom with the door shut a couple of minutes before the officers came in; that the two officers then dashed into the room like "bandits," and hit the bathroom door, knocking him down and jumping upon him. At all times he vehemently and consistently denied that he had placed the pink bindle in the toilet bowl, that it belonged to him, or that he knew it was there.

It should be here noted that these two federal agents were dressed in plain clothes and had no search warrant. They had no reason to believe that appellant was committing a crime in the room, because they did not even know that he was there. They did not identify themselves as officers when in the hallway, nor when they dashed into the room. They conceded that they did not mention that they were officers until after appellant had been dragged from the bathroom and was struggling with officer Traynor in the bedroom. Admittedly Mulgannon was armed with a gun, but Traynor was unarmed. At some stage in the proceedings Mulgannon drew his gun and used it to subdue appellant.

It should also be noted that the state introduced into evidence a diagram of the bedroom and bathroom. For more unexplained reason the diagram failed to disclose that there were two doors to the bathroom, one leading to Severson's bedroom and the other, apparently, leading to an adjoining bedroom. The prosecutor, when this error was called to his attention, readily admitted the oversight, but failed to produce any evidence as to whether the second door was locked or unlocked, or where it led.

After appellant had been subdued he was searched, and nothing incriminating was found upon his person. The officers then searched the room and the other two occupants. Morgan had in his possession a white bindle containing six grains of heroin and some hypodermic equipment. On and under the bed near where Severson was sitting the two officers found two packages of marijuana cigarettes, containing a total of 171 grains of that narcotic. Severson, while at first denying ownership, finally admitted that this marijuana belonged to him.

There is much confusion in the record about the admissions of Severson when the narcotics were found. Both the agents and appellant agree that Severson stated that appellant did not live in the room, was just a visitor, had only been there a few minutes before the raid, was out on parole, and should be given a "break." Appellant testified that Severson also stated that he, appellant, had nothing to do with the narcotics found by the officers, and that he, Severson, had thrown the pink bindle into the toilet. The two officers contradicted this testimony, stating that upon being questioned each of the three occupants denied ownership of the pink bindle, or that he had thrown it into the toilet.

At the trial Severson, who was then imprisoned at Folsom, was called as a witness by the appellant. He refused to answer most questions asked of him, claiming his privilege against self-incrimination, but finally did answer "no" when asked if he had dropped the pink bindle into the toilet. Thereupon, appellant attempted to impeach him, making an offer of proof that Severson had admitted, on appellant's preliminary hearing, that he had dropped the pink bindle into the toilet. The trial court, upon a showing that Severson had also testified at that hearing that he had not done so, held that appellant was not damaged by the testimony, and refused to permit the impeachment.

Appellant makes two major and many minor contentions on this appeal. In our opinion both major contentions are sound, which makes it unnecessary to consider the minor assignments of error.

[1] The first major contention of appellant is that he was not permitted, on cross-examination of the officers, to develop the fact that the arrest was illegal, and was denied instructions proffered by him, to the effect that a person may use reasonable force to resist an unlawful arrest.

The appellant offered two instructions on this issue, both of which were refused.

The first of these would have told the jury that a person subjected to an unlawful arrest may use reasonable force to free himself from the unlawful restraint. The second of these refused instructions outlined the circumstances under which a lawful arrest may be made as defined in section 836 of the Penal Code. It must be remembered that it was the theory of the appellant, supported by evidence produced on his behalf, that he was in the bathroom when the two officers, in plain clothes and without disclosing that they were officers, see Penal Code, §§ 841, 843, broke into the bathroom and attacked him. At the trial the prosecution made much of the fact that appellant resisted the officers, and on the argument to the jury contended that such resistance was equivalent to flight and, as such, an admission of guilt. But according to appellant's testimony, he did not flee at all, but was attacked in the bathroom. If his testimony were believed by the jury, then he was entitled to have the jury told that, under those circumstances, he had the lawful right to resist the attack, and that no adverse inferences could be indulged in because of such resistance.

The rule, supported by several cases, is stated as follows in 5 Cal.Jur.2d p. 186, § 30:

"While it is the duty of every citizen to submit to lawful arrest * * * reasonable resistance to an unlawful arrest may rightfully be made either by the person sought to be arrested or by third persons acting in his aid * * *.

"The authority for the rule that if an arrest is unlawful, either the person being arrested or others acting in his behalf may resist, using no more than reasonable force, is derived from the statutes providing that lawful resistance to the commission of a public offense may be made by the party about to be injured * * *. These provisions are applicable because the effect of the statute defining false imprisonment as the unlawful violation of the personal liberty of another is to make an unlawful arrest a public offense."

On this appeal the respondent argues, as did the prosecutor at the trial, that evidence that the arrest was illegal was properly excluded because the resistance here involved was part of an attempt at flight, and that the state of mind of appellant in resisting would only be relevant had appellant actually known that the officers had no warrant. Here the evidence shows that the officers did not identify themselves as officers until after they dragged appellant into the bedroom and until that time said nothing about appellant being under arrest. Certainly appellant was not required to prove that he did not know that the officers did not have a warrant when he testified that he did not know they were officers. While the evidence produced by the prosecution tended to show something akin to flight, appellant's testimony contradicted this evidence directly. Appellant was entitled to show that the arrest was illegal, and was entitled to instructions on his theory of the case supported by evidence. To refuse appellant instructions and the right to produce evidence on this issue, was error of a most serious nature.

The second serious error was committed when the trial court refused to permit appellant to impeach his own witness, Severson. As already pointed out, Severson was called as a witness by appellant. Severson was then confined at Folsom. The trial court carefully instructed Severson as to his privilege against self-incrimination. Severson, on the ground of that privilege, refused to answer most questions, but did answer some, and did testify that he had not dropped the pink bindle of heroin into the toilet. Appellant then claimed surprise, and, outside the presence of the jury, offered to prove that before the committing magistrate Severson had testified that he dropped the pink bindle into the toilet. The prosecutor countered with the statement that at that same preliminary hearing Severson had testified that he knew nothing about the pink bindle. It was then admitted by all concerned that, at the preliminary hearing, Severson had first testified he knew nothing about the pink bindle, but on redirect examination admitted ownership of it, and admitted that he had thrown it into the toilet. The prosecutor argued that there could be no surprise

when appellant knew that the witness had previously testified both ways on the issue. The trial court, on the assumed authority of People v. Newson, 37 Cal.2d 34, 230 P.2d 618, refused to admit the impeaching evidence, holding that a negative answer was not damaging within the impeachment rule.

[2] The evidence should have been admitted. To permit impeachment of one's own witness in this state, three elements must exist: (1) damage to the party calling the witness; (2) materiality of the evidence; and (3) surprise at his present testimony.

That the evidence was material is not disputed. But the trial court believed that, under the Newson case, a negative answer is never damaging, and on that ground sustained the objection. In that case the court held that it was error to permit the prosecution to impeach its own witness who, upon being expected to testify that she saw defendant upon looking into a drugstore where two murders were committed, testified that she did not see anyone. It was held that this evidence was not damaging since the witness did not say that the defendant was not there, nor that there was no one there. The court stated, 37 Cal.2d at page 41, 230 P.2d at page 622: "Where a witness states no fact against the party calling him, there is nothing to counteract. The testimony which may be contradicted must be prejudicial and detrimental, otherwise the previous statement shown would stand out, not as offsetting contrary testimony already given, but as substantive evidence of a fact." Thus the rationale of the descision was not that a negative answer is never damaging, but that if the impeaching evidence is not needed to contradict, it should be excluded as serving no legitimate purpose.

The respondent, while admitting that there is some difference in degree between the damage caused the prosecution by the negative answer in the Newson case and the damage caused appellant by such answer in the instant case, nevertheless argues that it is the law that no legal detriment arises upon an answer entirely negative. In that connection, in addition to the Newson case, respondent places considerable reliance on the case of People v. Godwin, 123 Cal. 374, 55 P. 1059, a prosecution for seduction of a previously chaste woman. There it was held that the defense could not impeach a witness who, contrary to expectations, testified at the trial that he had not had intercourse with the prosecuting witness. It is argued that this case and the instant case are the same because in the Godwin case the "no" answer was some indication of the prosecuting witness' chastity, and so damaging to the defense, while in the instant case Severson's denial merely increased the odds that appellant had placed the heroin in the toilet. The two cases are not comparable. In the Godwin case the testimony of non-intercourse with the witness was only of the slightest damage to the defendant. Obviously, the failure to have had intercourse with one particular man does not mean that the prosecuting witness may not have had intercourse with every other male of her acquaintance. Each case must turn on its own facts. Here, under the facts, the jury was faced with but two probabilities—that is, that either Severson or appellant placed the heroin in the toilet bowl. There were other slight possibilities, but from a practical standpoint those were the only two reasonable probabilities. Here the very basis of appellant's defense was that Severson placed the heroin where it was found. When Severson testified at the trial that he had not placed the heroin there, this was very damaging, indeed, to appellant. If believed, the only other reasonable alternative was that appellant must have been the culprit.

There are many cases holding that negative testimony can be damaging within the meaning of the impeachment rule. See, for example, In re Estate of Johnson, 152 Cal. 778, 93 P. 1015; Rystinki v. Central California Traction Co., 175 Cal. 336, 165 P. 952; People v. Gallagher, 12 Cal.App. 2d 434, 55 P.2d 889; People v. Jaggers, 120 Cal.App. 733, 8 P.2d 206; People v. Mallicoat, 27 Cal.App. 335, 149 P. 1000.

Moreover, there are cases that permit impeachment not because the trial testimony was detrimental, but because of the psychological loss of position before a jury caused by a disappointing witness. The most recent case of this type is People v. LeBeau, 39 Cal.2d 146, 245 P.2d 302. There the defendant, accused of unlawful possession of narcotics, testified that he never had had narcotics in his possession, and never had had any contact with them. He denied, on cross-examination, that he was a user of narcotics, and denied telling one Nancy that he was a user of cocaine. In rebuttal, the prosecution called Nancy and asked her if LeBeau had not told her he was a cocaine user. She replied "No." The prosecution was allowed to impeach her by the testimony of a police inspector that prior to trial she had stated that LeBeau had told her that he was a user. This was upheld by the majority of the Supreme Court. The appellant, in that case, relied upon the Newson case for a reversal. The Supreme Court discussed that case as follows, 245 P.2d at page 303: "The Newson case did not, of course, purport to lay down a rule that all negative answers are harmless, and it is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached has actually damaged the party calling him." The court went on to hold that unless the prosecution was permitted to impeach Nancy it would create a damaging impression before the jury, because it would make it appear that the prosecution had been harassing defendant and attempting to discredit him by asking him if he were a user. "Under the circumstances the prosecution was entitled to correct this damaging impression by cross-examining its own witness * * *". 245 P.2d at page 304. See, also, People v. Deckert, 77 Cal.App. 146, 246 P. 157; People v. Wright, 26 Cal.App.2d 197, 79 P.2d 102.

[3] The rule of the LeBeau case is here controlling. Here appellant, through his testimony, had built up the defense that Severson must have been the guilty party. When appellant produced Severson the jury could well expect that he was called to prove that fact. When Severson stated that he had not placed the heroin where it was found a most damaging impression was left with the jurors. To hold that evidence that the only other suspect involved did not commit the crime is not damaging is to close one's eyes to the realities of the situation. If the prosecution is "damaged" because of the possibility of creating a "damaging impression," as was held in the LeBeau case, certainly the defense is "damaged" by testimony that the only other suspect involved did not commit the crime. The rule works both ways. In this case there was "damage" both in the testimonial and the psychological meanings of that term.

But, says the respondent, even if there were damage, appellant was not "surprised" by Severson's testimony because that witness, at the preliminary examination, had given evidence both ways on the subject under discussion. It is argued that the trial judge has a wide discretion in determining whether surprise exists, and that where the witness has given prior testimony both ways on the subject, the trial court, in its discretion, could determine that it was not "surprising" that the witness at the trial testified either way on the subject. Appellant argues that he had a legal right to presume that Severson would testify in accordance with his last testimony given at the preliminary, which was to the effect that Severson had thrown the heroin in the toilet.

This element of "surprise" as part of the impeachment rule has been added by the courts. Section 2049 of the Code of Civil Procedure merely provides that the "party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony * * *." There are many states that hold that "surprise" is not properly part of the impeachment rule at all. (See discussion and cases cited in III Wigmore on Evidence (3rd ed.) p. 383, et seq.) But there can be no doubt that in this state the "surprise" requirement has been

made by the cases an integral part of the impeachment rule. See discussion in Sandoval v. Southern Cal. Enterprises, Inc., 98 Cal.App.2d 240, 219 P.2d 928.

[4] The trial judge undoubtedly has some discretion in ruling upon whether "surprise" in the legal sense exists. People v. Jaggers, 120 Cal.App. 733, 8 P.2d 206; Sandoval v. Southern Cal. Enterprises, Inc., 98 Cal.App.2d 240, 219 P.2d 928. However, the purely formalistic concepts that the party producing a witness vouches for him and is bound by his testimony, should not preclude impeachment where fairness requires it. Thus it has been held that the trial courts should be liberal in permitting such impeachment, and doubts should be resolved in favor of allowing the testimony. Stevenson v. Alta Bates, Inc., 20 Cal.App.2d 303, 66 P.2d 1265.

We have been cited to no case, nor have we found any, that deals with the question as to whether a party is legally surprised when his witness at the trial testifies adversely when he knows that the witness has previously testified both ways on the issue, but his testimony latest in point of time was favorable to the one producing him. There are cases holding that the trial court can properly find against surprise when the witness sought to be impeached testified previously and at the trial in the same way. Anthony v. Hobbie, 85 Cal.App.2d 798, 193 P.2d 748; Sandoval v. Southern Cal. Enterprises, Inc., 98 Cal. App.2d 240, 219 P.2d 928; In re Estate of Dolbeer, 153 Cal. 652, 96 P. 266. There are also cases holding that impeachment is allowed where the prior testimony is contrary to that given at the trial. People v. Gist, 28 Cal.App.2d 287, 82 P.2d 501; People v. Humphrey, 27 Cal.App.2d 631, 81 P.2d 588; Werner v. Southern Pacific Co., 44 Cal.App. 76, 185 P. 1016.

What should be the rule where the witness has previously testified both ways on the question? An absolute rule cannot be laid down. It partly depends upon the nature of the testimony. But where a witness, previous to trial, and under oath, first denies that he committed the crime, and then admits that he did so, keeping in mind that by his admission he is confessing to the crime, it would appear that the defendant could reasonably suppose that, if the witness has once confessed to the crime, he would do so again. He is legally "surprised" when the witness testifies to the contrary at the time of trial.

There are other errors charged. The trial judge, on several occasions, without warrant so far as the record discloses, castigated appellant's counsel before the jury, on one occasion completely preventing any argument on a debatable issue and making a veiled reference to appellant's eventual right of appeal, thus indicating to the jury that he anticipated a conviction. These and other errors need not be discussed because they are not apt to occur on the new trial. The two errors discussed were clearly prejudicial. The evidence, while sufficient to support a conviction, is not strong. Undoubtedly the fact that appellant resisted the officers was telling evidence against him. When the trial court erroneously refused to permit appellant to produce the facts, if he could, to show that such resistance was lawful and reasonable, and refused to instruct on the issue, it dealt the defense a serious and prejudicial blow. When it refused to permit appellant to impeach Severson by showing that he had admitted his guilt at the preliminary hearing, such ruling took away from appellant his main defense.

The judgment and order appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.

Walter Franklyn GROSS v. TIPTON.*

Cr. 8286.

District Court of Appeal, Third District, California.

July 24, 1952.

PER CURIAM.

The petition for writ of mandamus is denied on authority of section 5519 of the Welfare and Institutions Code.



115 Cal.App.2d 502

Ex parte GROSS.

Cr. 4897.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1953.

Proceedings on motion for subpoena and writ of attachment and on motion to annul and vacate sexual psychopathy proceedings. From orders of the Superior Court of Los Angeles County, Philip H. Richards, J., denying such motions, movant appealed and the Attorney General moved to dismiss the appeals. The District Court of Appeal, Drapeau, J., held that appeal from order denying motion for subpoena and writ of attachment should be dismissed where similar motion subsequently filed had meantime been granted and requested proceedings set in motion.

Appeals dismissed.

1. Criminal Law ⇐625

Appeal from order denying motion for subpoena and writ of attachment to require superintendent of mental hospital to which movant had been committed as a sexual psychopath to certify to committing court his opinion as to whether movant was still a sexual psychopath should be dismissed, where similar motion subsequently filed had meantime been granted and the requested proceedings set in motion, resulting in commitment by movant as a sexual psychopath to department of mental hygiene for placement. Welfare and Institutions Code, §§ 5500, 5519.

2. Criminal Law ⇐625

Sexual psychopathy proceedings are civil in nature and order denying motion to annul and vacate such proceedings was interlocutory and hence not appealable. Code Civ.Proc. § 963; Welfare and Institutions Code, §§ 5500, 5519.

3. Criminal Law ⇐625

Where one committed as a sexual psychopath to department of mental hygiene for placement after pleading guilty to a sex offense is returned to committing court because superintendent of mental hospital and director of mental hygiene are of the opinion that he is cured or is no longer a fit subject for confinement in a mental hospital, judgment must be pronounced on his plea of guilty and he must be committed to prison, in absence of facts justifying probation. Welfare and Institutions Code, §§ 5500, 5501, 5517, 5518, 5519; Pen. Code, § 288.

Walter Franklyn Gross, in pro. per.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

In 1948 Walter Franklyn Gross pleaded guilty to violation of Section 288 of our Penal Code. He admitted criminal misconduct upon a nine year old boy. He also admitted prior felony convictions, for which he served prison terms: burglary, sodomy, and lewd and lascivious conduct with a child. At the time of his arrest he had jumped bail in Stockton upon a charge of another sexual crime of the same kind.

Proceedings in the criminal case were suspended. Defendant was adjudged a sexual psychopath, and committed to Camarillo State Hospital.

Portions of the reports of two medical experts who recommended this commitment are as follows:

1. "Subject * * * is a frank homosexual * * *.

"There is probably no possibility of rehabilitation. His long sentences at San

* Subsequent opinion 270 P.2d 1025.

Quentin and Folsom have had no effect as a deterrent to his compulsion.

"He falls definitely in the category of sexual psychopathy as defined in Section 5500 of the Welfare and Institutions Code, and he should be permanently removed from free association with children or society in a penal or other type of state institution."

2. "This man, in middle life, comes to examination with a history of sexual abnormality covering the greater portion of his life. He has spent nearly fifteen years in prisons and jails for the one recurring offense, and under present conditions can be expected to repeat it again if ever an opportunity is presented to him."

Defendant escaped from Camarillo State Hospital. He was apprehended after a few months of liberty, and was then confined in Mendocino State Hospital.

On July 21, 1952, defendant filed in the Superior Court (No. 39063) a "Motion for subpoena and writ of attachment. This motion was denied July 23, 1952, and defendant filed notice of appeal from that order the same day. Respondent has moved to dismiss this appeal.

July 24, 1952, the District Court of Appeal, Third District, denied defendant's petition for a writ of mandamus, directing the superintendent of Mendocino State Hospital to report whether defendant was still a menace to others, "on authority of Section 5519 of the Welfare and Institutions Code." 252 P.2d 416.

September 18, 1952, defendant filed in the Superior Court of Los Angeles, in the criminal proceeding in which he had been adjudged a sexual psychopath, a paper which he called "Motion for Subpoena and Writ of Attachment." He alleged that the superintendent of Mendocino State Hospital arbitrarily refused to certify him as being no longer a menace to society. He referred to Section 5519 of the Welfare and Institutions Code as authority for his motion and prayed that the court proceed, "in accordance with the statutory proceedings in such case made and provided."

The judge of the Superior Court followed the provisions of the section, and requested the superintendent of Mendocino State Hospital to forward to the committing court his opinion as to whether defendant was still a sexual psychopath.

The superintendent reported that defendant was still a sexual psychopath, and was still a menace to society.

The judge then ordered defendant returned to the Superior Court for further proceedings.

The judge also referred defendant to two medical experts for their reports as to his then psychopathic condition. These experts reported that defendant was still a sexual psychopath, and was still a menace to society, with little hope for recovery.

December 15, 1952, the Court found defendant to be still a sexual psychopath, still a menace to the health and safety of others, and committed him to the Department of Mental Hygiene, for placement at Terminal Island—all in accordance with the provisions of Section 5519 of the Welfare and Institutions Code.

No appeal was taken from this order, and it is now final.

This brings us to a consideration of the only question before this court: Should the Attorney General's motion to dismiss defendant's appeal be granted?

[1] Inasmuch as the motion was finally granted, and the proceedings which defendant himself requested were set in motion, the appeal from the order of July 23, 1952, should be dismissed.

The following facts are necessary to an understanding of this situation: From the date of filing of defendant's motion to the date of the hearing on December 15th, the minutes show that the case was before the Superior Court several times:

September 19, 1952, when the superintendent of Mendocino State Hospital was directed to forward his opinion; October 24th, when the report was received, and defendant ordered returned to the committing court; November 5th, when the matter was continued for further proceedings, and transferred to a trial department of the court; November 17th, when the medical experts were appointed, defendant's motion to vacate the psychopathy proceedings was denied, and the case continued for hearing to December 15th.

On November 17th defendant filed two documents. One he called "Motion to annul, vacate, and set aside further psychopathy proceedings." The other, "Notice of Appeal from the order denying to annul, etc." Treating the last document as a notice of appeal, it must, of course, apply to the court's order of November 17th, denying defendant's motion to annul and vacate the psychopathy proceedings.

[2] The appeal from the order of November 17, 1952 must also be dismissed. The law does not permit appeals from interlocutory orders. The rule in criminal cases is discussed in People v. Barnett, 27 Cal.2d 649, 166 P.2d 4, and in 3 Cal.Jur.2d 539. Sexual psychopathy proceedings being civil in nature, In re Keddy, 105 Cal.App. 2d 215, 233 P.2d 159, the rule is the same. The order of December 15, 1952 was the final judgment in this case. The order of November 17th was interlocutory and not final. Code of Civ.Proc. sec. 963; Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018.

[3] Defendant indulges in a not unnatural, but nonetheless complete misunderstanding, so far as his legal status is concerned. For if he ever is returned to the Superior Court, because the superintendent of a mental hospital and the Director of Mental Hygiene are of the opinion, either that his is cured, or that he is no longer a fit subject for confinement in a mental hospital, then it will become the duty of the judge of the Superior Court to pronounce judgment on his plea of guilty and commit him to state's prison. It is difficult to conceive of any set of facts which would ever justify or permit probation in this case. Sections 5517, 5518, Welfare and Institutions Code; People v. Tipton, 90 Cal.App.2d 103, 202 P.2d 330.

As this court observed in People v. Wells, 112 Cal.App.2d 672, 246 P.2d 1023, one of the purposes of California's sexual psychopathy law is to protect children from degenerates. The law was never intended to be a legal by-pass whereby certain privileged perverts might be kept in mental hospitals for a short time and then released. The only possible advantage to a person adjudged to be a sexual psychopath after conviction is that his confinement may be in a mental institution, rather than in a prison of maximum security. See In re Stone, 87 Cal.App.2d 777, 197 P.2d 847, and amendments to Section 5501, Welf. & Inst. Code, made in 1949. And note the imperative duty of trial courts and district attorneys to insist upon *convictions* in these cases whenever possible.

In the proper administration of the sexual psychopathy law there should be no hope of early release for any sexual psychopath. Indeed, it would seem but fair that such persons should understand that their time of confinement may well be equal at least to time they would have served in state's prison for violation of the law, plus time spent in mental hospitals.

Both attempts to appeal are herein set forth because the clerk of the Superior Court erroneously made an extra file, Gross v. Tipton, No. 39063. All proceedings in this case should be filed in the criminal case, People v. Walter Gross, No. 117937.

The appeals from the orders of July 23, 1952, and November 17, 1952, are dismissed.

WHITE, P. J., and DORAN, J., concur.



115 Cal.App.2d 320

SQUIRE'S DEPARTMENT STORE, Inc. v. DUDUM et al.

DUDUM et al. v. SQUIRE'S DEPARTMENT STORE, Inc.

Nos. 15160, 15161.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1953.

Action by lessor against lessee for damages for fraud in connection with lease calling for rental of 50% of lessee's net profits on leased premises, and second action by lessee for arbitration of dispute in accordance with provision for arbitration of controversies rel-

ative to the determination of rental due under the lease. The Superior Court for the City and County of San Francisco, Edward Molkenbuhr and Clarence Morris, JJ., entered orders from which lessees appealed. The District Court of Appeal, Fred B. Wood, J., held that count of complaint for damages for actual fraud concerning promises made with respect to rental, allegedly without any intention of performing same, sounded in tort, and did not involve rental dispute within arbitration provision of contract.

Order in accordance with opinion.

1. Landlord and Tenant ⇐201

Where lease of basement of department store provided for arbitration of disputes relative to the determination of rental due, with such rental being stipulated for in lease at an amount equal to 50 per cent of lessee's net profits on the premises, complaint in three counts for goods sold, damages for fraudulent diversion of patronage from lessor, and damages for actual fraud consisting of promises in connection with 50 per cent rental, made without any intention of performing same, was not an action upon the contract for rental due, as to which arbitration was required to be invoked.

2. Fraud ⇐31

If a defrauded party is induced by false promises to execute a contract, he need not disaffirm the contract, but he has the option of rescinding or of affirming the contract and recovering damages for fraud. Civ.Code, §§ 1572, subd. 4, 1709, 1710, subd. 4, 3294.

3. Action ⇐27(2)
Landlord and Tenant ⇐201

Count of complaint by lessor against lessee under lease fixing rental at 50 per cent of lessee's net profits on premises, which charged false promises of lessee as to intention to keep separate records with respect to business done on premises, and predetermined fraudulent plan to defraud lessor by concealment and by diversion of revenues to other business premises of lessee, and which sought damages for such fraud and deceit, sounded in tort for breach of an obligation imposed by law, and not upon the lease to enforce obligation to pay rent, even though alleged fraudulent acts might also operate as breach of contract, and consequently provision for arbitration of rental disputes under contract was not operative.

4. Action ⇐27(1)

A demand for exemplary damages is consistent only with a tort action, and not one upon the contract.

5. Landlord and Tenant ⇐201

Where lessee sought arbitration of dispute as to rental as provided for by lease, on ground that lessor had commenced action pertaining thereto, and had refused arbitration, the filing by lessee of answer and cross-complaint to complaint of lessor in its action after lessee's motion to stay certain count pending arbitration had been denied, was not a waiver by lessee of its right, if any, to arbitration, when cross-complaint filed by lessee did not present for determination any dispute which parties had agreed to arbitrate.

6. Landlord and Tenant ⇐201

Party who sought arbitration of rental dispute in accordance with terms of lease, who had made timely application for arbitration by filing petition therefor, and who had made timely application for stay of lessor's action allegedly involving rental dispute, and who, when answering and cross-complaining to latter action, had included plea of arbitration agreement in bar or stay of action of court in every instance, was not in default in proceeding with arbitration, and his right thereto, if any, was not thereby waived. Code Civ.Proc. §§ 1280–1293.

7. Appeal and Error ⇐81

Order vacating order which stayed proceedings on certain count of complaint by lessor against lessee for damages and order vacating order in lessee's proceeding for arbitration which directed arbitration, were interlocutory and nonappealable, but that portion of order in latter proceeding which denied petition for arbitration and dismissed proceedings therefor operated as final appealable judgment.

8. Appeal and Error ⇐119

An order with respect to costs was appealable as a special order made after final judgment.

9. Appeal and Error ⇐854(2), 1122(2)

Where judgment dismissing petition of lessee for arbitration of controversy with lessor was based on erroneous finding of waiver by lessee in lessor's action for damages, of right to arbitration, but record disclosed that no arbitrable dispute had arisen under the lease contract, reviewing court would exercise its statutory power to make findings of fact contrary to and in addition to those made by the trial court, and would affirm the dismissal on the proper ground that no arbitrable dispute was presented.

Hone & Lobree, San Francisco, Hubert D. Forsyth, San Francisco, of counsel, for appellants.

Conrad T. Hubner and Abraham Setzer, San Francisco, for respondent.

FRED B. WOOD, Justice.

Squire's Department Store, Inc., leased a basement store to Ramallah Wholesale Import Company, a copartnership, for the period March 16 to December 31, 1949, at a rental in the amount of 50% of the lessee's net profits at these premises. At the end of the term the lessee vacated and paid no rent, claiming there were no net profits.

A controversy has arisen between the parties. The main question is whether or not this controversy includes a "dispute" relative to "determination of the rental due" under the lease, and as such subject to arbitration. The lease provided: "In the event of any dispute between the Lessor and the Lessee relative to the determination of the rental due hereunder, they shall each select an arbitrator, the two arbitrators so selected shall select a third arbitrator, and the three arbitators so selected shall hear and determine the controversy and their decision thereon shall be final and binding upon both the Lessor and the Lessee, who shall bear the cost of such arbitration equally between them."

A subsidiary question is whether or not Ramallah, the lessee, who is insisting upon arbitration, has waived the right thereto.

[1] Within three months of the expiration of the lease, Squire's, the lessor, filed a complaint against Ramallah in the superior court (Action No. 395,802 in the trial court; No. 15160 in this court; hereinafter called the "first action"). Of the three counts alleged, two had nothing to do with rent. Count II was for goods sold. Count III was for damages for asserted fraudulent diversion of patronage from the plaintiff.

Nor did count I present an arbitrable dispute. It was not an action upon the contract for "rental due." It was an action to recover "damages" for actual fraud. The fraud consisted of promises "made without any intention of performing" them. Civ.Code, § 1710, subd. 4 and § 1572, subd. 4; Union F. M. v. Southern Cal. F. M., 10 Cal.2d 671, 676, 76 P.2d 503. "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Civ.Code, § 1709. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, § 3294.

[2] If the defrauded party is induced by such false promises to execute a contract, he need not disaffirm the contract. He has the option of rescinding or of affirming the contract, and recovering damages for the fraud. Hines v. Brode, 168 Cal. 507, 511–512, 143 P. 729; Thompson v. Modern School, etc., 183 Cal. 112, 190 P. 451; Morey v. Bovee, 218 Cal. 780, 25 P. 2d 2; Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935; Hickman v. Johnson, 36 Cal.App. 342, 178 P. 145; Security Commercial etc. Bank v. Seitz, 43 Cal.App. 353, 185 P. 188; Hullinger v. Big Sespe Oil Co., 50 Cal.App. 6, 194 P. 742; Howland v. Meximerican Co., S. A., 55 Cal.App. 581, 583–584, 203 P. 1019; Mahony v. Haines, 66 Cal.App. 456, 226 P. 620; Connelly v. J. D. Millar Realty Co., 131 Cal.App. 67, 69, 20 P.2d 781; Hjorth v. Bernstein, 44 Cal.App.2d 561, 564, 112 P.2d 643; Williamson v. Clapper, 88 Cal.App.2d 645, 653, 199 P.2d 337; Le Clercq v. Michael, 88

Cal.App.2d 700, 703, 199 P.2d 343; 12 Cal. Jur. 781, Fraud and Deceit § 49; 24 Am. Jur. 21–24, Fraud and Deceit § 200.

In count I, Squire's without disaffirming the contract alleged that, in order to induce Squire's to lease this basement store, Ramallah promised to pay Squire's as rental a sum equal to 50% of the net profit to be derived by Ramallah; that Squire's, relying upon such promise, executed a lease of the store; that Squire's has fully performed the lease; that Ramallah had possession and conducted business throughout the term and has paid no rental therefor; that Ramallah has made statements indicating a net loss and a lack of net profit earned during the term but that these statements were and are false and untrue and were made pursuant to a secret predetermined fraudulent plan of Ramallah to cheat and defraud Squire's; that there never was any intention by Ramallah to ever pay Squire's for the possession, use and occupancy of the premises; that prior to executing the lease Squire's did not know of said fraudulent plan; that Squire's believed the promises of Ramallah as set forth in the lease, particularly that Ramallah would abide by its agreement to keep separate and accurate sales records of all business done in, upon or from the demised premises and would enter all receipts and expenses arising from said business in regular books of account kept by Ramallah for said purpose, whereas by various fraudulent devices, such as diverting all substantial purchases originating upon the premises to the wholesale business of Ramallah at a different location, by failing to record sales made at the premises or diverted to other locations, by charging unreasonable salaries and padding the payroll, and by the assertion of false cost of merchandise and by asserting false operating costs and charges against the operation of the business, Ramallah fraudulently concealed from Squire's, from the inception of the lease, the true revenues and net profits of the business conducted thereat; that had Squire's known of the fraudulent and corrupt plan and the corrupt design and intent of Ramallah, it would not have entered into the lease; that not until the end of the term and the denial by Ramallah of any indebtedness to plaintiff did said fraudulent plan of Ramallah stand revealed to Squire's; that through said possession, use and occupancy of the demised premises Ramallah earned and received a net income in excess of $35,000; that it would be an unjust enrichment of Ramallah to permit Ramallah to retain such ill-gotten gain and that in equity and good conscience the sum of $35,000 is justly due Squire's and that Squire's has been damaged by Ramallah's fraud and deceit in the sum of $35,000; that Ramallah has thus been guilty of oppression, fraud and malice, and Squire's, in addition to the actual damages alleged, is entitled to $15,000 further damages from Ramallah for the sake of example and by way of punishing Ramallah.

[3] Quite clearly, in count I, Squire's is suing for the breach of an obligation imposed by law, not for the breach of a contractual obligation to pay rent. That characterizes it as an action in tort, not an action sounding in contract. Nathan v. Locke, 108 Cal.App. 158, 161–162, 287 P. 550, 291 P. 286, and De Mirjian v. Ideal Heating Corp., 91 Cal.App.2d 905, 908–909, 206 P.2d 20. That is so even though the alleged fraudulent acts might also operate as a breach of an obligation created by contract. Chelini v. Nieri, 32 Cal.2d 480, 486, 196 P.2d 915; Haigler v. Donnelly, 18 Cal.2d 674, 680, 117 P.2d 331.

[4] We are not here concerned with the question whether Squire's used a correct theory for the measure of damages in pleading this action in tort. It asked for all of the net profits which Ramallah earned at the demised premises during the period of the lease, not for the difference between what Squire's bargained for and what Squire's received, nor for the value of Ramallah's use and occupation of the demised premises. See Bagdasarian v. Gragnon, supra, 31 Cal.2d 744, 759–763, 192 P.2d 935, for a discussion of the proper measure of damages in fraud cases. The measure he did use finds no basis whatsoever in contract, and the demand for exemplary damage is consistent only with a tort action, not an action upon the contract.

After the filing of the action and on May 5, 1950, Ramallah filed a notice of motion for an order staying further proceedings in the action, pending arbitration of the issues pursuant to the contract pleaded by the plaintiff. By an order filed October 10, 1950, the court granted this motion, but limited the stay to the first count, did not apply it to the second or third counts of the complaint.

[5] Meanwhile, May 24, 1950, Ramallah filed a petition for an order for arbitration, in a separately numbered action (No. 397,395 in the trial court; No. 15161 in this court; hereinafter called the "second action"). The petition alleged the execution of the lease, setting forth a copy, and stated that a controversy had arisen relative to the determination of the rental due, Squire's having commenced an action claiming that Ramallah made a net profit of $35,000; and that Ramallah has demanded but Squire's refuses arbitration. June 28 Ramallah gave notice of a motion to appoint an arbitrator. By an order filed October 10, 1950, the court found the allegations of the petition true and that neither the making of the agreement for arbitration nor the failure of the petitioners to comply therewith was in issue, and directed Squire's to proceed to the arbitration of the controversy in accordance with the terms of the agreement therefor. December 6 the court made an order designating the arbitrators.

Next, in sequence, it appears that plaintiff Squire's amended the third count of its complaint in the first action. Then on February 2, 1951, Ramallah filed notice of motion to stay that count pending arbitration. This motion was denied March 7, 1951.

Meanwhile, March 2, 1951, Ramallah filed an answer and cross-complaint to the amended third count of the complaint in the first action. By so doing Ramallah did not waive its right to arbitrate any arbitrable controversy which might arise under the contract.

In the answer, Ramallah alleged five separate defenses, one of which pleaded the agreement for arbitration and averred that the controversy related to determination of the rental due and was subject to arbitration, that the court in the second action had appointed arbitrators and ordered arbitration to proceed, and that the controversy set forth in the third count of the complaint should not be determined by the court in the first action.

By the cross-complaint to the amended third count of the complaint in the first action, Ramallah pleaded the execution of the lease and alleged the following breaches of the lease by Squire's: Failure to keep the premises in good order and repair; failure to regularly trim and display windows and to display Ramallah's merchandise in a manner as advantageous as displays made for Squire's and others; failure to change display windows at least every two weeks; failure to keep in proper order the aisles and means of ingress and egress; operations in the portion of the building retained by Squire's (ground floor and mezzanine) were a detriment to Ramallah's operations; failure to furnish necessary fixtures and equipment for the conduct of Ramallah's business; interfering with, harassing, hindering, and annoying Ramallah to the extent that Ramallah was unable peaceably and quietly to have, hold, and enjoy the premises. Ramallah then alleged that had Squire's not breached the lease in these respects, the net profits during the rental period would have been $7,500, and claimed damages in half that amount, $3,750. In addition, Squire's pleaded two causes of action against Henry Glatt, president of Squire's, one for tortious interference with Ramallah's operations, the other for goods sold and delivered. None of these alleged facts, if true, had any bearing upon the determination of Ramallah's profits or net profits or of the rental due under the lease. Accordingly, this cross-complaint did not present to the court for determination any dispute which the parties had agreed to arbitrate. Its filing, therefore, did not operate as a waiver of the right to arbitrate any arbitrable dispute which might have arisen; especially so, when (in the answer concurrently filed with, and a part of the same document as, this cross-complaint) Ramallah was still in-

sisting that the entire controversy was subject to arbitration and should be arbitrated. Even if this cross-complaint did present an arbitrable dispute, the concurrent plea of the arbitration agreement as a bar to the action would negative an intent by Ramallah to make an election of remedies by pursuing a court action in lieu of arbitration and thus waiving the right to arbitrate. Ramallah was in a defensive position. He was under the compelling necessity of meeting the issues presented by the complaint *with all the defenses available,* cross-actions as well as counterclaims, denials, and pleas in bar. The law does not put a person in such a position and then, when he responds by pleading all of his several defenses, take one remedy away from him because it is inconsistent with one or several of the other remedies pleaded. That would be a compulsory involuntary "election" of remedies, a patently self-contradictory and self-destroying concept.

The arbitration statute, Code of Civ. Proc., §§ 1280–1293, declares that a provision of a contract (other than a contract pertaining to labor) "to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof * * * shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract". Section 1280. "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *" § 1282. "If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; *provided, that the applicant for the stay is not in default in proceeding with such arbitration.*" Section 1284, emphasis added.

[6] We may assume, solely for the purpose of discussing the question of waiver, that count I of Squire's complaint in the first action presented an arbitrable dispute. In such a case Ramallah met all of the requirements of this statute, conducted himself throughout in accordance with its provisions. He made timely application for arbitration when he filed the second action. He made timely application for a stay in the first action. He never disavowed his insistence upon arbitration or relinquished his right thereto. Whenever pleading to the complaint in the first action, he included a plea of the arbitration agreement in bar or as a stay of the court action. He was, therefore, *not in default in proceeding with such arbitration.*

The case law is in harmony with our view of the statute as applied to the facts of this case.

In Clogston v. Schiff-Lang Co., Inc., 2 Cal.2d 414, 41 P.2d 555, it appeared from the face of the complaint that there was an agreement to arbitrate, and no showing why the dispute need not be arbitrated. Defendants' demurrer directed to that issue was overruled. In answering, defendant included, as its sixth defense, the bar or stay of the arbitration agreement. At the trial, the court erroneously held the arbitration agreement did not preclude settlement of the controversy by the court, and gave judgment for the plaintiff. That judgment was reversed. Although the question of waiver is not mentioned in the opinion, the facts speak with eloquence. The defendant did not waive its right to arbitrate by answering, after the overruling of its demurrer, when it included in the answer its renewed or continued insistence upon arbitration.

Although no California case precisely like ours has come to attention, there are New York and Federal cases which are

quite persuasive. In Nagy v. Arcas Brass & Iron Co., Inc., 1926, 242 N.Y. 97, 150 N.E. 614, the court observed that when an agreement to arbitrate is pleaded in an answer it is an assertion that the defendant does not intend to abandon his right to arbitrate, and so rebuts any inference which otherwise might be drawn from the mere service of an answer. In W. E. Hedger Transp. Corporation v. Miller, 166 Misc. 77, 1 N.Y. S.2d 345, the defendant did not waive its right to arbitration by joining issue and alleging a counterclaim, when in its answer it also pleaded the arbitration agreement as a bar to the action and, before trial, commenced proceedings to compel arbitration. Nor was there a waiver when a defendant interposed a general denial, pleaded plaintiff's failure to comply with defendants' demands for arbitration, moved for judgment on the pleadings, demanded a bill of particulars, counterclaimed against the plaintiff, and cross-complained against other defendants in the action. In re Ralph Catino Contracting Co., 173 Misc. 239, 17 N.Y.S.2d 699. In Almacenes Fernandez, S. A. v. Golodetz, 2 Cir., 148 F.2d 625, 161 A.L.R. 1420, the plaintiff claimed that defendant Golodetz & Co. waived its right to arbitrate when it answered the complaint with affirmative defenses and a counterclaim and when it invoked the jurisdiction of the court to bring in third party defendants. The court overruled that contention. The answer showed that Golodetz relied upon the arbitration agreement. Its move to bring in additional parties was but a procedural step permitted by the rules upon leave of court. Those parties defendant were not parties to the arbitration. Getting them in was deemed an attempt to have all parties in interest before the court for adjudication of their rights, "if necessary, in proceedings following the termination of any stay granted pending arbitration. Such action did not indicate an intention on the part of Golodetz & Co. to abandon its right to insist on arbitration, which it had already alleged as a defense, and so fell short of a waiver of it." 148 F.2d at page 628.

There have been a number of cases in this state in which it was found that a party to an arbitration agreement had waived his right to arbitrate. In none of them did the reviewing court indicate views inconsistent with those we have expressed. The following are some of the circumstances which indicated a waiver of the right to arbitrate: The submission of an arbitrable dispute to a court for decision without contending it should be arbitrated, Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182; Jones v. Pollock, 34 Cal.2d 863, 215 P.2d 733; Wilson v. Mattei, 84 Cal.App. 567, 258 P. 453; failure of a defendant to plead an arbitration agreement as a defense, Bass v. Farmers Mut. P. Fire Ins. Co., 21 Cal.App.2d 21, 68 P.2d 302; Fejer v. Paonessa, 104 Cal.App.2d 190, 198, 231 P.2d 507; failure to plead the arbitration agreement or to petition for arbitration, and neglect to move for a stay until one or two days before trial, 22 months after answer filed, Pneucrete Corp. v. U. S. Fid. & G. Co., 7 Cal.App.2d 733, 46 P.2d 1000; failure of a defendant to apply for a stay of the court proceeding or to petition for arbitration, even though he pleaded the arbitration agreement as a defense, Landreth v. South Coast Rock Co., 136 Cal.App. 457, 462, 29 P.2d 225; by a plaintiff when he brings a suit upon a cause of action which is inextricably linked with a contract that contains an arbitration clause, and the defendant cross-complains or counterclaims upon that contract, Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 604–606, 220 P.2d 912; failure to file a demand for arbitration within the time limited therefor by the arbitration agreement, Jordan v. Friedman, 72 Cal. App.2d 726, 165 P.2d 728.

March 7, 1951, plaintiff Squire's filed notice of motion to vacate the order of October 10, 1950, which stayed proceedings on the first count of the complaint in the first action. At the same time, Squire's filed notice of motion to vacate the order of October 10, 1950, directing arbitration, in the second action.

April 24, 1951, the court granted both motions, denied the petition for arbitration, and ordered the proceedings in the second action dismissed. The order dismissing the second action found and declared that

"the application and petition for arbitration * * * be denied and said proceedings dismissed, the Court finding particularly that there is another action pending between the parties hereto upon the same subject matter to wit: Said Action No. 395,802, and that by cross-complaining in said Action No. 395,802, the applicants herein have waived any right to arbitration which they may have had in the instant proceeding."

On or after May 31, 1951, Squire's filed a memorandum of costs in the second action. Ramallah then moved to tax costs, including an item for $215, Squire's one-half of the third arbitrator's fee. This motion was denied June 12, 1951.

Ramallah has appealed from the orders of April 24, 1951, in each action, and from the order for costs in the second action.

[7, 8] The appeal from the order of April 24, 1951, in the first action and from that portion of the order in the second action which vacated an earlier order therein, must be dismissed. Those orders are interlocutory and as such are non-appealable. Sjoberg v. Hastorf, 33 Cal.2d 116, 118–119, 199 P.2d 668, and cases cited.

In the second action, that portion of the order of April 24, 1951, which denied the petition for arbitration and dismissed the proceeding therefor, operated as a final judgment and as such is appealable. It made final disposition of that action. We entertain no doubt that it was legally proper for Ramallah to petition for arbitration in a separate and independent proceeding. The arbitration statute contemplates and sanctions a separate proceeding by authorizing a person desiring arbitration to "petition any superior court" of the "county or city and county where either party resides". Code of Civ.Proc., § 1282. Had Squire's filed the first action for such an amount that would have put it in the municipal court or had he filed it in the superior court of a county where neither party resided, Ramallah would have been compelled to file his petition as the moving paper in a separate and independent action. Similarly, if no other action had been filed when Ramallah petitioned for an order directing arbitration, his petition would have initiated an independent action or proceeding. That was the very situation which obtained in Trubowitch v. Riverbank Canning Co., supra, 30 Cal.2d 335, 182 P.2d 182, in which the Supreme Court entertained an appeal from a judgment dismissing the petition, and reversed the judgment for lack of findings. Of that, the Supreme Court in a later case said "In that case, however, no action on the contract had been previously instituted. Thus the trial court's dismissal of the petition resulted in a final determination of the litigation before the court and was a final judgment in a special proceeding." Sjoberg v. Hastorf, supra, 33 Cal.2d 116, 117, 199 P.2d 668, 669. When an action has been previously instituted, as in our case, a stay of that action may be ordered by "the court in which such suit * * * is pending", section 1284, but this requirement does not extend to the "petition * * * for an order directing that such arbitration proceed * * *." Section 1282. It does not require that such petition be filed in the suit which is pending. As aptly stated by respondent Squire's in its brief at page 18: "Actions Nos. 395,802 and 397,395, have never been consolidated in the trial courts. Each is an independent piece of litigation * * *." The non-appealable order in the second action is, of course, reviewable upon the appeal from the judgment of dismissal therein. The order in respect to costs is appealable as a special order made after final judgment.

[9] The judgment of dismissal must be affirmed. It was based upon an erroneous finding that by cross-complaining in the first action Ramallah waived any right to arbitration in the second action. However, as we have seen, no arbitrable dispute had arisen. Specifically, count I of Squire's complaint in the first action did not present such a dispute. For that reason the judgment of dismissal and the order vacating the earlier order which directed that arbitration proceed, were right and proper.

These facts, in the record upon this appeal, make it proper for a reviewing court to exercise the power, given it by Section 956a of the Code of Civil Procedure, to

make findings of fact contrary to and in addition to those made by the trial court. Johndrow v. Thomas, 31 Cal.2d 202, 187 P.2d 681; Mirich v. Underwriters at Lloyd's London, 64 Cal.App.2d 522, 528–529, 149 P.2d 19.

Accordingly, in support of the judgment of dismissal in No. 15161, we amend the findings of fact upon which it was based by striking therefrom the finding "that by cross complaining in said Action No. 395,-802, the applicants herein have waived any right to arbitration which they may have had in the instant proceeding," and by substituting therefor the following: "that action No. 395,802 does not present a controversy or dispute that is subject to arbitration as provided in the contract of lease executed by the parties in 1949, but it is not true that the petitioners have waived the right to arbitration under said contract. This dismissal is without prejudice to the right of petitioners to apply for arbitration if and when a dispute arises which is subject to arbitration under said contract."

The order awarding costs to Squire's, including the portion of the third arbitrator's fees which Squire's had advanced, should also be approved. The arbitration clause of the lease provided that the lessor and lessee pay the third arbitrator's fees in equal shares. Upon final determination that arbitration was not in order, the losing party, Ramallah, who prematurely brought the arbitration proceeding, should bear such costs necessarily incurred by the opposite party.

There is pending a motion by Squire's for leave to produce additional evidence consisting of three pleadings filed by Ramallah subsequent to the making of the orders which terminated arbitration. These pleadings were filed in the first action and consist of Ramallah's answer and cross-complaint to Squire's first count, an amended cross-complaint to that count, and an amended cross-complaint to Squire's third count. The application should be denied. The pleadings are merely cumulative. Their addition would add nothing of significance to the record. The answer to the first count consists of five separate defenses, the fourth of which is a renewal of Ramallah's claim that the controversy is within the terms and conditions of the arbitration clause of the lease and should not be heard or determined by the court in that action. The cross-complaint to the first count incorporates by reference the provisions of Ramallah's cross-complaint to Squire's third count, which we have found presents no arbitrable dispute. The amended cross-complaint to Squire's third count is the same as the original cross-complaint thereto save that some of the allegations have been recast in more specific terms and one of the counts against Henry Glatt, president of Squire's, has been omitted and withdrawn. The amended cross-complaint to Squire's first count merely incorporates by reference the allegations of the amended cross-complaint to Squire's third count. The motion for leave to produce additional evidence is denied.

The appeals in the first action, No. 15160, and the appeal from that portion of the order of April 24, 1951, in the second action, No. 15161, which vacated an earlier order in that action, are dismissed. The remainder of the order of April 24, 1951, in No. 15161, denying the petition for arbitration and dismissing the proceeding, and the order of June 12, 1951, in respect to costs in No. 15161, are affirmed.

PETERS, P. J., and BRAY, J., concur.

115 Cal.App.2d 751

PEOPLE v. SUTTON.

Cr. 4892.

District Court of Appeal, Second District, Division 3, California.

Feb. 3, 1953.

Defendant was convicted of murder and thereafter filed a petition for a writ of error coram nobis. The Superior Court, Ventura County, Walter J. Fourt, J., denied the petition, and defendant appealed. The District Court of Appeal, held that the mere fact that another might now be willing to repudiate testimony given at the trial and exonerate the defendant would furnish no ground for relief in the present proceeding.

Affirmed.

Criminal Law ⇐997

Fact that another had repudiated testimony given at trial of defendant and was now willing to exonerate defendant would not furnish ground for granting of writ of error coram nobis.

Richard E. Erwin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondents.

PER CURIAM.

Eugene Sutton appeals from an order of the superior court denying his petition for a writ of error coram nobis. Upon appellant's request for appointment of counsel Richard E. Erwin, Esq., member of the Los Angeles Bar Association on Criminal Appeals, was appointed by this court to represent him. As to the conditions of his appointment see People v. Dodd, 113 Cal.App. 2d 682, 248 P.2d 965. Mr. Erwin has reported that in an examination of the record he has found no meritorious ground for the appeal. We have made an independent study of the record. There is no merit in the appeal.

In his petition Sutton represents that on September 16, 1946, in Ventura County he was convicted of the crime of murder and sentenced to State prison. The victim of the murder was a cab driver who was shot in his cab in which petitioner and one Jake Thompson were riding. It is alleged that Thompson had the gun and fired the fatal shot; that he left the gun in the cab from which it was removed by petitioner. Thompson confessed the murder but upon the trial implicated petitioner therein and both were convicted. In the early part of 1952, in State prison, Thompson informed petitioner that his testimony at the trial was false and that he accused petitioner of the murder in order to save himself from capital punishment.

The first point advanced by petitioner is that Thompson, and not he, committed the crime. In the argument of this point it appears that the only fact not known to petitioner at the time of trial is that Thompson now admits that it was he and not petitioner who fired the shot. The second contention is that before the trial petitioner informed his attorney that blood which was found on his clothing resulted from a fight he had had with one Denver Kingleloe and requested that witnesses to the fight be subpoenaed for the trial but that his attorney failed to have them subpoenaed. It is claimed that the attorney did not call witnesses to a conversation between Thompson and petitioner's ex-wife just prior to the murder, but it does not appear in what respect proof of the incident would have aided petitioner. Although it is contended that petitioner was convicted on the false testimony of Thompson it is not claimed that the district attorney knew the testimony to be false. While it is alleged that Thompson first admitted having fired the shot and later repudiated his confession and laid the blame upon petitioner, it is not claimed that the district attorney or any other representative of the State induced or encouraged any change in Thompson's testimony. Upon the contrary it is alleged that Thompson claims to have implicated petitioner at the instigation of his, Thompson's, attorney. Attached to the petition is a copy of a letter written by petitioner to his former attorney with the latter's reply. In peti-

tioner's letter no complaint was made that he had not been properly represented at the trial. If there had been inadequate representation, which does not appear to have been the case, it would not provide a ground for vacating the judgment.

No facts are stated in the petition which bring the case within the rule that applies to such proceedings, as stated in People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505. The court would not have been justified in setting aside the judgment. The fact that Thompson may now be willing to repudiate his testimony given at the trial, and to exonerate petitioner, furnishes no ground for relief in the present proceeding. People v. Vernon, 9 Cal.App.2d 138, 146, 49 P.2d 326. The question as to the truth or falsity of Thompson's testimony was the very one that was determined in the trial. If it could now be proven to have been false it would avail petitioner nothing unless it had been used at the trial with knowledge on the part of the district attorney of its falsity.

The order is affirmed.



115 Cal.App.2d 490

In re EASLEY'S ESTATE.

Civ. 19245.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1953.

Hearing Denied March 23, 1953.

Proceeding upon administration of estate, involving question of whether decedent had, by his will, created trust for his son. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered judgment that trust had been created, and ordered distribution accordingly, and the son appealed. The District Court of Appeal, Doran, J., held that where testator, by holographic codicil, cancelled clause in will creating trust for son, and set forth substituted clause in which testator gave specific directions to trustee named in original will regarding handling of balance of estate and manner of its distribution to son, from the language of which, although technical terminology of trust was not used, the subject, purpose and beneficiary of a trust were clearly determinable, codicil and will, construed as an entirety, evidenced testator's intention to create, and did create, trust relation.

Judgment and order affirmed.

1. Wills ⇐671

Where testator, by holographic codicil, cancelled clause in will creating trust for son, and set forth substituted clause in which testator gave specific directions to trustee named in original will regarding handling of balance of estate and manner of its distribution to son, from the language of which, although technical terminology of trust was not used, the subject, purpose, and beneficiary of a trust were clearly determinable, codicil and will, construed as an entirety, evidenced testator's intention to create, and did create, trust relation. Civ.Code, § 2221.

2. Wills ⇐669

Beneficiary of testamentary trust will not be permitted to defeat testator's intention and destroy trust under any theory of election, equitable conversion or reconversion.

3. Wills ⇐450, 470

In determining testator's intention, will must be considered as a whole and effect given to each and every expression therein.

4. Wills ⇐435

Courts have no authority to render decision the effect of which would amount to making a new will changing status of beneficiary of testamentary trust to that of heir at law and absolute devisee and legatee.

Harry F. Elliott, Los Angeles, for appellants.

Maynard J. Givens, Los Angeles, for respondent, Security-First Nat. Bank.

DORAN, Justice.

According to appellants' brief, "There is only one question of law involved in this appeal, namely the correctness of the court's decision in finding and establishing

a trust under the terms of last will and testament of the decedent".

The testator's original will, which was typewritten, witnessed and dated June 2, 1936, had in Clause VIII, created a trust in favor of decedent's son and only heir. This will was followed by seven holographic codicils, one of which, dated May 10, 1945, "cancelled" the original Clause VIII and set up a new Clause VIII which did not make use of the terms "trust", "trustee", or "trust estate". The probate court concluded, nevertheless, that the substituted Clause VIII created a trust in favor of the son. From that decision and order of distribution, testator's son, and Carl H. Thomsen, the named executor, have appealed.

William L. Easley, the testator, died on July 25, 1947, and was survived by William L. Easley, Jr., appellant herein, who was then about 20 years of age, and had married at the age of 19. It may be noted that the testator's real estate consisted of an undivided one-half interest in business property located at 211–219 N. Market Street, Inglewood, California valued at $150,000, the other half interest belonging to the executor, Carl H. Thomsen.

The executor's final account shows other assets consisting of a record player, diamond ring, personal effects and household furniture, and cash in the sum of $4,209.69, the entire estate for distribution being valued at $153,609.25. On January 22, 1952, the son, William L. Easley, Jr., filed an Election of Beneficiary "to take the undivided one-half interest in the real estate which constitutes the principal asset of my father's estate in kind in place of having the real estate sold and the cash distributed to me".

Clause VIII of the original will, reads as follows: "The remaining one-half of said residue, after the conversion thereof into cash by said executor, as hereinbefore provided in Clause V of my will, I give, devise and bequeath unto the Security-First National Bank of Los Angeles, in Trust, for the following uses and purposes". The trustee is directed to invest and reinvest the fund in stocks and bonds, income therefrom to be paid to decedent's son. One-third of the corpus is to be turned over to the son at the age of 25 years, another third at the age of 30, and the remainder to be paid over at the age of 35.

By another provision of the original will, the executor, co-owner of the business real estate, is authorized to make any improvements deemed necessary. In Clause V of a codicil dated June 12, 1937, testator provides that "All the rest, residue and remainder of my estate, or whatever kind and nature, and wheresoever situated, I direct my executor, hereinafter named to reduce to cash as soon as in his sole and exclusive discretion, it shall be wise to do so; provided, however, that such sale and reduction to cash shall be within fifteen (15) years from the date of his appointment as such executor".

By a codicil of May 10, 1947, the son is bequeathed "All household furniture and personal property of any nature whatsoever including my camera equipment and automobiles, etc." This codicil contains the substituted Clause VIII, which appellants claim was not intended to create a trust, reading as follows:

"Clause VIII is hereby cancelled and a new Clause VIII shall read as follows—My Executor Carl H. Thomsen shall have complete discretion as to payments of income to my son. It being my desire as I know it is his desire to keep our property intact. I direct my Executor to pay to my son, William L. Easley, Jr. one-third of the total amount received from the final reduction to cash as per Clause V Paragraph 1. The balance I direct him to pay to the Security 1st Natl Bank and to hand the Security 1st Natl Bank the following instructions: Keep the money invested in cash account and do not pay said money to my son Wm. L. Easley except in case of need. Bank to have sole power to determine amount of need. At the end five years from date you receive the money pay over one-half of the amount you received. At the end of the second five year period pay over to my son the balance in full. My son is to be helped at the Bank's

full discretion during the second five year period."

The trial court found that the above codicil "created a trust and the Security-First National Bank of Los Angeles should be appointed Trustee and William L. Easley, Jr., as Beneficiary of said trust", and ordered distribution of one-third of the cash to the son, and the remaining estate to the Bank in trust.

It is appellants' position that since by the express words of the codicil of May 10, 1947, "Clause VIII is hereby cancelled", and the substituted provision hereinbefore set forth, contains no direct mention of a trust by name and no reference to a trust estate or a trustee, "the new Clause VIII * * * fails to reveal any intention to create a trust". Appellants further contend that "One striking characteristic which negatives the findings of an intention to create a trust is, that there is no disposition of the trust estate in the event of the death of William L. Easley, Jr., prior to its being paid over to him". In the order of distribution, appellants say, "There is no semblance of following the wishes of the testator. The Court seems to have chiseled out or modeled a trust according to the court's own conception of what the trust should be".

[1] The appellants' contentions are untenable, and the order of the Probate Court declaring that a trust was created by the codicil provision, must be sustained. It is conceded in appellants' brief that the failure to use the terms "trust", or "trustee", or "trust estate", is not controlling. As stated in Section 2221 of the Civil Code, "a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty; 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust".

Although the technical terminology of trusts is not employed by the testator, it can hardly be doubted that, under the code definition just referred to, a trust relation was intended and actually created. The codicil in question was in the testator's handwriting and employed the language of a layman rather than that of an attorney. The "subject, purpose and beneficiary of the trust" are, however, clearly designated. Appellants' theory that William L. Easley intended that the son should receive the property free from any trust restriction is negatived by the language used.

Specific directions are given to the Security-First National Bank, the same trustee named in the original will, regarding the handling of the "balance" of the estate, one-half of which is to be paid over to the son at the end of a five-year period. Discretion is conferred on the Bank to supply testator's son with additional money "in case of need". The remainder of the corpus is to be turned over to William L. Easley, Jr. at the end of a second five-year period.

[2] The fact that a sale of the business real estate which was owned in equal shares by the testator and the executor, did not occur, in no manner changes the legal aspect of the situation. This, indeed, was contemplated by the testator, it being the father's "desire to keep our property intact". Certainly there is nothing expressed or implied, in either will or codicils, to indicate that if this property was not sold, the son should receive the property outright. And by no theory of election, equitable conversion or reconversion, may the beneficiary of a trust be permitted to defeat the testator's intention and destroy the trust.

[3] "The long established rules for determining the testator's intention", correctly says respondent's brief, "are to consider testators will as a whole and give effect to each and every expression therein", rather than to analyze each sentence separately as appellants seem to have done in the present case. The construing of will and codicils as an entirety, leads to the conclusion that in substituting the new provisions for the original Clause VIII of the will, William L. Easley, Sr. had no intention of departing from the trust idea, but merely wished to alter the terms of the trust. The same trustee is to act; the same purpose is apparent, namely the quite

natural desire to prevent waste or dissipation of the estate.

[4] To approve appellants' position would amount to making a new will changing the son's status from beneficiary of a trust to that of heir at law and absolute devisee and legatee of the father's estate. This, no court has authority to accomplish.

The judgment and order appealed from are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



115 Cal.App.2d 517

BUDROW et al. v. WHEATCRAFT et al.

Civ. 15116.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1953.

Action for breach of warranty in connection with sale of used automobile. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., granted defendants' motion for judgment on the pleadings as to second and third counts and granted a nonsuit as to remaining counts, and plaintiffs appealed. The District Court of Appeal, Goodell, Acting P. J., held that gratuitous promise allegedly made by seller after sale and delivery of automobile to put it in good condition was of no legal effect and could not be relied upon as a warranty in absence of a new consideration therefor.

Appeal dismissed in part and order granting motion for nonsuit affirmed.

1. Contracts ⇐88

Where written contract of conditional sale of automobile disclaimed warranties of any kind, there could be no presumption of consideration arising from a written contract for promise allegedly made by seller after sale and delivery of automobile to put it in good condition. Code Civ.Proc. § 1963, subd. 39.

2. Sales ⇐258

Where written contract of conditional sale of used automobile disclaimed warranties of any kind, gratuitous promise allegedly made by seller after sale and delivery of automobile to put it in good condition was of no legal effect and could not be relied on as a warranty in absence of a new consideration therefor. Code Civ. Proc. § 1963, subd. 39.

3. Pleading ⇐199

The sufficiency of complaint to state a cause of action could be questioned at any time, though no formal demurrer to complaint had been interposed before trial.

4. Pleading ⇐343, 350(3)

A motion for judgment on the pleadings is essentially the same as a general demurrer to complaint, and, although an answer is on file, court can look only to the face of the complaint.

5. Appeal and Error ⇐133

Order granting defendant's motion for judgment on the pleadings was equivalent to order sustaining a formal demurrer without leave to amend and such order was not itself appealable but must be followed by entry of a judgment.

6. Appeal and Error ⇐105

Where motion for nonsuit was granted, the minute entry thereof was sufficient for all purposes, was treated as a final judgment, and was therefore appealable. Code Civ.Proc. § 581 et seq.

7. Appeal and Error ⇐345(1)

Where motion for nonsuit was granted, plaintiff was entitled to move for a new trial, and the time for taking an appeal from minute entry of nonsuit did not run pending a ruling on new trial. Rules on Appeal, rules 2(a), 3(a); Code Civ.Proc. § 656.

8. New Trial ⇐18

New trial proceedings were unauthorized after granting of motion for judgment on the pleadings, since a re-examination of issue of fact was not involved. Code Civ. Proc. § 656.

9. Appeal and Error ⇐105, 792

Order granting defendants' motion for judgment on the pleadings as to two counts of complaint for failure to state a cause of action and dismissing such counts was not appealable, notwithstanding minute entry of such order, and where no judgment was entered in action, appeal from such order must be dismissed on court's own motion.

Edward E. Craig, Berkeley, and H. J. Rodriguez, Oakland, for appellants.

Brown, Rosson & Berry, Oakland, for respondents.

GOODELL, Acting Presiding Justice.

The plaintiffs filed a complaint in four counts in an action for breach of warranty. An answer was filed and when the case came on for trial the court granted defendants' oral motion for judgment on the pleadings as to the second and third counts and proceeded to trial without a jury on the first and fourth counts. At the conclusion of plaintiff's case a motion for nonsuit was granted (as to those remaining counts) and a minute order was entered reciting all the proceedings. A motion for new trial was denied and this appeal was taken on behalf of all three plaintiffs.

The first count alleged that on November 19, 1948 defendants sold to plaintiff S. J. Budrow a 1941 Ford station wagon and "expressly and impliedly warranted to the plaintiff S. J. Budrow, that the said automobile was fit for the purpose for which it was sold, to-wit: to drive as a vehicle upon the public highways." It alleged a breach of that warranty in that the car, while being driven by Budrow several days after the sale, turned over because its brakes locked, and that he was injured in the accident.

The second count, based on the same warranty, was for damages arising from injuries sustained by plaintiff Eula Budrow, wife of S. J. Budrow, while she was riding in the car on the same occasion.

The third count, based on the same warranty, was for damages arising from injuries sustained by plaintiff Frenell Johnson while a passenger on the same occasion.

The fourth count, based on the same warranty, alleged that plaintiff S. J. Budrow had a $1000 equity in the car and that after the accident it was repossessed by defendants, resulting in the loss of his $1000 equity.

The appeal is divisible into two parts, as to both substantive and procedural law.

The case of plaintiff S. J. Budrow on the first and fourth counts.

The nonsuit was granted for failure to prove any warranty. Plaintiff introduced in evidence a printed conditional sale contract which provided that the sale of the car was made "in its present condition", also that "This agreement constitutes the entire contract and no waivers or modification shall be valid unless written upon or attached to this contract, and said car is accepted without any express or implied warranties, agreements, representations, promises or statements unless expressly set forth in this contract at the time of purchase." Attached to the agreement was a purchase order reading: "No salesman's verbal agreement is binding on the Company; all terms and conditions of this sale are expressed in this agreement. We do not guarantee the mileage or model * * * I * * * agree to take the above car AS IS * * *." (The emphasis is in the writing itself).

Plaintiff S. J. Budrow testified that after taking possession of the car he filled it up with gas "and started home and the car stopped; it wouldn't run;" that Wheatcraft's son then "shoved me back to the filling station. * * * And the car remained there until the next morning. * * And the next morning I went back to Mr. Wheatcraft. * * * He said, 'It's only the foot throttle wrong'. So he say he put a new foot throttle on it. So I pick up the car after that, and went home, and carried the car home, and the brake would lock on me. And I carried it back to him. I said, 'The brake locks on this car. It don't work'. He said, 'I'll have it * * * fixed right'. So he put it in the garage". Defendants lent him a car temporarily and

the next day they notified him to pick up the station wagon which he did. That evening he drove it into Oakland (from Richmond or Stege) and it did not then work well. Early the following morning they left for Dos Palos, where plaintiff S. J. Budrow was employed, and on the way the brakes locked and the mishap occurred, injuring the three plaintiffs. After the accident an officer took the station wagon to a Los Banos garage and left it. Shortly thereafter plaintiff S. J. Budrow mailed the contract and other papers to defendants thereby apparently abandoning the car. Defendants later repossessed it.

The plaintiff was asked: "Now, Mr. Budrow, going back to the time you bought the automobile from Mr. Wheatcraft, did you have any conversation with Mr. Wheatcraft about the condition of the automobile? Did you talk with him about the car? * * Mr. Berry: I object to oral remarks, or conversations alleged to have been had as part of the transaction, on the ground that they violate the parol evidence rule. * * Mr. Craig: I especially call attention to the fact that the car was sold under that written contract, on an 'as is' basis. The purchase order expressly recites that car is sold as is. The Court: Yes. And to show any implied warranty of any kind would be in contravention to the express terms of that contract—violation of the parol rule.

"Mr. Berry: I submit that that would be so, Your Honor. * * * The Court: So we have to keep to the express terms of the contract, I'm afraid. Objection sustained. Proceed, please."

That these conversations were after the sale had been consummated and possession transferred to the buyer appears from appellants' statement of the issue on appeal as follows: "Is parol evidence admissible when a cause of action is based on warranty and such evidence is essential to establish warranty where there are subsequent oral agreements between the parties?"

Appellants concede that "It is a general principle of law that where there is a written integrated contract of sale, parol evidence is inadmissible to show an express warranty since it would amount to an alteration of the terms of the contract; since the contract of sale was on an 'as is' basis it would negate any implied warranty, and in addition there is no implied warranty on second-hand cars in California." They nevertheless go on to argue that "The exception to the parol evidence rule is a subsequent oral agreement between the parties in which parol evidence is admissible. This is distinguished from prior or contemporaneous agreements which seek to vary or contradict an integrated contract of sale. Therefore, when the defendants and Mr. Budrow entered into a subsequent oral agreement in which the defendants agreed to see that the car was in A-1 shape, and undertook such repairs, there was an express warranty separate and apart from the initial contract of sale."

It thus appears that appellants' reliance is placed squarely on a warranty subsequent to the sale.

Respondents answer that there would necessarily have to be a new or fresh consideration to support any such new promise or warranty. In support of that contention they cite William A. Davis Co. v. Bertrand Seed Co., 94 Cal.App. 281, 288, 271 P. 123, 126, wherein this court said: "But it is respondent's contention that after the receipt and acceptance of the goods and the payment of the price the defendant made certain written statements in its correspondence with the plaintiff which constituted a warranty. But in the first place each and every one of those statements relied upon was contained in a letter, which contained also the printed disclaimer of warranty and there was evidently no intent expressed to give a warranty, and, furthermore, *there was no consideration received or accepted which would sustain any new or additional warranty for goods already sold and delivered.* In fact, as stated in 1 Williston on Sales (2d Ed.) paragraph 211: 'If the seller's liability on a warranty is based upon an agreement to contract, *consideration is essential * * * still more clearly if no representation of warranty was made at the time of the sale, a subsequent representation or agreement to war-*

rant will be of no legal effect unless new consideration is given to it'—citing many cases." (Emphasis added.)

[1, 2] No attempt was made by offer of proof, or otherwise, to show that there was any consideration for the subsequent promise relied on. We are mindful that this case was disposed of by nonsuit, but there can be no possible presumption of consideration, § 1963, subd. 39, Code Civ. Proc., arising from a written contract, since the only writings in evidence disclaim warranties of any kind. The result is that appellants must rely solely on a naked, gratuitous promise based on no present consideration. The Davis case (wherein a hearing was denied) is directly in point.

Respondents rely also on El Zarape, etc. Factory v. Plant Food Corporation, 90 Cal.App.2d 336, 344, 203 P.2d 13, which quotes from Calpetro Producers' Syndicate v. C. M. Woods Co., 206 Cal. 246, 251, 274 P. 65.

Appellants have not seen fit to file any closing brief, and such failure leaves respondents' points and authorities—conspicuously set forth in their brief—wholly unanswered.

In our opinion the rulings were correct and the nonsuit was properly granted.

The cases of Eula Budrow on the second count, and Frenell Johnson on the third.

[3] When the case came on for trial the judge expressed doubt whether either the second or third count stated a cause of action (there being no privity between the defendants on the one hand and Eula Budrow and Frenell Johnson on the other). No formal demurrer had been interposed, but the sufficiency of the complaint could be of course questioned at any time. After argument the court granted defendant's oral motion for judgment on the pleadings as to the second and third counts, for their failure to state a cause of action.

[4, 5] A defendant's motion for judgment on the pleadings is essentially the same as a general demurrer to the complaint, and although an answer is on file the court can look only to the face of the complaint, Hibernia S. & L. Society v. Thornton, 117 Cal. 481, 49 P. 573. That being so, the court's order granting the motion was the same as if a formal demurrer had been sustained without leave to amend. Such an order of course is not itself appealable, but must be followed by the entry of a judgment. Appeals are continually being dismissed from orders sustaining demurrers without the entry of judgment thereon. *No judgment was ever entered in this action.*

On the day the nonsuit was granted as to the first and fourth counts a minute order was entered which recited all the proceedings including the following: "Thereupon counsel for the defendant moves the court for a judgment on the pleadings, as to the second and third causes of action in plaintiff's complaint herein, upon the grounds of failure to state facts sufficient to constitute causes of action, in that the allegations affirmatively show a lack of privity of contract between defendants and plaintiffs Eula Budrow and Frenell Johnson.

"Said motion is argued to the court by counsel and submitted to the court for consideration and decision and the court having fully considered the same and being duly advised in the premises, orders that said motion be and the same is hereby granted, and the court dismisses the said second and third causes of action as set forth in plaintiff's complaint." Nothing more was said on that point.

[6] Although no judgment was entered, none was required *as far as the nonsuit was concerned*, by reason of the special provisions of § 581 et seq. Code Civ.Proc. It has been repeatedly held that when a motion for nonsuit is granted the minute entry thereof is sufficient for all purposes and is treated the same as a final judgment and therefore appealable. See 2 Cal.Jur. pp. 402–3; See, also, Gwinn v. Ryan, 33 Cal.2d 436, 202 P.2d 51, and Costa v. Regents, 103 C.A.2d 491, 229 P.2d 867.

[7, 8] A notice of intention to move for a new trial was filed on behalf of all three plaintiffs, and when a new trial was denied there was a notice of appeal, like-

wise on behalf of all three, "from the judgment made herein in favor of defendants * * * and against the said plaintiffs * * * and from the whole and each and every part of said judgment." It was filed on March 23, 1951, which was 66 days after the minute order of January 16 (see Rule 2(a), Rules on Appeal). It was timely as far as the first and fourth counts were concerned, since on the nonsuit there existed a right to move for a new trial and under Rule 3(a) on appeal an appellant's time is tolled pending a ruling on new trial. Respondents contend, however, that new trial proceedings were unauthorized after the motion for judgment on the pleadings was granted, since that was not "a re-examination of an issue of fact". § 656, Code Civ.Proc.; Abbey Land etc. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408; Reeves v. Reeves, 34 Cal.2d 355, 358, 359, 209 P.2d 937. The authorities so hold. Based on these premises respondents contend that the appeals of plaintiffs Eula Budrow and Frenell Johnson were six days late, assuming that the time to appeal ran from January 16.* For these reasons they move for a dismissal of their appeals.

[9] We agree that their appeals have to be dismissed, but for a different reason. That reason is that no judgment was entered in this case after the demurrers to their second and third counts were sustained. The case of Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 P. 868 is directly in point. At 2 Cal.Jur. pp. 402–3, in discussing dismissals under Code Civ.Proc. § 581 et seq., including nonsuits, where, as already appears, minute orders are treated for purposes of appeal the same as final judgments, it is said: "This rule does not, however, apply to a judgment on a demurrer, though the judgment declares that the action be dismissed, for whether a judgment on demurrer declares that the plaintiff take nothing, or that the action abate, or that the action be dismissed, it is a final judgment on the pleadings of the relative rights of the parties so far as the particular action is concerned, and, therefore, no appeal lies from such a judgment until it is entered in the judgment-book." Citing Wood, Curtis & Co. v. Missouri Pac. Ry. Co., supra. The opinion in that case discusses at length the reasons why § 581 et seq. do not apply to or embrace a court's action on the sustaining of a demurrer without leave to amend, and it repeatedly speaks of those sections as "special provisions" and makes it clear that they are exceptional.

The appeals on behalf of plaintiffs Eula Budrow and Frenell Johnson are dismissed on the court's own motion, see Collins v. Corse, 8 Cal.2d 123, 64 P.2d 137, because no judgment was ever entered in this action.

The order granting defendants' motion for nonsuit is affirmed.

DOOLING, J., and JONES, J. pro tem., concur.

* Respondents erroneously make that assumption and argue that the minute order "was a final judgment as to the plaintiffs Eula Budrow and Frenell Johnson" citing Southern Pac. R. Co. v. Willett, 216 Cal. 387, 390, 14 P.2d 526, 527. In that case, however, the action was dismissed in the trial court under § 583, Code Civ. Proc., "for failure to prosecute with reasonable diligence and for failure to bring the case to trial within the time prescribed by the statute" and such a dismissal was clearly within the purview of the "special provisions" of § 581 et seq. The present case is not in that category.

Nor is the instant case within the purview of such "special provisions" under § 581 which reads: "An action may be dismissed in the following cases: * * *. 3. By the court * * * when, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court, and the defendant moves for such dismissal. * * *" What was done here simply does not come within that provision.

PACIFIC GAS & ELECTRIC CO. v. MINNETTE et al.

Civ. 8071.
Sac. 6203.

District Court of Appeal, Third District, California.

Jan. 30, 1953.

Rehearing Denied Feb. 27, 1953.

Hearing Denied March 29, 1953.

Electric power company brought suit against those who had constructed a garage under company's electric power lines, for mandatory injunction requiring removal of garage. The Superior Court of Solano County, Harlow V. Greenwood, J., entered judgment in favor of company, and owners of garage appealed. The District Court of Appeal, Van Dyke, P. J., held that Superior Court did not abuse its discretion in granting mandatory injunction.

Judgment affirmed.

1. Boundaries ⇐3(6)

Where it was clear from testimony of surveyor and from language of grants of easements for electric power lines, that parties had agreed on actual lines, had staked them on the ground, and had intended that descriptions should conform thereto, any doubt as to conformity of descriptions as they might be platted with actual location of easements was immaterial, and descriptions of easements as written in grants were required to yield to monument stakes set before descriptions were written.

2. Deeds ⇐111

Where parties themselves so construe deed by their subsequent acts that there can be no reasonable ground to doubt correct interpretation of descriptions used, location so fixed by parties themselves and acquiesced in by them over the years will control any technical construction of deed.

3. Notice ⇐5, 12

Possession of land is notice to the world of every right that possessor has therein, legal or equitable.

4. Notice ⇐12

Knowledge chargeable to a person after he is put on inquiry by possession of land by another, is not limited to such knowledge as would be gained by examination of public records.

5. Notice ⇐5

Rules that possession of land is notice of the possessor's rights are applicable where possession is under a right of way grant.

6. Easements ⇐22

Where purchasers of lot, before purchasing lot, could see that electric transmission lines extended over lot and for long distances on either side of lot, and that, though entire territory was closely built up, no buildings were constructed beneath wires, but purchasers nevertheless purchased lot and constructed building on lot in violation of easements that had been given to company, without making any inquiry of company as to rights it was claiming, they would be deemed to have had notice of easements, though recorded grants of easements allegedly contained erroneous description of their location.

7. Easements ⇐57

Where grants of easements to electric power company to maintain electric power lines over tract of land provided that no building or other structure would be erected or maintained by landowners on the right of way, and purchasers of lot over which the power lines passed erected a garage, the roof of which was within four feet of certain of the company's wires, the building constituted an obstruction.

8. Appeal and Error ⇐1097(1)

Rule that where evidence on retrial shows averments of answer to be true, decision of an appellate court on former appeal on demurrer to answer is the law of the case, had no application where answer's allegations of essential facts, which District Court of Appeal had held would support judgment for defendants if true, were held by trial court at retrial to be untrue.

9. Easements ⇐61(1)

Where grants of easements giving electric power company easements to construct and maintain electric power lines and providing that rights of way should remain free of buildings, the servitudes, though in

form of covenants, were enforceable in equity.

10. Easements ⇐22

If owner of land enter into covenant concerning land and its uses, and subjecting it to easements or personal servitudes and the like, and land is afterwards conveyed or sold to one who had notice of covenant, grantee or purchaser will take premises bound by the covenant, and will be compelled in equity either to execute it specifically, or will be restrained from violating it, and it makes no difference whether covenant is or is not one which in law runs with the land.

11. Easements ⇐61(2)

A court of equity will, in a proper case, award mandatory injunction for protection and preservation of easement, including, where remedy is appropriate, order for removal of obstruction already erected, but trial court is vested with judicial discretion.

12. Easements ⇐61(9)

Trial court did not, under evidence, abuse its discretion in granting electric power company mandatory injunction to compel those who had constructed a $9,000 garage under wires in violation of grants of easements to remove garage, though removal would amount to destruction of garage.

Leo C. Dunnell, Wm. H. Herbert, and Adey Moy Dunnell, Fairfield, Bradley & Millon, Vallejo, for appellants.

Robert H. Gerdes, W. R. Dunn, and Frederick W. Mielke, Jr., San Francisco, Burt D. Goodman, Fairfield, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment quieting title in plaintiff to granted easements, and granting a mandatory injunction requiring appellants to remove a concrete block building which they constructed beneath the electric transmission wires of the respondent which cross over appellants' property. The trial court found this building encroached upon plaintiff's rights of way.

The action was brought by respondent and the allegations of the complaint may be summarized as follows: On April 4, 1917, M. Dos Reis and A. Dos Reis were the owners of a large tract of land in Solano County. On that date they granted to plaintiff an easement 40 feet in width across their lands for a term of 50 years. This grant gave the plaintiff the right of erecting and maintaining electric power lines on the parcel described in the grant and contained a covenant that the grantors would not erect or maintain any building or other structure on the right of way. On February 2, 1920 a like grant of easement was executed, giving the plaintiff for a term of 50 years the same easement rights in a strip of land 25 feet in width contiguous to the land described in the first grant. Plaintiff entered into the exercise of its easement rights and erected and maintained poles and wires for the transmission of electric energy. On July 2, 1945 the successors in interest of M. and A. Dos Reis conveyed to defendants and appellants a parcel of land 50 feet wide and 100 feet deep which lay beneath the plaintiff's wires. The complaint further alleged that with full knowledge of plaintiff's easements, and in violation of the original grants containing the building restrictions, the defendants in 1947 built upon their lot and beneath the wires a basalt block building 42 by 50 feet in horizontal dimensions and 21 feet in height, intended for use as a garage and repair shop. The complaint prayed for a decree quieting plaintiff's title to the easements and for a mandatory injunction requiring the removal of the building from plaintiff's rights of way. The court found that all of the foregoing allegations of the complaint were true and in addition found that the roof of the garage was erected to within 4 feet of wires carrying more than 750 volts. The evidence shows without dispute that, in addition to the particular wires referred to in the findings, plaintiff had for many years, before defendants purchased their lot, maintained three lines of poles on which were suspended wires carrying 12,000 volts beneath which, as well as beneath the lower voltage wires, the defendants constructed their building.

The answer of the defendants denied that the plaintiff's rights of way cross their lot,

although not denying that their building was beneath plaintiff's wires. These allegations rested upon a theory that the descriptions contained in the right of way grants, when platted by reference to the public records thereof and by reference to recorded title documents affecting lands referred to in the rights of way descriptions, were located some 100 feet easterly of defendants' lot and touched no part thereof. Defendants denied that plaintiff had ever entered into possession of the granted easements or into exercise of the rights given them, but on the contrary had erected their poles, wires and electric conduits on lands other than those described in the grants. Defendants alleged their title was not subject to the easements claimed by plaintiff. They pleaded that they had between January of 1947 and the 1st day of September of that year built their building at a cost of approximately $9,000; that a portion of the building was constructed beneath "the wires of power lines suspended across said lands by plaintiff"; but defendants denied that their building was constructed on plaintiff's rights of way. They pleaded they had no notice of the recorded easement grants nor of the contents thereof and particularly of those provisions thereof concerning the construction of buildings on the rights of way. They alleged that when they took their title, although plaintiff's wires crossed over their lot, yet buildings had been built by others, not only upon the lot they bought but on property on either side thereof and beneath the plaintiff's wires, with the result that they in good faith believed they likewise had a right to build beneath the wires. Further, defendants alleged that before purchasing the property they caused the public records to be searched by a title company as to any liens, easements or other encumbrances that might be upon the lot they were buying and were told by the title company that the same was free from encumbrances; that they took title and thereafter constructed their building and that during the time of construction plaintiff had knowledge thereof and made no objection thereto until the building was nearly completed. They pleaded that in the intervening years between the granting of the easements for the construction of the electric transmission lines and the purchase of defendants' lot by them the neighborhood had greatly changed and had become closely built up, with the result that the plaintiff's wires extended over many buildings and structures in the same manner and to the same extent that they extended over defendants' building; that their building did not cover the whole of the rights of way claimed by plaintiff and did not interfere with plaintiff's ingress and egress thereto; that their building could not be moved because of the type of construction; that its presence did not damage the plaintiff nor constitute any but very slight inconvenience to it. They claimed estoppel so far as mandatory injunction to remove be concerned.

To the defendants' answer plaintiff interposed a general demurrer which was sustained without leave to amend and from the judgment thereafter entered the defendants appealed. The judgment was reversed by this Court upon the ground that the pleadings presented triable issues of fact, our opinion appearing in Pacific Gas & Electric Co. v. Minnette, 92 Cal.App.2d 401, 206 P.2d 1138. Thereafter the case was tried and the present judgment from which this appeal has been taken was entered against the defendants.

We have already said that the court found the allegations of the complaint were true. As to the answer the court found as above stated concerning the proximity of the roof to some of the wires; further found that at the time of the construction of the garage there were and for a long time prior thereto had been present upon the site of the garage a fuel shed and, on property adjoining that site, there was on one side a building 6 by 8 feet in horizontal dimensions used for a dwelling, and on the other side a one-story frame building used for a dwelling and as an office for an auto trailer court; that, aside from such buildings and mobile auto trailers from time to time present, the spaces beneath the wires were clear of any buildings visible from the site of the garage; that defendants had expended about $9,000 in the construction of the garage and that the building could not be moved with-

out the destruction of it; that the defendants "had no actual knowledge of the instruments attached to the complaint as Exhibits A and B [the two easement grants] prior to or at the time of erection of said garage building and that plaintiff did not express to defendants any objection to such construction at the time thereof"; that when the garage was built the neighborhood had been built up with dwellings and business structures, over some of which electric wires, of a light and power company subsidiary to plaintiff, extended. The court found all other allegations of the answer to be untrue.

[1, 2] Appellants contend that the finding the rights of way crossed the defendants' lot is not supported by the evidence. This contention cannot be sustained. The witness Pestoni testified for plaintiff as follows: He was a registered civil engineer and licensed land surveyor; in 1916 he located the right of way granted in 1917, and in 1920 went back and located the second right of way; in each instance he set stakes in the ground at the exact location where the poles suspending the wires were to be placed; in each case the poles later were actually placed in the ground where these stakes had been placed; all the poles and lines have remained in the same position ever since; having set the stakes, he then drew up descriptions from his survey. These descriptions so drawn were used in the easement grants. Both grants contained statements that the center line of each right of way, where the same crossed the Dos Reis lands, had been located and marked upon the ground by stakes driven therein by the engineer of the grantee and approved by the grantors. Appellants' arguments based upon a claim that the surveyor made a mistake with reference to the proper location of his starting point for his survey, so that a platting of the descriptions would put the rights of way in non-conformity with the actual location of the poles and wires, is unavailing here for it is clear from the testimony of the surveyor and from the language of the grants that the parties had agreed upon the actual lines, staked them upon the ground and intended that the descriptions should conform thereto. Any doubt, therefore, as to the conformity of the description as it might be platted with the actual location of the rights of way made by the parties is immaterial. This is a case where the descriptions as written must yield to the monument stakes set before the descriptions were written. They control the descriptions and fix the location on the ground of the rights of way described in the grants. Where the parties themselves so construe a deed by their subsequent acts that there can be no reasonable ground to doubt the correct interpretation of the descriptions used, the location so fixed by the parties themselves and acquiesced in by them over the years would control any technical construction of the deeds. Grant v. Bannister, 160 Cal. 774, 781, 118 P. 253. This is but an application of the rule that when the meaning of the language of a contract is doubtful the acts of the parties done under it afford one of the most reliable clues to the intention of the parties. The findings of the trial court as to the actual location of the rights of way and that these rights of way cross the appellants' lot are amply supported.

[3–6] Appellants contend that the finding they had full notice of the easements and rights of way of the respondent is not supported. And partially in support of this contention they point to the court's finding that the appellants had "no actual knowledge" of the deeds of the grants of rights of way, copies of which were attached to the complaint. This contention cannot be sustained. It is uncontradicted that the transmission lines extended for long distances on either side of appellants' lot; that standing upon their lot they could see north along the lines for at least a mile and see that although the entire territory was closely built up no buildings were constructed beneath the wires. Likewise, turning south they could see that although the territory for a mile or more visible to the south was closely built up on one side of the lines, no buildings were constructed beneath them. Standing on their lot they could also see, of course, that the lines crossed over it. Plaintiff Christino Minnette so testified. It was thus visually apparent when appellants purchased their lot

and when they were constructing their building that some person or corporation was actually maintaining power lines across and over appellants' lot. Minnette further testified that while obtaining a building permit from zoning authorities a member of the planning commission went with him upon the lot, called his attention to the wires and suggested that the respondent might have some rights to maintain them where they were; that he then asked Minnette if the respondent had such rights and Minnette replied it did not, whereupon the commission member remarked that in that case and if appellants built the respondent would have to move or raise the wires. "Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting all persons on inquiry as to the nature of the occupant's claims." (39 Am.Jur. 242.) "Except in so far as the rule has been varied by statute, actual possession of land is such notice to all the world, or to anyone having knowledge of such possession, as will put on inquiry those acquiring title or a lien on the land to ascertain the nature of the right that the occupant has in the premises. The presumption is that inquiry of the possessor will disclose how and under what right he holds possession, and, in the absence of such inquiry, the presumption is that, had such inquiry been made, the right, title, or interest under which the possessor held would have been discovered. The notice which the law presumes has been held to be actual, and not merely constructive, notice. Possession is notice not only of whatever title the occupant has but also of whatever right he may have in the property, *and the knowledge chargeable to a person after he is put on inquiry by possession of land is not limited to such knowledge as would be gained by examination of the public records.*" 66 C.J.S., Notice, § 11, pp. 646, 647; see, also, Civ.Code Sec. 19 and 20 Cal.Jur. 238. The foregoing rules are applied by California courts. They are applicable where the possession is under a right of way grant. Follette v. Pac. Light & Power Corp., 189 Cal. 193, 208 P. 295, 23 A.L.R. 965; see, also, J. R. Garrett Co. v. States, 3 Cal.2d 379, 44 P.2d 538. It is uncontradicted in the testimony that appellants made no inquiry of the possessor, that is, of respondent, but professed to rely solely upon the title report which they obtained. But, as we have seen, this they could not do when inquiry of the possessor would certainly have disclosed that the respondent was in possession of the easements and claiming under the recorded grants, which on being read would have disclosed everything of which the appellants here claim to have been ignorant, including the restrictions upon use which the trial court found they violated by building their building on respondent's rights of way. As to the finding that they had no actual knowledge of the instruments it must be construed in the light of the foregoing authorities as amounting to no more than a finding that they did not see the grants or the record thereof; for the knowledge with which they are charged is the knowledge they would have gained had they pursued the inquiry required of them. And such knowledge would have been actual when gained by inquiry. The foregoing amply supports the challenged findings, even assuming, as appellants contend, that, platting the record descriptions of the rights of way and of appellants' lot, the rights of way would appear not to cross the lot. This is so because it is not necessary in view of what has been said to depend upon constructive notice by record in the situation portrayed here.

[7] Appellants contend there is no support for the court's finding that their building obstructed respondent in the use of and passage over its rights of way and in the maintenance of its power lines. But respondent's rights included the right to have the land embraced in its rights of way kept free of buildings. It requires no testimony to show that putting a building where appellants put theirs is an obstruction to respondent's use and an encroachment upon respondent's rights. Certainly passage over the land embraced within the rights of way would not be as free with the building there as if it were not there. Equally certain is it that the dangerous proximity of building and wires is an obstruction to use.

[8] Appellants contend that the holding of this Court on the previous appeal constitutes the law of the case and in developing this contention they begin by citing authorities to the effect that where evidence on a retrial shows the averments of an answer to be true the decision of an appellate court on a former appeal on demurrer to the answer is the law of the case. The rule has no application and the contention cannot be sustained for the reason that allegations of essential facts, which we held would support a judgment for defendants if true, were held at the trial to be untrue. Contrary to the allegations of the answer, the evidence showed and the court found that the plaintiffs had constructed their building upon respondent's rights of way and beneath respondent's wires, and that appellants were charged with full knowledge of the context of the easement grants, including the declaration therein that the grantors would neither build nor permit the building of any structures upon the rights of way. The answer pleaded that the respondent had knowledge during the construction of appellants' building that they were building it in violation of respondent's rights and respondent made no objection thereto until the building was completed. The trial court found these allegations to be untrue and the record supports the finding. The only evidence of knowledge on the part of respondent is sought to be inferred from evidence that the rights of way were patrolled every 4 to 6 weeks by employees of respondent. But there was no evidence that these employees had any duty to report or did report to respondent concerning the progressing encroachments by appellants. The trial court was free to conclude that such knowledge was not possessed earlier than when, just before the completion of the building, the respondent asserted its rights, stopped the construction, and began suit.

[9, 10] Appellants contend that the covenants contained in the easement grants regarding buildings on the rights of way do not run with the land. We think that appellants misconceive the nature of the so-called covenants. Strictly speaking, they are not covenants at all, but are statements of the servitudes placed upon the grantor's land as part and parcel of the easements created by the grants. True, they are stated in the form of covenants, but when the grants are considered as a whole it is clear that these covenants are descriptive of the servitudes created and are not mere covenants. The right to have the land contained within the boundaries of the rights of way remain free of buildings was germane to the main purpose of the right to erect and maintain the transmission lines. "Easements may be created by contract or covenant; such agreements are grants in effect. * * * The precise form or nature of the covenant or agreement is not material. It is not even essential that it should run with the land; * * *." 28 C.J.S., Easements, § 28, pp. 682–683. Furthermore, treating these parts of the grants as covenants they clearly created servitudes enforceable in equity. "'If the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which "in law runs with the land".'" Richardson v. Callahan, 213 Cal. 683, 687, 3 P.2d 927, 929, quoting the foregoing from Pomeroy's Equity Jur. 2d ed., secs. 688, 689.

Finally, appellants contend that the trial court abused its discretion in issuing its mandatory injunction requiring the removal of their building from respondent's rights of way, which removal could only be accomplished by destroying the building. They argue that this was a proper case for weighing relative hardships; that when the relative hardships between granting and denying the mandatory injunction be considered the trial court should, as a matter of law, have withheld its injunctive relief. In our former opinion we adopted

this view. We granted a rehearing in order to further consider the matter. After such consideration we have concluded that the trial court did not abuse its discretion in ordering the appellants' building removed.

[11] It is settled law that a court of equity will in a proper case award a mandatory injunction for the protection and preservation of an easement, including, where that remedy is appropriate, an order for the removal of an obstruction already erected; but, as is generally the case, where the extraordinary remedy of mandatory injunction is asked the trial court is vested with a judicial discretion as to whether it will grant such relief or on the contrary will withhold it and relegate the parties to legal remedies. Clough v. W. H. Healy Co., 53 Cal.App. 397, 400, 200 P. 378; see, also, Wright v. Best, 19 Cal.2d 368, 386, 121 P.2d 702. In short, where the right to relief has been made out in such a case as this and injunctive relief is asked, there is usually posed a further question of the appropriateness of such relief. The matter is treated substantially as follows in Restatement of the Law of Torts, Ch. 48, secs. 933–951, inclusive: The availability of injunction against a committed tort depends upon the appropriateness of this remedy as determined by a comparative appraisal of all the factors of the case including the following: The character of the interest to be protected, the relative adequacy to the plaintiff of injunction and of other available remedies such as damages; plaintiff's delay in bringing suit, plaintiff's misconduct, if any; the relative hardship likely to result to defendant if the injunction is granted and to plaintiff if it is denied; the interest of third parties and of the public, and the practicability of framing and enforcing the order or judgment. The appropriateness of injunction is to be determined as of the time of the order or judgment unless special circumstances otherwise require. In the instant case the property interests invaded by the appellants' encroachment were those of a public utility, the invaded property being dedicated to a public use. As to a comparison of the relative adequacy to the plaintiff of injunction and of the remedy of damages the following factors, among others, were presented for consideration: Encroachment was substantial, permanent and continuing, in gross violation of the plaintiff's rights of way; the situation created by appellants' building might well subject respondent to the alternative of corrective construction of its lines, or the risk of injury to third parties with resultant litigation. On the other hand, the damage alternative would be difficult to admeasure and would involve a large amount of speculation, as even corrective measures, such as raising the wires, could easily involve inconvenience and expense in future maintenance. In respect of plaintiff's delay in bringing the suit as one of the factors to be determined in considering the appropriateness of an injunction the trial court had, as we have held, found that plaintiff had not been guilty of any delay and this finding was supported by substantial evidence. The same can be said as to the factor of plaintiff's misconduct, of which the trial court had found it to be free. As to the relative hardship likely to result to appellants if injunction be granted and to respondent if it be denied the situation was this: Plaintiff had proved that a tort had been committed which involved a permanent and substantial encroachment upon its rights of way. The responsibility for this encroachment was entirely that of the appellants. This wrongdoing of appellants was not in the nature of innocent mistake since both, when they purchased their property and when they constructed their building, were charged with knowledge of the respondent's rights and when, before beginning construction, their attention was specifically directed to the dangerous situation they would be creating if they built their building as planned, their response was to the effect that respondent was in fact trespassing upon the appellants' property, had no right to have its wires running across that property and that if hazard arose it would be for the respondent to remove it by taking corrective action on its own responsibility.

[12] Under all the circumstances we think that the trial court was within the

bounds of its legal discretion when, in view of the factors involved, it determined that mandatory injunction constituted the appropriate remedy.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



115 Cal.App.2d 684

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 19257.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1953.

Rehearing Denied Feb. 17, 1953.

Proceeding to review an order of the Industrial Accident Commission awarding compensation for personal injuries. The District Court of Appeal, Vallée, J., held, inter alia, that the evidence supported the determination that defendant was estopped from raising the bar of the statute of limitations for a certain period after the injury, and that applicant had not unreasonably delayed in filing her application after such estoppel had ceased to exist.

Affirmed.

1. Workmen's Compensation ⇐2059

Evidence and reasonable inferences to be drawn therefrom would be stated in light most favorable to applicant for adjustment of workmen's compensation claim on issues whether insurer was estopped from raising defense of statute of limitations and whether the claim was barred by such statute. Labor Code, § 5405.

2. Limitation of Actions ⇐13

The equitable doctrine of estoppel in pais is applicable in a proper case to prevent fraudulent or inequitable resort to statute of limitations.

3. Estoppel ⇐52

When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, such one is estopped from taking advantage of the act or omission caused by his own act or promise.

4. Limitation of Actions ⇐13

One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought.

5. Limitation of Actions ⇐13

Actual fraud in the technical sense, bad faith, or an intent to mislead, are not essential to create an estoppel against relying on statute of limitations as a defense.

6. Insurance ⇐623(3)

An insurer cannot hold out a hope of amicable adjustment of a claim and thus delay action against it, and then plead the delay caused by its own conduct as a defense to an action when brought.

7. Limitation of Actions ⇐13

A party has a reasonable time within which to bring his action after estoppel from relying on statute of limitations as a defense has expired.

8. Limitation of Actions ⇐13, 199(1)

Whether an estoppel from relying on statute of limitations as a defense exists depends upon whether the act, representations or conduct of defendant lulled plaintiff into a sense of security preventing him from instituting proceedings before the running of the statute of limitations, and whether plaintiff relied thereon to his prejudice, and such questions are questions of fact.

9. Workmen's Compensation ⇐2030

In proceeding on application for adjustment of workmen's compensation claim, evidence supported determination of commission that compensation insurer was estopped from raising defense of statute of limitations during a certain period and that claimant had not unreasonably delayed in filing application for benefits after such estoppel had ceased to exist. Labor Code, § 5405.

10. Appeal and Error ⇐994(3)

A reviewing court cannot reject testimony of witness that has been believed by the trier of facts unless it is physically impossible that such testimony be true, or its falsity is apparent without resorting to inferences or deductions.

11. Appeal and Error ⇐931(1)

Trial ⇐382

The trier of fact may believe and accept a portion of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effects, and on appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment.

12. Workmen's Compensation ⇐1704, 1939

Questions as to credibility of applicant for workmen's compensation benefits and weight of the evidence are for the commission, and if there is any evidence, whether direct or by reasonable inference, which will support the finding of the commission, a reviewing court has no power to disturb it.

13. Workmen's Compensation ⇐1939

The function of the court on review of the action of the Industrial Accident Commission is to determine whether the evidence, if believed, is substantial and supports the findings.

Herlihy & Herlihy and E. H. Herlihy, Los Angeles, for petitioner.

Edmund J. Thomas, Jr., San Francisco, for respondent Industrial Accident Commission.

Harry O. Juliani, Oceanside, for respondent Nellie Varela.

VALLÉE, Justice.

Review of an award of the Industrial Accident Commission. On February 2, 1946, respondent Nellie Varela, referred to as the applicant, sustained an injury to her left eye which arose out of and occurred in the course of her employment. On August 3, 1950, applicant filed an application for adjustment of claim with the commission. Petitioner is the insurance carrier for applicant's employer. It contended before the commission that the claim was barred by the statute of limitations. The commission made an award in favor of applicant, adjudged that petitioner was estopped from raising the defense of the statute of limitations and that the claim was not barred. Petitioner contends here that the latter conclusions of the commission are not supported by any substantial evidence. That is the sole question for decision.

The parties agree that ordinarily the statute of limitations would have run one year from the date of injury, or on February 2, 1947. Labor Code, § 5405. It will be noted that the application for adjustment of claim was filed more than four years after February 2, 1946, the date of injury. Petitioner, as we read its petition for review, concedes that as to the period between February 2, 1946, and May 12, 1949, the evidence on the question of estoppel is in conflict and, inferentially at least, concedes that if the application had been filed within one year after May 12, 1949, it would not have been barred by the statute of limitations. It argues that on May 12, 1949, applicant ceased to rely on any conduct or representations of petitioner and that as she did not file her application within one year thereafter it is barred. We have concluded that the findings of the commission are supported by substantial evidence.

[1] The evidence and the reasonable inferences to be drawn therefrom will be stated in the light most favorable to applicant. Coborn v. Industrial Accident Comm., 31 Cal.2d 713, 716–717, 192 P.2d 959. The injury occurred on February 2, 1946, in San Diego. Applicant's employer was ill at the time, and she reported the injury to him within a few days. Within less than two months after the injury, applicant's employer reported the fact to petitioner. About two months after the injury, applicant reported the injury to petitioner's representative, one Francis, at its office in San Diego. Francis asked her "a lot" of questions about the accident, filled in some blanks on a form which applicant signed, and told her "You will hear from us." About six weeks later, not hav-

ing heard from petitioner or Francis, applicant again went to petitioner's office in San Diego and talked to Francis. Applicant "told him she hadn't heard anything from him and he said, 'Well, you will hear.' She said that maybe she ought to get an attorney and he said, 'No, we'll take care of this. Don't worry about it.'" On this occasion, Francis also asked applicant some questions about the accident and wrote on a pad. Thereafter she went to see Francis five or six times in San Diego and called him every five or six weeks, and on each occasion was told she would hear from the company.

Applicant went to see Francis again on November 13, 1947. She testified she went to see him on this occasion because "they always told me I would hear from them and I never did." She had just come from the hospital after having surgery on her eye. She was wearing plastic glasses with "just a tiny pinhole", and her right eye was blindfolded with a "tiny" opening. She could not turn her eyes from side to side. Francis told her he could not understand why she had not heard from petitioner "in all this period of time," that the first report must have been lost—he would make out a new one. Applicant testified Francis "told me that the reason for this report was he told me the first one had been lost and he himself couldn't understand why I haven't heard. One time before when I saw him he took notes and had written them down and said I should hear from them and if not that I should come in or call up but I should hear from them." Francis told her he had written a couple of letters and was going to write again. He asked her about the details of the accident, and filled out another form which she signed. Because of the condition of her eyes, she was unable to read the form. Francis did not read it to her—she assumed he had written down what she had told him. There was evidence that Francis made several incorrect statements in the report. He told applicant on this occasion she should call petitioner's Los Angeles office. She called that office "every two-three months for a period of a year and a half, or more."

About March 28, 1949, applicant wrote to petitioner saying that she "would appreciate very much hearing from you in regard to my claim." Petitioner did not answer the letter.

The last telephone call applicant made was to petitioner's office in Los Angeles on May 12, 1949. She testified she did not know whom she talked to and that she was "a wee bit angry," crying, and "having a lot of trouble with my eye," told the person she talked to she was going to get a lawyer and sue them. The person she talked to did not tell her "the company was not going to pay her anything" or tell her "there was nothing further in his file to indicate that the accident was compensable" or that "the company was not assuming liability" for her claim. Applicant also testified he told her "it takes time", and "that I shouldn't get excited and all riled up. I was crying over the phone I remember that, and he told me that I could call again in six weeks or two months. He told me that every time I called and I told him, 'You have been telling me to call back every six weeks or two months or three months,' and he told me not to get excited and I told him I said I was tired of all this and I was going to to get a lawyer and he said that would not be necessary and that this would be taken care of automatically." She further testified that she eventually got a lawyer; she did not get one, or try to get one, at the time of this last conversation; "I thought perhaps I would hear from them eventually and I waited, oh, I don't know how long, but Mr. Frank Shull and everybody that I talked to thought I should get a lawyer. They thought that the insurance company was giving me a run around." She filed her application with the commission immediately after consulting counsel in 1950.

The reports made out by Francis were sent to petitioner's Los Angeles office. At one of the hearings, the referee found a memorandum in petitioner's file dated December 15, 1948, which read: "Here it is—the lost has been found!"

After the accident, Doctors Kilgore and Berends treated applicant. On December 28, 1948, petitioner requested each doctor

to give it a report as to what he did and what his findings were at the time he examined applicant. Doctor Kilgore wrote to applicant asking her permission to give petitioner her case history. In the early part of 1949, the doctors sent reports to petitioner. Petitioner's file showed it did not take any action in the matter between November 13, 1947, and December 28, 1948. No explanation was offered for the delay.

There were four hearings in this matter. After two hearings, it was submitted and an award made in favor of applicant. Francis was present at the first hearing, and heard applicant testify she first reported the injury to him about two months after it happened. He did not, prior to the submission of the matter at the end of the second hearing, take the stand to rebut her testimony, nor was the report made on November 13, 1947, offered in evidence by petitioner, although it was in the possession of petitioner's counsel at the time, nor did petitioner produce its file at those hearings. Thereafter, the commission granted a rehearing and two additional hearings were held. Prior to the fourth and last hearing, in a request for a further hearing, petitioner's counsel told the commission that before the application for adjustment of claim was filed petitioner's file "consisted of a statement taken from the applicant on November 13, 1947, and a telephone memorandum dated May 12, 1949." The file at that time also consisted of (1) rough notes made by Francis on November 13, 1947; (2) the memorandum of December 15, 1948, reading "Here it is—the lost has been found!"; (3) the letter of March 28, 1949, from applicant to petitioner; and (4) the correspondence between petitioner and applicant's physicians and their reports. These items were not disclosed until the last hearing which was granted contingent upon production of the file and of Francis as a witness. At the last hearing Francis testified he had no independent recollection on the subject, but by referring to the file he testified applicant first reported the injury on November 13, 1947, and he knew at that time that the claim "was filed late" but he did not so advise applicant.

Petitioner's file was produced at the last hearing. It did not contain a copy of any communication from petitioner to applicant. Petitioner did not, at any time, either orally or in writing, tell applicant her claim was rejected.

[2–4] The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 P. 439, 49 L.R.A. 647; 16 Cal.Jur. 576, § 172; 53 C.J.S. Limitations of Actions, § 25 p. 962. A person by his conduct may be estopped to rely on the statute. Where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. Adams v. California Mut. B. & L. Ass'n, 18 Cal. 2d 487, 489, 116 P.2d 75; Langdon v. Langdon, 47 Cal.App.2d 28, 31–32, 117 P.2d 371; Berkey v. Halm, 101 Cal.App.2d 62, 68, 224 P.2d 885; Schaefer v. Kerber, 105 Cal. App.2d 645, 647, 234 P.2d 109. When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise. Rapp v. Rapp, 218 Cal. 505, 509, 24 P.2d 161; Quanchi v. Ben Lomond Wine Co., 17 Cal.App. 565, 567, 120 P. 427; Miles v. Bank of America etc. Ass'n, 17 Cal.App. 2d 389, 397–399, 62 P.2d 177. One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought. Carruth v. Fritch, 36 Cal.2d 426, 433, 224 P.2d 702, 24 A.L.R.2d 1403.

[5–7] Actual fraud in the technical sense, bad faith, or an intent to mislead, are not essential to create such an estoppel. It is sufficient that the debtor made misrepresentations or so conducted himself that he misled the creditor, who acted thereon in good faith to the extent that he failed to commence action within the statutory period. 34 Am.Jur. 324, § 412; Annotations 130 A.L.R. 49, 50; 24 A.L.R.2d 1435. Acts or conduct which wrongfully

induce a party to believe an amicable adjustment of his claim will be made, may create an estoppel against pleading the statute. Miles v. Bank of America etc. Ass'n, 17 Cal.App.2d 389, 398, 62 P.2d 177; Annotation 130 A.L.R. 38; 27 A.L.R.2d 1430. An insurer cannot hold out a hope of amicable adjustment of a claim and thus delay action against it, and then plead the delay caused by its own conduct as a defense to an action when brought. Perry v. Magneson, 207 Cal. 617, 621–622, 279 P. 650. It is only when a substantial period for instituting proceedings supervened after expiration of the delay engendered by a party that his conduct or representations will not estop him from asserting the bar of the statute, or where such conduct or representations did not in fact induce the party to forbear from institution proceedings. 53 C.J.S., Limitations of Actions, § 25, p. 967. A party has a reasonable time in which to bring his action after the estoppel has expired. Annotations 130 A.L.R. 20; 24 A.L.R.2d 1423.

[8] Whether an estoppel exists—whether the acts, representations, or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact, not of law. Cruise v. City and County of San Francisco, 101 Cal.App.2d 558, 562, 225 P.2d 988; Annotation 130 A.L.R. 13.

The facts in Benner v. Industrial Accident Comm., 26 Cal.2d 346, 159 P.2d 24, are closely parallel to those in the case at bar. In holding that under the evidence the insurance carrier was estopped from invoking the statute of limitations, the court, speaking through Mr. Justice Shenk, said in 26 Cal.2d at pages 349, 350, 159 P.2d at page 26: "To create an equitable estoppel, 'it is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.' 3 Pomeroy Eq.Jur., 5th Ed., § 812, p. 233. * * * It follows that the employer and its insurance carrier cannot escape the consequences of their acts or conduct affirmatively engaged in to procure delay for purposes of settlement, or investigation or otherwise, upon which the employee has relied and by which he has been induced to delay the filing of a claim until after the expiration of the statutory period. Such conduct, so relied upon, becomes the basis of an estoppel against the party responsible for the delay and should, under the facts here presented, preclude the bar of the statute of limitations." Cf. Sears v. Rule, 27 Cal.2d 131, 145–148, 163 P.2d 443; Tyra v. Board of Police & Fire Commissioners, 32 Cal.2d 666, 197 P.2d 710; Truck Ins. Exch. v. Industrial Acc. Comm., 36 Cal.2d 646, 226 P.2d 583; Mendibles v. City of San Diego, 100 Cal.App.2d 502, 224 P.2d 42.

[9] Tested by the rules stated, the evidence abundantly supports the conclusion of the commission. Applicant promptly reported the injury to her employer and to petitioner. Petitioner did nothing to discharge its obligation to furnish medical treatment or to pay compensation. Its efforts were directed solely to building a defense to applicant's claim by taking statements from her and obtaining reports from her physicians. The record shows a studied effort on the part of Francis to cause applicant to delay filing a claim with the commission. One cannot read the record without fairly concluding that he was, to use a phrase in the record, giving her a "runaround." He deliberately misled her. She relied on him and did not realize her legal rights until she consulted counsel. Petitioner did not at any time reject the claim. It clearly appears from the record that applicant had no knowledge of legal proceedings, and that she was ignorant of her rights. A reasonable inference, even from the cold record, is that she was gullible and easily misled. The commission was warranted in concluding that she reasonably relied on petitioner's representations and conduct until she consulted counsel immediately prior to the time she filed her application. It cannot be said as a matter of law that the inducement

for delay ceased to operate more than a reasonable time prior to the institution of the proceeding. We cannot say that the proceeding before the commission was not seasonably instituted after applicant became aware that petitioner had in fact rejected her claim.

[10–13] Petitioner argues there were inconsistencies in the testimony of applicant, and that the commission should have accepted that testimony from which it must have concluded that she did not rely on any representation or conduct of petitioner after May 12, 1949. "A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. * * * The trier of fact may believe and accept a portion of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836." People v. Whitehurst, 112 Cal. App.2d 140, 245 P.2d 509, 510. Questions as to the credibility of applicant and the weight of the evidence are for the commission, and if there is any evidence, whether direct or by reasonable inference, which will support the finding of the commission, a reviewing court has no power to disturb it. Mercer-Fraser Co. v. Industrial Acc. Comm., 40 Cal.2d 102, 251 P.2d 955. The function of the court on review of the action of the commission is to determine whether the evidence, if believed, is substantial and supports the findings.

Kemper v. Industrial Acc. Comm., 177 Cal. 618, 171 P. 426, relied on by petitioner is not in point. The Kemper case merely held that the conclusion of the commission that the claim was barred was supported by the evidence.

Award affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

ABNEY v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14986.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1953.

Rehearing Denied Feb. 26, 1953.

Passenger's action for injuries sustained when municipal bus came to a sudden stop, allegedly to avoid hitting a child. The Superior Court, City and County of San Francisco, I. L. Harris, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Goodell, Acting P. J., held that there was sufficient evidence to support the judgment.

Affirmed.

1. Carriers ⇐316(3)

In action for personal injuries to passenger in defendant's bus, when plaintiff invoked res ipsa loquitur doctrine and proved that bus came to a sudden stop, burden of explanation was on defendant.

2. Carriers ⇐320(19)

In action for personal injuries to passenger in defendant's bus, when plaintiff invoked res ipsa loquitur doctrine and proved that bus came to a sudden stop and defendant offered evidence that brakes had been applied to avoid hitting child, it became function of jury to weigh all evidence to determine therefrom whether inference of negligence had been rebutted and whether plaintiff had sustained burden of proving negligence of defendant by preponderance of all evidence.

3. Carriers ⇐318(4)

In action for personal injuries to passenger in defendant's bus, wherein plaintiff invoked res ipsa loquitur doctrine and proved that bus came to a sudden stop, but defendant showed that brakes had been applied to avoid hitting a child, evidence supported verdict for defendant.

4. Appeal and Error ⇐1051(1)

In passenger's action for injuries sustained when bus came to sudden stop, where witness, upon being confronted with her statement, made prior to trial, that two children had ran in front of the bus, answered that she had not seen them run in

front of the bus but had merely seen them on the sidewalk, any error in admitting document containing such statement by witness was harmless.

5. Trial ⇐54(3)

In passenger's action for personal injuries sustained when municipal bus stopped suddenly, there was no error in connection with examination of one of plaintiff's fellow passengers, notwithstanding reading of impeaching pre-trial statement in which witness had opined that bus had stopped to avoid hitting children, where court made it clear to jury by prompt and positive rules that those portions of the statements which gave the witness's opinions and conclusions were stricken out and had to be disregarded.

6. Witnesses ⇐269(2)

In passenger's action for injuries sustained when bus came to sudden stop, where bus driver testified on direct examination that he had left defendant's employ shortly after the accident, cross-examination as to whether termination of his employment had been voluntary was properly excluded.

7. Witnesses ⇐282½

In passenger's action for injuries sustained when municipal bus came to a sudden stop, wherein defendant showed that brakes had been applied to avoid hitting child, defendant's objection to cross-examination of driver as to whether it was his custom to slacken his ordinary speed when young children were on the street in front of him was properly sustained.

8. Witnesses ⇐276

Municipal bus driver whose sudden stopping of bus occasioned injuries to passenger was not a "managing agent", within purview of code section permitting examination of managing agent as an adverse witness. Code Civ.Proc. § 2055.

9. Trial ⇐296(3)

In passenger's action for injuries sustained when municipal bus came to a sudden stop, there was no error in court's instruction that a mere surmise or conjecture that there might have been negligence on part of defendant did not entitle plaintiff to a verdict, notwithstanding fact that doctrine of res ipsa loquitur had been invoked, where such instruction was followed almost immediately by one adequately explaining that doctrine.

10. Carriers ⇐321(11)

In passenger's action for personal injuries sustained when municipal bus came to a sudden stop, instructions as to bus driver's duty to stop bus in order to avoid hitting a pedestrian or because of traffic conditions were proper.

11. Carriers ⇐321(9)

In passenger's action for injuries sustained when municipal bus came to a sudden stop, instruction that prima facie speed limit at time and place of accident was 25 miles per hour was properly given, notwithstanding plaintiff's contention that it was misleading because issue was whether driver was proceeding too fast in light of presence of children rather than in light of any statutory requirement, and because it failed to explain that prima facie limit was, according to plaintiff, inapplicable during last one hundred feet before intersection. Vehicle Code, § 511.

12. Carriers ⇐321(9)

In passenger's action for injuries sustained when bus stopped suddenly, allegedly to avoid striking child, instruction on imminent peril was properly given.

13. Carriers ⇐321(11)

In passenger's action for injuries sustained when bus stopped suddenly, allegedly to avoid striking child, instruction, that bus driver would not necessarily be chargeable with negligence in decreasing his speed and stopping if he were exercising all care required by law, and, without fault on his part, was confronted with situation suddenly requiring him to do so, was properly given.

14. Trial ⇐260(1)

It is not error to refuse to submit tendered instruction if court gives adequate instructions on subject.

15. Trial ⇐237(1)

In passenger's action for injuries sustained when bus came to sudden stop, instructions given on preponderance of evidence were adequate.

16. Carriers ⇐321(21)

In passenger's action for injuries sustained when municipal bus came to sudden stop, instructions given on subject of res ipsa loquitur were adequate. Civ.Code, § 2100.

17. Carriers ⇐321(19)

In passenger's action for injuries sustained when municipal bus came to sudden stop, instructions given on joint or concurrent negligence were adequate.

18. Carriers ⇐321(11)

In passenger's action for injuries sustained when municipal bus came to sudden stop, trial court's charge adequately dealt with bus driver's duty to anticipate presence of young children in street.

Ernest I. Spiegl, San Francisco, for appellant.

Dion R. Holm, City Attorney and Lawrence S. Mana, Deputy City Attorney, San Francisco, for respondent.

GOODELL, Acting Presiding Justice.

This appeal is from a judgment entered on a verdict for defendant in an action for personal injuries. A new trial was denied.

Appellant was a passenger on a municipal bus traveling easterly on Visitacion Street approaching its intersection with Brittain Street in San Francisco, when it came to a sudden stop which threw the passengers forward against the seats in front of them. Appellant, who was seated in the middle of the long seat at the rear of the bus (with no seat in front of her) was thrown into the aisle, and in falling her head struck a part of the bus.

Appellant's first contention is that the evidence is insufficient to justify the verdict.

[1, 2] This admittedly is a res ipsa loquitur case, and it was tried as such. Under that rule, once it was proved that the bus came to a sudden stop the burden of explanation was on the respondent. It appeared in evidence that the brakes had been "slapped on" to avoid hitting a boy on a scooter, who had darted out from the curb into the street and was headed directly toward the bus. With that evidence before the court it became the function of the jury under the rule "to weigh all the evidence and to determine therefrom whether the inference of negligence had been rebutted and whether plaintiff had sustained the burden of proving the negligence of defendants by a preponderance of all the evidence". Renzetti v. Los Angeles Motor Coach Co., 48 Cal.App.2d 37, 39, 119 P.2d 164, 165.

Appellant concedes that "the act of the child running into the path of the bus, was *a* proximate cause of the accident". Whether it was the *sole* proximate cause was a question of fact for the jury to decide in the light of all the evidence and particularly the testimony as to the speed of the bus, the operator's control over it, and all his acts and conduct immediately before and at the time of the application of the brakes.

It is to be implied from the verdict that the jury decided that the boy's act in darting out from the curb (which precipitated the sudden stop) was the sole cause of the accident. Had the jury concluded that the driver had not held his bus under proper control, or that he should have slackened its speed earlier in view of his admission that he saw the children over a block away, and that these or any other acts or omissions were contributing causes, the verdict doubtless would have been against the respondent, since the jury was instructed that: "If you find that some negligent act or omission of the defendant * * * and some negligent act or omission of any other person or persons, were, either jointly or concurrently, the proximate cause of plaintiff's injury, then in such event it makes no difference that the negligence of one was greater or less than the negligence of the other; and in such event plaintiff may recover from the defendant * * *."

That instruction was followed immediately by another which summarily removed from the jury any consideration of plaintiff's contributory negligence. It told them that "no conduct on her part constitutes a defense against such negligence, if any, which you may find chargeable to the defendant * * *."

[3] There is sufficient evidence to support the verdict and there is nothing to differentiate this case from the usual personal injury case, or to convert its plain questions of fact into questions of law. In Aboudara v. City & County of San Francisco, 114 Cal.App.2d 630, 251 P.2d 32, 34, this court had before it a similar case, where a woman passenger was thrown to the floor of a municipal bus when it was brought to a sudden stop in avoiding a collision with an automobile. Therein we said: "Whether in so stopping [the driver] acted in a manner which was reasonably prudent for the safety of his passengers was a question of fact for the trial court. The court below having answered the question in the affirmative, this court is bound by its determination." Numerous cases are collected therein to which attention is directed.

Since there is ample evidence to support the verdict it follows that appellant's second contention, namely, that her motion for a directed verdict should have been granted, must be rejected.

Appellant's third point is that "The verdict can only be explained upon the ground that the jury was misled by prejudicial error committed by the trial court in its rulings on evidence and when instructing the jury."

The first assignment concerns the testimony of Mrs. Adele Rosenberger and her sister-in-law Mrs. Ruth Rosenberger, who also were passengers, witnesses for appellant, and each of whom filled out one of the City's questionnaire forms. Appellant says: "Under the guise of impeaching something said by the witnesses on direct examination, counsel produced these statements and, over the objection of appellant, placed before the jury the witnesses' opinions as to what transpired outside of the bus, as well as their opinions as to the respective fault of driver and children."

The only expression of Adele Rosenberger's opinion was not in the presence of the jury but was contained in her answer, in the negative, to the printed question in the City's form: "In your opinion were bus employees in any way at fault?" To another question therein she answered "Two children running in front of bus and sudden stopping". She was questioned in court as to whether she had actually seen the children running in front of the bus and answered that she had not. During her cross-examination there were attempts by the defense to read from the questionnaire, which brought prompt objections from appellant. Counsel for respondent confronted her with her statement in the questionnaire: "Bus was under way, when two children ran in front of bus", and she answered: "I did not see them run in front; I saw them on the sidewalk." Respondent then offered the questionnaire and over appellant's objection that it was not proper impeachment it was admitted.

[4] Nothing whatever was brought out on the examination of this witness to attract the jury's attention to her expression of opinion in the questionnaire. While technically it might have been error to admit the document, we are satisfied that such error, if any, was harmless under the circumstances.

The questionnaire of Mrs. Ruth Rosenberger was not offered in evidence. When the defense sought to read therefrom the court, on appellant's objection, required respondent to point directly to the impeaching matter and it turned out, again, that this witness did not see the children run in front of the bus, and did not know where they came from. The following colloquy then ensued:

"Mr. Spiegl: We have no objection if he wants to ask her whether she previously stated she had seen the children run in front of the bus; I have no objection to that question.

"The Court: Read that statement.

(Statement read by Mr. Mana.)

" 'Two small children ran in front of the bus. The driver is not at fault. He stopped bus to avoid hitting the children. And as he did the lady was thrown off her seat. I thought at the time the lady was hurt as she hit her head but I am sure the driver did not know she was thrown from her seat until I called his attention to it. I feel he is not to blame.'

"Mr. Spiegl: I object to that.

"The Court: The objection is overruled. Read that portion that you say applies to impeachment.

"Mr. Spiegl: The statement is full of conclusions. I think he should limit himself to an impeaching question and lay the foundation for that question * * *.

"The Court: 'You don't know where they came from.' Now, then, you want to impeach that testimony?

"Mr. Mana: Yes, your Honor.

"The Court: Very well.

"Mr. Mana: Q. You stated at that time, did you not, Mrs. Rosenberger, that 'Two small children ran in front of the bus. The driver is not at fault.'

"Mr. Spiegl: Now, if your honor please—

"The Court: Now, that is objectionable —Wait a minute

"Mr. Spiegl: I will ask—

"The Court: The jury is instructed to disregard that particular statement read by counsel. Now, you should not do that, counsel, especially in the face of the objection now. The jury is instructed to disregard that * * *.

"The Court: No speeches. Ask her with respect to that particular testimony that you wish to impeach. Have you already asked that?

"Mr. Mana: Yes.

'The Court: All right. That is all.

"Mr. Mana: I think another portion is relevant, your Honor.

"Q. You also said at that time, 'He stopped bus to avoid hitting the children', is that correct?

"A. To my best knowledge.

"Mr. Spiegl: That is objected to as incompetent, irrelevant and immaterial.

"The Court: I am instructing the jury to disregard it, that is not by way of impeachment at all; she said nothing of that kind this morning that I can recall * *. The jury is instructed to disregard that question, and the answer is stricken out."

[5] The court thus made it clear to the jury by prompt and positive rulings that that part of the written statement which gave her opinions and conclusions were stricken out and had to be disregarded. Then at the conclusion of the case the usual instruction was given respecting testimony to which objections had been sustained and answers stricken out.

We find no error in connection with Mrs. Ruth Rosenberger's testimony.

[6] Appellant next complains that the cross-examination of Still, the driver of the bus, was unnecessarily curtailed. On direct examination he testified that he left respondent's employ shortly after the accident. On cross examination he was asked whether such termination was voluntary, to which the court sustained an objection. Appellant says "It was appellant's desire to explore this situation to determine whether or not the termination of employment was due either to Still's faulty driving in connection with this accident, or to his general incompetence as a driver." The ruling was proper.

[7] Respondent's objection to the question to the driver whether it was his custom to slacken his ordinary speed when young children were on the street in front of him was likewise properly sustained. No authority is cited supporting the attack on that ruling.

[8] Appellant next claims that she should have been permitted to examine the driver as an adverse witness under Code Civ.Proc. § 2055, on the novel theory, unsupported by authority, "that, as driver of the bus he was the managing agent of the defendant for all purposes connected with the trip of that bus." Sec. 2055 at the time of trial provided that the managing agent of a party could be so examined, but a bus driver is not a managing agent.

Five claims of error are made on instructions given and seven on instructions refused. *Only once is authority cited in support of these twelve attacks.*

[9] (a) The court gave the usual instruction that "A mere surmise or conjecture that there may have been negligence on the part of defendant does not entitle the plaintiff to a verdict." It is

claimed that such an instruction was improper because this was a res ipsa loquitur case. However, the instruction was followed almost immediately by one adequately explaining that doctrine and there could have been no confusion since there was no conflict or inconsistency between the two.

[10] (b) Appellant complains of three instructions which told the jury that it was the duty of the bus to stop, if necessary, to avoid hitting a pedestrian. This complaint is made notwithstanding appellant's concession in so many words, that "when the child ran into the street, his [the driver's] only course was to stop the bus." The third instruction of this series concluded with the following: "You may not find the bus driver guilty of negligence in stopping or reducing the speed of his bus, if traffic conditions required him to reduce speed and stop *and if he otherwise exercised the degree of care required by law.*" (Emphasis added.) Appellant's argument on this point is not at all persuasive and no authority is cited.

[11] (c) The jury was instructed "that the prima facie speed limit at the time and place of this accident was twenty-five miles per hour." It is claimed that this was misleading, first, because "the entire theory of the case was based upon the question of whether the driver was or was not proceeding too fast in light of the presence of the children—and not in light of any statutory requirement." Secondly, it is claimed to be "prejudicial in that it fails to explain that the prima facie limit is inapplicable during the last 100 feet before the intersection" citing § 511, Vehicle Code. That section contains no such provision. The instruction was properly given.

[12] (d) An instruction on imminent peril was given in the usual form. Its language is not criticized but it is claimed that no such instruction at all should have been given. This is the only one of the twelve attacks on instructions where authority is cited, Vedder v. Bireley, 92 Cal.App. 52, 267 P. 724, and Van Fleet v. Heyler, 51 Cal.App.2d 719, 125 P.2d 586. Neither case is in point. In each case the court found error in the very *language* of the instructions and in the Van Fleet case sudden peril instructions were held to create confusion because it was a wilful misconduct case. Appellant concedes that when the child ran into the street the driver's only course was to stop the bus, but says that the driver's negligence must be determined upon his failure to slow down sooner. This is an argument which should have been, and doubtless was, addressed to the jury. The defendant was entitled to the instructions. In Dodge v. San Diego, etc., Co., 92 Cal.App.2d 759, 767, 208 P.2d 37, which also was a case where the plaintiff a bus passenger was injured because of the sudden stopping of the bus to avoid a collision, the giving of an imminent peril instruction was held proper.

(e) Lastly appellant attacks an instruction reading:

[13] "The California Vehicle Code recognizes that a sudden decrease of speed of a vehicle may be necessary. You are instructed that a sudden decrease of speed of a vehicle is not necessarily negligence. If the driver of the bus was exercising all of the care required by law, and, without fault on his part, was confronted with a situation requiring him suddenly to decrease his speed and stop, he would not necessarily be chargeable with negligence in so doing."

The argument against this instruction is the same as that on imminent peril. It is not convincing.

We find no error in the instructions discussed above.

The seven claims of error in refusing instructions tendered by appellant are as follows:

[14, 15] (a) The court rejected four instructions on preponderance of the evidence. The court instructed that in a civil case "the preponderance of evidence is what is required. By preponderance of evidence is meant such evidence as when weighed to that opposed to it has more convincing force * * *. If the evidence in your judgment is equally balanced in weight, quality, effect and value, so

that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof." The four tendered instructions (1) told the jury that slight preponderance sufficed; (2) discussed circumstantial evidence; (3) pointed out the difference between reasonable doubt and preponderance, and (4) told the jury that plaintiff was entitled to a verdict if she met her burden. It is of course usual and proper for each side to propose instructions drawn to their own pattern, but it is not error to refuse them if the court gives adequate instructions on the subject. In our opinion the instructions given on preponderance of the evidence were adequate hence there was no error in rejecting the four so tendered.

[16] (b) The court rejected four of plaintiff's instructions (5, 6, 7 and 9) on res ipsa loquitur. What has just been said with respect to instructions drawn to a pattern most favorable to one's side applies here as well. The court gave an instruction on this subject which in our opinion adequately defined and explained the rule. The first two sentences thereof read exactly the same as the first two sentences of plaintiff's 5. Plaintiff's 6 gave the English translation of the Latin phrase but the court gave the same translation. Plaintiff's 7 covered the highest degree of care rule but the court gave two instructions on this subject which, together, were in substantially the language of sec. 2100, Civil Code. The language of plaintiff's 9 is not too clear, and it added nothing substantial to the res ipsa loquitur instruction which the court gave.

We might add that the authorities sometimes use the words "inference" and "presumption" of negligence indiscriminately in res ipsa loquitur instructions. See discussions in Crooks v. White, 107 Cal.App. 304, 310–11, 290 P. 497, Anderson v. I. M. Jameson Corporation, 7 Cal.2d 60, 66–67, 59 P.2d 962, and Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 734, 81 P.2d 950, 118 A.L.R. 533. The instruction which the court gave used much plainer language (see comments in Mudrick case, 11 Cal.2d at page 734, 81 P.2d 950, supra, respecting laymen). Instead of using "inference" or "presumption" it said "it affords *reasonable evidence*, in the absence of explanation by the defendant, that the accident arose from a want of care." (Emphasis added.)

We find no error in the rejection of these four instructions.

(c) While complaining of the refusal of her proposed instructions 12, 12C, 12D and 12E, appellant concedes that they were "partially repetitious" and that parts of each of them were given.

[17] (d) It is asserted that there was error in refusing to give part of plaintiff's 17 on joint or concurrent negligence. We have already quoted the part of this instruction which was given and are satisfied that it was sufficient, without more, to properly inform the jury on the subject.

(e) Plaintiff's 19A and 19B dealt with the carrier's duty to maintain adequate equipment, the argument being that had there been a railing in front of the rear seat appellant would not have fallen. There was no issue on faulty or defective equipment hence there is no merit in this assignment.

[18] (f) and (g) Plaintiff's 28, 30 and 31 dealt with the duty to anticipate the presence of young children in the street. They were lengthy and somewhat argumentative, and the subject was adequately covered by the other instructions.

A careful study of the instructions given in this case satisfies us that the jury was fully and fairly informed on all the legal rules applicable to the facts. In our opinion no injustice could have resulted from the refusal of any of the instructions just reviewed.

We find no merit in any of appellant's contentions.

The judgment is affirmed.

DOOLING, J., and JONES, J. pro tem., concur.

PEOPLE v. ELLIOTT.

Cr. 4833.

District Court of Appeal, Second District, Division 2, California.

Jan. 16, 1953.

Rehearing Denied Jan. 29, 1953.

Hearing Denied Feb. 11, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of wilful and corrupt misconduct in office in that he had an interest in contract made by school board of which he was a member, and he appealed. The District Court of Appeal, McComb, J., held that evidence sustained conviction.

Judgment affirmed.

1. Municipal Corporations ⇐211

In view of provision of education code that no member of governing board of school district shall be interested in contract made by board of which he is a member, grand jury's accusation charging defendant with wilful and corrupt misconduct in office as member of board of education of municipality in that defendant had an interest in contract made by board, was sufficient to charge the offense of wilful misconduct, since it is not necessary that the act charged be a crime in order to constitute misconduct. Government Code, §§ 1090, 3060; Education Code, § 1011.

2. Municipal Corporations ⇐211

Provision of government code precluding city and state officers from having interest in any contract made by them in their official capacity, or by any board of which they are members, included member of school board of municipality, since board members were both city and state officers. Const. art. 11, § 8½, subd. 2; Government Code, § 1090.

3. States ⇐44

The term "state officers" is not limited to officers whose jurisdiction is co-extensive with the state, but applies generally to persons clothed with functions which affect the public and duties assigned to them by state laws, and to the extent that local officers discharge duties in exercise of the state police power, they act as state officers.

See publication Words and Phrases, for other judicial constructions and definitions of "State Officer".

4. States ⇐44

The matter of education being one of state-wide concern and one of the responsibilities of state government, a school board member who carries that responsibility on behalf of the state is acting as a "state officer" even though his activities may be limited to a particular city. Government Code, §§ 1090, 1097.

5. Indictment and Information ⇐71

Accusation of grand jury charging defendant with wilful and corrupt misconduct in office in that he, as a member of board of education, was interested in nine specified contracts made by board of which he was then a member, which further specified dates of the contract, the number thereof and the party contracting with board, was sufficiently specific to apprise defendant of offense of which he was accused. Government Code, §§ 1090, 1092, 3061; Education Code, §§ 1011, 1013.

6. Indictment and Information ⇐71

The primary purpose of accusation of grand jury is to apprise defendant of offense of which he is accused so that he may make his defense thereto, and an accusation need not set forth in detail all the facts constituting the offense. Government Code, §§ 1090, 1092, 3061; Education Code, §§ 1011, 1013.

7. Indictment and Information ⇐108

An accusation of the grand jury is sufficient if it charges the offense and the enactment describing it and the details are supplied by a copy of transcript of the proceedings before the Grand Jury.

8. Municipal Corporations ⇐211

Evidence sustained conviction of defendant for wilful and corrupt misconduct in office as member of board of education of municipality in that he was interested in certain contracts made by board of which he was a member. Government Code, §§ 1090, 1097; Education Code, §§ 1011, 1013.

9. Officers ⇐121

That unlawful interest of a public officer in a public contract which is pro-

hibited by statute pertaining thereto, is a personal interest which might interfere with the unbiased discharge of the officer's duty to the public, or which might prevent the exercise on his part of absolute loyalty and undivided allegiance to the best interests of the governmental unit which he represents. Government Code, §§ 1090, 1097; Education Code, §§ 1011, 1013.

10. Municipal Corporations ⇐211

Member of city school board who was the attorney for principal transportation contractor with the board on a retainer fee basis, had a sufficient prohibited interest in the transportation contracts to bring board member within purview of statutes prohibiting a public officer from having an interest in contracts made by board of which he is a member. Government Code, §§ 1090, 1097; Education Code, §§ 1011, 1013.

11. Officers ⇐66

A public officer may be removed from office for either wilful misconduct or corrupt misconduct, with sole requirement in former case being that officer acted knowingly, and in latter case that officer acted with the requisite corrupt intent. Pen. Code, § 7, subds. 1, 2, 3.

12. Officers ⇐121

The term "wilful misconduct" as used in provision of government code pertaining to accusation against county, township or municipal officer, for wilful or corrupt misconduct in office, does not require that an evil intent or purpose to do wrong existed on part of the officer charged. Pen.Code, § 7; Government Code, §§ 1090, 3060; Education Code, § 1011.

13. Municipal Corporations ⇐211

In prosecution of city school board member for wilful and corrupt misconduct in office in that he was interested in certain contracts made by board of which he was a member, instruction that government did not have to prove actual fraud, dishonesty, or loss, and that absence of actual fraud or dishonesty or loss was not a defense, was proper. Pen.Code, § 7; Government Code, §§ 1090, 3060; Education Code, § 1011.

14. Municipal Corporations ⇐211

In prosecution of city school board member for wilful and corrupt misconduct in office in that he had an interest in certain contracts made by board of which he was a member, instructions sufficiently informed jury that all elements of wilful misconduct or all elements or corrupt misconduct must be found as prerequisite to finding of guilty, and sufficiently disclosed that mere finding of unlawful interest in public contract, without finding of wilful misconduct or corrupt misconduct, would not suffice. Pen.Code, § 7; Government Code, §§ 1090, 3060; Education Code, § 1011.

15. Municipal Corporations ⇐211

In prosecution of city school board member for wilful and corrupt misconduct in office in that he had an interest in certain transportation contracts with board, made at time when he was a member thereof, evidence as to relationship of the company having the transportation contract and its principal creditor with whom defendant had also dealt, was properly admitted. Pen.Code, § 7; Government Code, §§ 1090, 3060; Education Code, § 1011.

16. Criminal Law ⇐1186(4)
Municipal Corporations ⇐211

In prosecution of city school board member for wilful and corrupt misconduct in office in that he had an interest in certain transportation contracts made by board, wherein it appeared that he had acted as attorney for party contracting with board, evidence that immediately after defendant board member was retained as attorney by the contracting party, such company had released from retainer the law firm previously retained was relevant and admissible even though defendant had no knowledge thereof, but even if error, was not reversible error in absence of showing of prejudice. Government Code, § 3060; Const. art. 6, § 4½.

17. Criminal Law ⇐1172(1)

In prosecution of defendant for wilful and corrupt misconduct in office in that he had an interest in certain contracts made by city school board of which he was a member, wherein jury was fully instructed

as to the elements of wilful misconduct and of corrupt misconduct, and that all twelve jurors must agree that the misconduct was wilful or all twelve must agree that the misconduct was corrupt, it was not prejudicial error to furnish to jury only two forms of verdict, one of guilty of crime of wilful and corrupt misconduct in office, and one of not guilty of the same offenses. Government Code, §§ 1090, 3060; Education Code, § 1011.

18. Criminal Law ⇐798½

It is not the duty of the trial judge to furnish forms of verdict to the jury.

Paul Barksdale d'Orr, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., and Mark Brandler, Deputy Dist. Atty., Los Angeles, for respondent.

McCOMB, Justice.

The Grand Jury of Los Angeles County in an accusation charged defendant with wilful and corrupt misconduct in office under section 3060 of the Government Code, in that as a member of the Board of Education of the City of Los Angeles he violated section 1011 of the Education Code and section 1090 of the Government Code by being interested in nine contracts entered into by the Board of Education and the Landier Management Company, a corporation.

The accusation contains nine specifications of misconduct, each one being based on a separate contract ranging in dates from July 11, 1949, to and including March 1, 1951.

Defendant was tried before a jury and found guilty of wilful and corrupt misconduct in office. Motion for a new trial was denied and the court pronounced judgment removing him from office as a member of the Board of Education of the Los Angeles City School District, Los Angeles City High School District, and Los Angeles Junior College District.

From the judgment of conviction and the order denying his motion for a new trial, defendant appeals.

[1] *Questions:* First: *Did the accusation state facts sufficient to constitute the offense of wilful and corrupt misconduct in office?*

Yes. Defendant was accused by the Grand Jury of Los Angeles County under the provisions of section 3060, Government Code, of wilful and corrupt misconduct in office as a member of the Board of Education of the City of Los Angeles, in that he violated section 1090, Government Code, and section 1011, Education Code, by having an interest in certain specified contracts with Landier Management Company.

Defendant concedes the applicability of section 1011 of the Education Code, which reads as follows: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

This being true the accusation stated a cause of action, because in order to constitute misconduct it is not necessary that the act be a crime. (In re Reid, 182 Cal. 88, 89 et seq. [3], 187 P. 7; In the Matter of Burleigh, 145 Cal. 35, 37, 78 P. 242; Coffey v. Superior Court, 147 Cal. 525, 529, 82 P. 75.)

Defendant contends however that section 1090 of the Government Code is not applicable to him since school board members are not mentioned in the section, which provides: "Members of the legislature, state, county, judicial district and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members", and therefore such school board members are excluded.

[2] This contention is devoid of merit for the reason that school board members are both city and state officers. The State Constitution, Article XI, section 8½, subdivision 2, specifically permits chartered cities to provide the manner in which, the times at which, and the terms for which the members of the boards of education shall be elected or appointed; for their

qualifications, compensation and removal; and for the number which shall constitute any one of such boards. In accordance with this power the City of Los Angeles has provided for the board of which defendant is a member, specifically including board members as city officials. (Cal. Stats., 1925, p. 1039, art. II, sec. 5, L.A. City Charter.) The courts have consistently recognized the two-fold nature of school board members as both city and state officials. (See Becker v. Council of the City of Albany, 47 Cal.App.2d 702, 705 [1 & 2], 118 P.2d 924.) To the extent that the city can provide for the removal of the members of the board of education for misconduct in having an interest in a contract entered into by the board, such members are clearly municipal officers.

[3] The terms "state officers" is not limited to officers whose jurisdiction is coextensive with the state but applies generally to persons clothed with functions which affect the public and duties assigned to them by state laws. The state legislature may in the exercise of its police power direct the performance of prescribed state functions through local officers within the counties of the state, and to the extent that local officers discharge such duties they act as state officers. Clearly a member of the board of education falls within the foregoing rule. (Cf. People v. Richards, 86 Cal.App. 86, 89, 260 P. 582.)

[4] The matter of education is of statewide concern and is one of the responsibilities of the state government. A member of the school board who carries out that responsibility on behalf of the state is therefore a state officer notwithstanding his activities may be limited to any particular city. Thus there is no reasonable basis for excluding him from the classification of "state officer" as used in section 1090 of the Government Code. (See People v. Richards, supra, 86 Cal.App. at page 89, 260 P. 582.)

It logically follows that section 1097 of the Government Code is also applicable to defendant. Section 1097, Government Code reads in part: "Every officer or person prohibited by the laws of this State from making or being interested in contracts, * * * who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the State prison for not more than five years, and is forever disqualified from holding any office in this State." There is nothing in the history of the Education and Government Code provisions, which defendant sets forth at length, which detracts from the foregoing conclusions, nor does the fact that the legislature has seen fit to place a different civil penalty in section 1092, Government Code, as contrasted with section 1013 of the Education Code, alter our conclusions.

Second: *Was the accusation of the Grand Jury sufficiently specific?*

[5, 6] *Yes.* The accusation charged defendant with nine specific acts of wilful and corrupt misconduct in office in that he, as a member of the board of education, in violation of section 1011 of the Education Code and section 1090 of the Government Code, was interested in nine specified contracts made by the board of education of which he was then a member. The specific dates of the contracts, the number of the contracts and the Landier Management Company as contractor were all specifically alleged. These allegations meet the requirements of section 3061 of the Government Code which provides: "The accusation shall state the offense charged in ordinary and concise language, and without repetition." The primary purpose of the accusation is to apprise defendant of the offense of which he is accused so he may make his defense thereto. (Reid v. Superior Court, 44 Cal.App. 349, 356, 186 P. 634.)

It is likewise unnecessary for the accusation to set forth in detail all the facts constituting defendant's prohibited interest in a contract. (Woods v. Varnum, 85 Cal. 639, 646, 24 P. 843.) In addition defendant was furnished a copy of the Grand Jury proceedings containing all the testimony and exhibits which were the basis for the return of the accusation. These documents fully informed him as to the

character of the charges and acquainted him with the evidence to be used against him at the trial. (People v. Harby, 51 Cal. App.2d 759, 766 [1], 125 P.2d 874.)

[7] In other words the accusation specifically advised defendant that he was a member of the board of education and while serving as such, in violation of two specified statutes of this state, he acquired an interest in contracts entered into by the board of education, of which he was a member, with the Landier Management Company. Under the new rules of pleading in criminal cases, an accusation is sufficient if it charges the offense and the enactment describing it and the details are supplied by a copy of the transcript of the proceedings before the Grand Jury, which defendant received. (People v. Pierce, 14 Cal.2d 639, 645, 96 P.2d 784; People v. Codina, 30 Cal.2d 356, 358 et seq., 181 P.2d 881.)

Third: *Was there substantial evidence to sustain the trial jury's finding that defendant was guilty of wilful and corrupt misconduct in office?*

[8] *Yes.* The evidence disclosed that defendant was a member of the board of education of Los Angeles City at the time it entered into nine contracts with the Landier Management Company to provide bus transportation for pupils of the school district.

Defendant, as a member of the board, voted to approve each of these contracts. At the time of the first contract defendant was the attorney for F. P. Landier and at the time each of the succeeding eight contracts was entered into defendant was attorney for the Landier Management Company, Landier and the Landier interests. In accepting his employment as attorney for the transportation contractor with the school board, defendant, who had been an attorney for over thirty years, acted with full knowledge of the relationship between his employer-contractor and the school board of which he was a member. The inference naturally follows that he deliberately, wilfully and knowingly created this personal and financial interest on his part in the contracts between the school board and the school bus contractor, which interest is the basis for the charge of wilful and corrupt misconduct in office, and his subsequent conviction and removal from office.

The parties to the school board contracts were the Los Angeles City Board of Education and the Landier Management Company, a California corporation. Defendant was the attorney for this contractor of record. While a member of the board and before the contracts set forth in the specifications two through nine were entered into, defendant sent to the Landier Management Company a letter on his attorney letterhead, advising the company that defendant, by agreement with Mr. Landier, was to receive from the Landier Management Company a monthly retainer fee of $200 payable on the first of each month. Prior to mailing this letter, Mr. Landier had explained to defendant at the latter's office that the Landier Management Company operated the school buses on school contracts and advised defendant to address this letter to the Landier Management Company.

Defendant then billed the company for services already rendered to that company and subsequently received a total of four Landier Management Company retainer checks during the period the contracts covered by specifications 2, 3 and 4 were entered into with the board.

Defendant actually performed services for the Landier Management Company in connection with its contracts with the board of education. Each of the transportation contracts required that the company carry public liability and property damage insurance, and that the school district be named as a co-assured on the insurance policy. The company was having some problems in connection with the carrying of this insurance and its president, together with Mr. Landier met defendant in his office to discuss these problems. Copies of their policies naming the company as the insured and the board of education as the co-insured were left with defendant for his examination and inspection. Subsequent to this meeting defendant had sev-

eral discussions and meetings in connection with this insurance problem. The president of the company telephoned defendant to obtain his advice relative to the use of an abbreviation for the word "Company" on the school buses. Defendant checked on the matter and then gave his advice to the president. On another occasion defendant had a telephone conversation with the president of the Landier Management Company concerning the financial difficulties of one of the employees, a school bus driver.

All this time defendant was voting on each of the contracts when it was approved by the board, making no disclosure of his relationship with the Landier Management Company to any other school board member. Defendant, as president of the board, signed his name to one of the school contracts, and at that time the signature of Harry H. Rosenfeld, on behalf of the Landier Management Company, was on the contract directly below the space provided for defendant's signature. This was done only two weeks after he had received a retainer check from the Landier Management Company and three weeks before he received another check, each being signed by Harry H. Rosenfeld as president of the Landier Management Company.

There is ample other evidence to support the jury's finding that defendant, while acting as attorney for the Landier Management Company and the Landier Transit Company whose stock was all owned by the Landier Management Company, voted for contracts between the board of education, of which he was a member, and the Landier Management Company.

[9] No useful purpose would be served by setting forth such evidence in detail. It is established that the unlawful interest of a public officer in a public contract which is prohibited, is a "personal interest which might interfere with the unbiased discharge of his duty to the public or prevent his exercise of absolute loyalty and undivided allegiance to the best interests of the [governmental unit which he represents.]" (Raymond v. Bartlett, 77 Cal.App.2d 283, 286 [3], 175 P.2d 288, 289; Salada Beach, etc., Dist. v. Anderson, 50 Cal.App.2d 306, 309, 123 P.2d 86. Cf. Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 318 [2], 293 P. 145.)

[10] Under the foregoing evidence defendant was not only the attorney for the principal transportation contractor of the board but was also attorney for the principal creditor of said company, which the record shows was receiving 10% to 14% of the gross receipts of the transportation company from the board of education by way of commissions for purported services rendered in the obtaining of board of education contracts. It was therefore to defendant's interest to have the board continue to award contracts to the Landier Management Company. As long as this business continued he was assured his retainer agreement would be continued, not only with the Management Company but also with Mr. Landier personally, since the latter benefited not only because he was a principal creditor of the Management Company and received payments on account of it, but also because he personally gained by reason of his commission agreements with the company. The more business the Management Company got, the greater its need for legal services and the more likelihood of its continuing to retain defendant.

The evidence supports the jury's finding that defendant's conduct was both wilful and corrupt. (People v. Becker, 112 Cal. App.2d 324, 246 P.2d 103.)

[11] There are two classes of misconduct for which a public officer may be removed from office, (a) wilful misconduct, and (b) corrupt misconduct. (Coffey v. Superior Court, 147 Cal. 525, 529, 82 P. 75; Reid v. Superior Court, 44 Cal.App. 349, 361, 186 P. 634.)

The word "wilfully" is defined in subdivision (1) of section 7 of the Penal Code as follows:

> "The word 'willfully', when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not

require any intent to violate law, or to injure another, or to acquire any advantage".

The word "knowingly" is defined in subdivision (5) of section 7 of the Penal Code as not requiring any knowledge of the unlawfulness of the act or omission which constitutes a transgression of the law, but only knowledge that the facts exist which constitute the transgression.

The word "corruptly" is defined in subdivision (3), section 7 of the Penal Code as follows:

"The word 'corruptly' imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person".

In Coffey v. Superior Court, supra, 147 Cal. at page 529, 82 P. at page 76, our Supreme Court said:

"The phrase 'misconduct in office' is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. State [ex rel. Tilley] v. Slover, 113 Mo. [202], 208, 20 S.W. 788. In Mechem on Public Officers (section 457) it is stated that: 'Misconduct in office does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive.'" (See also People v. Harby, 51 Cal.App.2d 759, 767 [2], 125 P.2d 874.)

It was not essential for the prosecution to prove corrupt misconduct of defendant in order to justify removal from office. However, the evidence supports the conclusion of the jury that defendant was guilty of corrupt misconduct as well as wilful misconduct. In addition to the evidence set forth above, the jury had before it the following facts:

At defendant's request communications from the transportation company relating to each of the contracts in question were delivered to defendant's law office prior to the time defendant, as a member of the board, voted to approve the contracts. Defendant voted on these contracts and at no time did he disclose to any member of the board, or to the legal advisor of the board, his relation to the Landier interests, including the contractor named in the contract by the board. Nor did he disclose these facts to the Grand Jury when it was investigating them.

The jury was, of course, entitled to disregard defendant's explanation while accepting his statement that as a member of the board he knew companies bearing the name of Landier had handled school transportation for a long time, and there was no distinction in his mind between the Management Company, Transit Company, or any other company bearing the name Landier. Also the evidence was before the jury that prior to defendant's mailing the retainer letter in January, 1950, to the Management Company, Mr. Landier had explained to him very definitely that the Management Company operated the school buses, and Mr. Landier told him to address the retainer letter to the Management Company.

It is unnecessary to set forth additional corroborative evidence here.

[12] Fourth: *Does the phrase "wilful misconduct" as it appears in section 3060 of the Government Code require an evil intent or purpose to do wrong?*

No. Section 3060, Government Code reads:

"Accusation against district, county, township, or municipal officer: Presentation by Grand Jury: Concurrence of 12 jurors. An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed. An accusation may not be presented without the concurrence of at least 12 grand jurors."

This identical contention was raised in the case of People v. Becker, 112 Cal.App. 2d 324, 246 P.2d 103 (hearing denied by the Supreme Court). The contention was rejected by the appellate court which relied upon the definition of the word "wilful"

as it appears in section 7 of the Penal Code. (See our discussion of this subject in answer to question Third, supra.)

[13] Fifth: *Did the trial court commit prejudicial error in instructing the jury as follows?*

"In seeking to establish a violation of Government Code Section 1090 or Education Code Section 1011, the People do not have to prove actual fraud, dishonesty, or loss; nor is it a defense to an alleged violation of Government Code Section 1090 or Education Code Section 1011 that there was no actual fraud or dishonesty or loss."

No. The foregoing instruction was a correct statement. (Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 319 [3], 293 P. 145.) There is no merit in defendant's claim that this instruction told the jury they could find defendant guilty of corrupt misconduct even though they found no dishonesty or fraud on his part. The instruction merely advises the jury that fraud and dishonesty are not essential in proof of an interest in a contract prohibited by law. It does not purport to define, limit or extend other instructions given to the jury defining wilful misconduct and corrupt misconduct.

[14] Even though the jury found defendant had an unlawful interest in a public contract in violation of section 1011 of the Education Code and 1090 of the Government Code, before they could return a verdict of guilty of the charges, they would have to consider the other instructions given them to ascertain whether or not this prohibited interest constituted wilful misconduct or corrupt misconduct.

Though they found no fraud or dishonesty in connection with this interest they would have to find under other instructions that such interest was acquired wilfully and knowingly by defendant in order to conclude he was guilty of wilful misconduct and in order to conclude he was guilty of corrupt misconduct; under the other instructions they would have to find he had a wrongful design in connection with that interest. None of the instructions told the jury that in and of itself it was sufficient to establish wilful or corrupt misconduct, if the evidence showed defendant had an unlawful interest in a public contract.

The instructions viewed as a whole told the jury they had to find all the elements of wilful misconduct present or all the elements of corrupt misconduct present in order to find defendant guilty.

Sixth: *Did the trial court commit prejudicial error in the admission of evidence (a) relative to the relationship of Mr. Landier with the Landier Companies, and (b) relative to the fact that after defendant was employed as attorney for the Landier interests the law firm of Spray, Gould and Bowers was dismissed, and when defendant ceased to represent the interests such firm was reemployed?*

[15] *No.* (a) Testimony and exhibits were received in evidence in connection with the arrangements for the purchase and sale of Mr. Landier's school bus business and transit company business to the Landier Management Company, as well as the disposition of the stock in this to Rosenfeld and others. There was also evidence showing agreements between Mr. Landier and the Management Company in which that company agreed to pay Mr. Landier commissions up to 14% of the gross revenue obtained from board of education contracts for his assistance in negotiating said contracts.

The above evidence established that Mr. Landier was not only the principal creditor of the Landier Management Company, but that he retained a proprietary interest in it because it could not transfer any assets without his consent, and in the event of default by the company its assets reverted to him. This evidence also established that Mr. Landier, as agent for the Management Company, directly participated in the proceeds received by the company from the board of education in connection with school bus contracts, indicating the very contracts involved in the specifications of the Grand Jury accusation against defendant. Thus a substantial portion of every bit of income received by the Landier Management Company from the school bus

business with the board went to Mr. Landier either in the form of commissions or in the form of payments to the purchase price of the school bus business or the transit company business. Defendant was Mr. Landier's personal attorney and thus was also profiting from these payments, since this steady income of Mr. Landier insured his retainer.

The jury was entitled to have before it all the evidence showing how closely involved all these Landier interests were.

[16] (b) Evidence was admitted that immediately after defendant was retained as attorney by the Landier Management Company such company released from retainer the law firm of Spray, Gould and Bowers, which had previously done legal work for it, and then rehired it after defendant terminated his relationship with the Landier Management Company and Landier Transit Company.

The sole objection to this evidence was that knowledge thereof had not been brought home to defendant.

Such evidence was relevant and admissible even though defendant had no knowledge thereof, since there was a permissive inference from such evidence that defendant took the place of the law firm which had rendered legal service to the Landier Management Company prior to defendant's retainer, and in turn took defendant's place after he terminated his retainer. In addition, such testimony was admissible to rebut the statement of defendant that he was retained by the Landier Management Company by mistake, and that he was to have been hired only by the Landier Transit Company.

Such testimony was not hearsay as these facts were testified to directly by Mr. Rosenfeld from the witness stand. In any event there was no showing of prejudice resulting from the admission of such testimony and this court must disregard such alleged error in view of the provisions of Article VI, section 4½ of the Constitution of the State of California.

Seventh: *Did the trial court commit prejudicial error in furnishing the jury only two forms of verdict; one of guilty of the crime of wilful and corrupt misconduct in office, and one of not guilty of the same offenses?*

[17] *No.* There are two classes of misconduct under section 3060 of the Government Code; (1) wilful misconduct and (2) corrupt misconduct. The trial judge fully instructed the jury in this respect, defining the elements of each type of misconduct. He also fully instructed the jury that all twelve of them must agree the misconduct was wilful or all twelve of them must agree the misconduct was corrupt.

[18] The verdicts submitted by the trial judge were in accordance with these instructions. Defendant neither complained of the forms of verdicts, nor did he submit any forms of verdicts himself. It is not the duty of the judge to furnish forms of verdict to the jury, and it is presumed that if their conclusion calls for a form of verdict with which they are not furnished, they will either ask for it or write one for themselves. (People v. Hill, 116 Cal. 562, 570, 48 P. 711. See also People v. Chapman, 93 Cal.App.2d 365, 385 [24], 209 P.2d 121; People v. Corbin, 118 Cal.App. 392, 396, 5 P.2d 460; People v. Mack, 115 Cal.App. 588, 593 [7], 2 P.2d 209.)

In the present case had the jury concluded that defendant was guilty of either wilful or corrupt misconduct, but not both, it could easily have stricken from the verdict furnished it the appropriate words. After the verdict was returned the jury was polled, and each juror individually answered affirmatively that it was his verdict.

An examination of the record discloses it to be extremely free from error.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

115 Cal.App.2d 597

PEOPLE v. SHAW.

Cr. No. 2825.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1953.

Prosecution for grand theft and conspiracy to commit grand theft. From a judgment of the Superior Court in and for the City and County of San Francisco, Harry J. Neubarth, J., on a jury's verdict convicting one of defendants, he appealed. The District Court of Appeal, Fred B. Wood, J., held that the jury's acquittal of another of defendants on the count of the indictment charging grand theft did not nullify such defendant's conviction on the count charging conspiracy or appellant's conviction on both counts.

Judgment affirmed.

1. Criminal Law ⇐877, 878(3)

A jury's acquittal of one of four defendants on count of indictment charging grand theft did not nullify such defendant's conviction on count charging conspiracy to commit grand theft or another defendant's conviction on both counts, as two offenses charged were separate and distinct and two convicted defendants were not connected with either offense by identical evidence. Pen.Code, §§ 182, 484, 487, 954.

2. Criminal Law ⇐877

When there is slightest difference in evidence as between two persons jointly tried for crime, trier of facts may weigh evidence and make allowance for such difference, and if one of defendants is thereafter acquitted and the other convicted, fact that evidence involves acquitted defendant to some extent will not require exoneration of other defendant.

3. Conspiracy ⇐41

A jury's finding that at least one of alleged conspirators committed at least one of overt acts alleged is sufficient to warrant conviction of conspiracy.

4. Conspiracy ⇐27

In prosecution of four men for conspiracy to commit grand theft, proof of one defendant's alleged overt act in carrying on conversation with victim of theft and another defendant's overt act in meeting with such victim was sufficient to establish conspiracy as against contention that neither act was done to effect object of conspiracy, in view of evidence that victim's interest in project leading to theft was aroused in such conversation and further stimulated to point of parting with his money during such meeting. Pen.Code, §§ 182, 184.

5. Conspiracy ⇐27

To warrant conviction of criminal conspiracy, none of acts relied on in support of charge need amount to a criminal attempt or be unlawful in themselves, but act done for purpose of effecting object of conspirators' unlawful agreement completes such crime, though otherwise lawful. Pen. Code, §§ 182, 184.

6. Conspiracy ⇐43(5)

In alleging overt act in conspiracy case, charge that act was performed in furtherance or pursuance of conspiracy is sufficient. Pen.Code, §§ 182, 184.

7. Criminal Law ⇐775(2)

An instruction that defendants were entitled to acquittal, if jury, after considering all evidence, had reasonable doubt as to whether defendants were present when crime charged was committed, was not erroneous as possibly misleading jury into believing that defendants had burden of proving their asserted alibi beyond such doubt.

8. Criminal Law ⇐783(2)

An instruction that accused's prior conviction of felony did not necessarily destroy or impair his credibility as witness or raise presumption that he testified falsely, but was a circumstance to be considered by jury in weighing his testimony, was not improper or misleading, though accused's requested instruction, refused by court, that his testimony as to such prior conviction should not be taken as evidence on issue of his guilt or innocence of crime charged, but was admissible only to impeach his credit as witness, could properly have been given.

9. Criminal Law ⇐781(6)

An instruction that even if jury found that defendant's confession of crime charged was false, it remained evidence for jury's consideration under court's instructions concerning false statements by an accused, was erroneous as permitting jury to infer defendant's guilt from falsity of his confession, in absence of instructions appropriately qualifying, explaining and clarifying such instruction.

10. Criminal Law ⇐538(3)

A false confession of crime is not evidence from which jury may infer that one making confession committed illegal act and may not be used to prove truth of what he confessed.

11. Criminal Law ⇐1169(12)

In prosecution for grand theft and conspiracy to commit grand theft, instruction that even if jury found that one defendant's confession of crimes charged was false, it remained evidence for jury's consideration under instructions concerning false statements by accused, was not prejudicial to such defendant, though erroneous, where there was other substantial evidence supporting verdicts of conviction. Pen. Code, §§ 182, 484, 487.

Nathan C. Coghlan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. and David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Appellant Fred Shaw and others, including Robert Williams, John Cartwright, and Robert Andrews, were indicted upon two counts: (I) violation of sections 484 and 487 of the Penal Code, grand theft, committed about March 20, 1951, by willfully, unlawfully and feloniously taking $6,000, the property of Sam E. Frudakis; (II) violation of section 182 of the Penal Code, committed about March 20, 1951, by willfully, unlawfully and feloniously conspiring to commit grand theft, and in pursuance of the object of the conspiracy they committed these overt acts, (1) Williams carried on a conversation with Frudakis, (2) Shaw met with Frudakis in a restaurant, (3) Andrews received $6,000 from Frudakis, and (4) Cartwright met with Shaw and Frudakis.

Shaw was convicted on both counts. He has appealed from the judgment and from an order denying his motion for a new trial. Williams pled guilty to grand theft. Cartwright did not appear at the trial, and was neither considered nor convicted. Andrews, acquitted of grand theft but convicted of conspiracy, appealed and then dismissed his appeal.

Shaw does not question the sufficiency of the evidence to support the verdict against him. In support of his appeal, Shaw claims: the acquittal of Andrews on Count I voided Andrews' conviction on Count II and Shaw's conviction on both counts; and that erroneous instructions were given on alibi, impeachment, and false confessions.

[1] (1) *Concerning the assertedly inconsistent verdicts and their effect,* Shaw reasons that Andrews' acquittal of grand theft negatives Overt Act No. 3; that Overt Acts 1 and 2 were insufficient to support a conspiracy charge (apparently there was no evidence of Overt Act 4); hence, there remained no adequate basis in law for Andrews' conspiracy verdict.[1] Shaw then argues that the acquittal of Andrews on Count I and the nullification of his conviction on Count II render Shaw's conviction on each count a nullity.

The argument is unsound. It seems to rest upon two assumptions, neither of them correct: (1) that the offenses of grand theft and conspiracy to commit grand theft are essentially the same, not separate and distinct, and (2) that the conviction or acquittal of Andrews and of Shaw upon each count, respectively, rested upon identical evidence.

That the two types of offense are separate and distinct is too well established

1. How the asserted nullity of Andrews' conviction can be invoked by Shaw, appellant does not make clear. See People v. Powell, 99 Cal.App.2d 178, 183, 221 P.2d 117.

to require extended discussion. An essential element of Count II was the criminal conspiracy, which was not included in Count I, the grand theft charge. That characterizes them as separate and distinct offenses. People v. Talbot, 220 Cal. 3, 21, 28 P.2d 1057; People v. Klinkenberg, 90 Cal.App.2d 608, 635–636, 204 P.2d 47, 613.

Shaw and Andrews were not connected with either offense by identical evidence. The parts which they played in the drama of persuading Frudakis to part with his money were separate and distinct.[2] Defendant Williams knew Frudakis, having become acquainted with him when patronizing the tavern of which Frudakis was a part owner. Williams told Frudakis that he knew a man who had $15,000 worth of whiskey he would sell for $9,000 and introduced Shaw as one who knew the man who had the whiskey for sale. The next day Frudakis met with Shaw for the purpose of meeting the man who had the whiskey for sale. The meeting was delayed from time to time. During much of this period, Shaw and Frudakis were in a restaurant. Andrews met them there. Andrews and Shaw engaged in a conversation during which Andrews stated that he had some "white stuff" that he would sell for $15,000. Shaw got $6,500 from a bank and induced Frudakis to get the money for the whiskey. Frudakis could only get $6,000. Meanwhile, Shaw represented that he had contacted a man who wanted to buy the "stuff" at a price that would leave Shaw a large profit. But Shaw needed $9,000, in addition to his $6,500, to buy it from Andrews. Shaw asked Frudakis to lend him the money. When Frudakis was reluctant to get "mixed up" in the deal, Shaw told him that it was his, Shaw's business and that Frudakis was not mixed up in it. When the time came for the delivery of the "stuff" to Shaw, Shaw delivered his money to Andrews and asked Frudakis to give Andrews the $6,000. Shaw assured Frudakis he would get his money back in a few hours and be able to buy the whiskey and make a large profit thereon. Frudakis handed the money to Shaw, who handed it to Andrews. Andrews gave Shaw a package containing some white powder in a cellophane bag that had Chinese or Japanese lettering on it. Later, Shaw and Frudakis went to deliver the package to the person who, supposedly, was buying it from Shaw. When they arrived at the appointed place, they were met with the cry "Vice squad" and two men appeared on the scene. One of these men told Frudakis that he knew who Frudakis was. Frudakis and Shaw left the scene in haste, but Frudakis returned to give himself up to the "police," and upon his return saw the men leaving in a blue Buick sedan which resembled Shaw's car.

[2] The different and much more extensive part which Shaw played, than did Andrews, demonstrates the very considerable difference in the evidence tending to connect them, respectively, with the crime. "When there is the slightest difference in the evidence as between two persons jointly tried the trier of facts may weigh the evidence and make allowance for such difference, and when that is done and one is acquitted and the other convicted the fact that the evidence involves the acquitted person to some extent will not require the exoneration of the other. [Citations.]" People v. Edwards, 81 Cal.App.2d 655, 661, 185 P.2d 74, 77; a petition for a hearing by the Supreme Court was denied. See also People v. Powell, supra, 99 Cal.App.2d 178, 182–183, 221 P.2d 117; People v. Stembridge, 99 Cal.App.2d 15, 24–25, 221 P.2d 212; People v. Taylor, 88 Cal.App.2d 983, 987–988, 199 P.2d 751; in each of which a petition for a hearing by the Supreme Court was denied.

[3–6] Shaw's claim that Andrews' acquittal of grand theft left no basis for Andrews' conspiracy conviction is based upon a theory that such acquittal amounted to a finding that Overt Act 3 (that An-

2. In furnishing the summary which follows, to indicate the different parts which the defendants respectively played, we do not mean to convey the impression that the evidence was without conflict, for there were conflicts. We mean, simply, that there was substantial evidence to support the facts narrated in this summary.

drews received $6,000 from Frudakis in pursuance of the object of the conspiracy) was not committed, and that Overt Acts 1 and 2, although proven, were insufficient to establish a conspiracy. We need not decide whether the acquittal negatived the commission of the Overt Act 3. Overt Acts 1 and 2 were amply proven. It is sufficient if the jury found that at least one of the conspirators committed at least one of the overt acts alleged. People v. Shurtleff, 113 Cal.App. 739, 741–742, 299 P. 92. Shaw's contention that Overt Acts 1 and 2 were not sufficient to establish the commission of a conspiracy is in effect a claim that neither constitutes an "act * * * done within this state to effect the object" of the conspiracy, within the meaning of those words as used in section 184 of the Penal Code. The point is not well taken. The indictment, after appropriately and sufficiently alleging the formation of the conspiracy by agreement among the defendants, alleged as Overt Act 1 "That thereafter, at and in the City and County of San Francisco, State of California, and in pursuance of the object of said conspiracy, the said George Williams did carry on a conversation in the City and County of San Francisco with Sam E. Frudakis," and as Overt Act 2 "That thereafter, at and in the said City and County of San Francisco, State of California, and in pursuance of the object of said conspiracy, the said Fred Shaw did meet with Sam E. Frudakis in a restaurant." Williams' conversation with Frudakis, as we have already noted, was an act quite definitely committed "to effect the object" of the conspiracy, for it was in that conversation that Williams made the original contact with Frudakis and aroused the latter's interest by telling him of an opportunity to make a large profit by purchasing a supply of whiskey at a greatly reduced price. Similarly, Shaw's meeting with Frudakis in a restaurant was the commission of an act done "to effect the object" of the conspiracy. During that meeting Shaw devoted his attention to further stimulating and arousing Frudakis' interest to the point of parting with his money. As said in People v. Ragone, 84 Cal.App.2d 476, at page 480, 191 P.2d 126, 128: "* * * it is not essential that any of the acts relied upon in support of a charge of conspiracy be an act amounting to a criminal attempt or one unlawful in itself. An act, which may be otherwise lawful, completes the crime of conspiracy when it is done for the purpose of effecting the object of the unlawful agreement. People v. Beck, 60 Cal.App. 417, 213 P. 61; People v. Rodriguez, 61 Cal.App. 69, 214 P. 452; People v. George, 74 Cal.App. 440, 241 P. 97." Numerous illustrations of various acts done in furtherance of a conspiracy and found sufficiently alleged and proven as "overt acts" are furnished in People v. Beck, 60 Cal.App. 417, at pages 422 and 423, 213 P. 61. "It is undoubtedly the law that, in alleging an overt act in conspiracy cases, it is sufficient to charge that the act relied upon was performed in furtherance or in pursuance of the conspiracy. People v. George, 74 Cal.App. 440, 241 P. 97; 12 C.J. 624." People v. Stevens, 78 Cal. App. 395, 399, 248 P. 696, 697.

Accordingly, there is no logic in the argument that the acquittal of Andrews on the grand theft charge nullified his conviction on the conspiracy charge and that such acquittal and nullification in effect nullified Shaw's conviction on each charge. This case is not at all like Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764, or In re Johnston, 3 Cal.2d 32, 43 P.2d 541, in each of which the only overt acts alleged in the conspiracy charge were the substantive crimes charged in other counts. Acquittal on each of those other counts naturally operated as a finding that none of the overt acts was committed. Our case is, instead, quite like People v. McNamara, 103 Cal.App.2d 729, 737–738, 230 P.2d 411; People v. Gilbert, 26 Cal.App. 2d 1, 22–23, 78 P.2d 770, and People v. Yant, 26 Cal.App.2d 725, 731–732, 80 P.2d 506, in each of which there was proof of one or more overt acts alleged in the conspiracy count, which acts, as in our case, were separate and distinct from the specific crime or crimes charged in other counts of which a defendant was found not guilty.

We conclude that there is nothing in this case to prevent these provisions of section

954 of the Penal Code from applying: "An indictment * * * may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class * * * under separate counts * * *. The prosecution is not required to elect between the different offenses or counts * * *, but the defendant may be convicted of any number of the offenses charged * * *. *A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.*" (Emphasis added.) That these words mean what they say has been too thoroughly and repeatedly expounded to require repetition. See People v. Stangler, 18 Cal.2d 688, 695–696, 117 P.2d 321; People v. Amick, 20 Cal.2d 247, 250–254, 125 P.2d 25; People v. Codina, 30 Cal.2d 356, 360–361, 181 P.2d 881; People v. Nye, 38 Cal.2d 34, 39, 237 P.2d 1; People v. Ranney, 123 Cal.App. 403, 406–407, 11 P.2d 405; People v. Horowitz, 131 Cal.App. Supp. 791, 793–794, 19 P.2d 874; People v. McNamara, 103 Cal.App.2d 729, 736–737, 230 P.2d 411; People v. Coakley, 108 Cal.App.2d 223, 229, 238 P.2d 633.

[7] (2) *Shaw claims error in the refusal of his requested instruction on alibi and the giving of another instead.* Each instruction mentioned the fact that the defendants had introduced evidence to the effect that they were not present at the time and place of the commission of the alleged offense. The rejected instruction then concluded: "You are to understand that it is not the duty of the defendants to prove, under such a defense, that they were not present at such time and place, but it is the duty of the prosecution to prove beyond any reasonable doubt that they were so present, and if any evidence offered by the defense leaves in your minds any reasonable doubt as to their whereabouts on the occasion in question, it is your duty to find both of them not guilty."

In lieu thereof the court instructed: "If after a consideration of all the evidence you have a reasonable doubt whether or not the defendants were present at the time the crime was committed, they are entitled to an acquittal."

Shaw claims the court's instruction could have misled the jury into believing that the defendants had the burden of proving their asserted alibi beyond a reasonable doubt.

The point is not well taken. The instruction given is not susceptible of such an interpretation. It simply told the jury that if their consideration of all the evidence left them with a reasonable doubt as to defendants' presence, they must acquit. That was an accurate and clearly understandable statement of the applicable provision of law. People v. McCoy, 25 Cal.2d 177, 184, 153 P.2d 315; People v. Lewis, 81 Cal.App.2d 119, 183 P.2d 271; People v. Spillard, 15 Cal.App.2d 649, 59 P.2d 887.

[8] (3) *Did the court properly instruct concerning the limited purpose and use of evidence of prior conviction of a felony?*

It came out during defendant Shaw's interrogation as a witness that he had previously been convicted of a felony. He requested, and the court refused, the following instruction: "The court instructs the Jury that the fact that one of these Defendants has stated in reply to a question asked by the prosecution that he was on a former occasion convicted of a felony, is not to be taken by you as any evidence whatever upon the issue here raised of his guilt or innocence of the crimes charged in the information before us. Such evidence is only admissible by way of impeachment of the credit of such Defendant as a witness and is not evidence of guilt or innocence of the crime charged."

Instead, the court instructed as follows: "The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility, and it does not raise a presumption that the witness has testified falsely. It is simply one of the circumstances that you are to take into consideration in weighing the testimony of such witness."

Shaw claims he was entitled to have the jury told "in no uncertain terms" that his

prior conviction of a felony was "not evidence of guilt or innocence of the crime charged."

The difference between the two instructions is largely one of emphasis. The requested instruction could properly have been given. People v. Miceli, 101 Cal.App. 2d 643, 650–651, 226 P.2d 14.

However, we do not consider that the instruction given was improper or misleading, in view of the rulings made in People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480, and People v. Buzzell, 15 Cal. 2d 654, 104 P.2d 503. In the Hardwick case an instruction requested and refused was substantially the same as that given in our case. Holding that refusal erroneous, the Supreme Court said: "It is not debatable that the instruction asked by defendant correctly states the law applicable to the situation." At page 589 of 204 Cal., at page 430 of 269 P. In the Buzzell case, instructions given and refused were very similar to those given and refused in our case. Upholding the action of the trial court, the Supreme Court said the lower court had "clearly informed the jury that evidence of a prior conviction suffered by any witness, whether he be the defendant or another, was a factor to be considered only in connection with the weight to be accorded to the testimony of said witness. In our opinion, the instruction properly confined the evidence of a prior felony conviction to the credibility of the witness." At pages 661–662 of 15 Cal.2d, at page 506 of 104 P.2d.

[9] (4) *Did the court commit prejudicial error in the giving of an instruction concerning false confessions?*

The court in its instruction to the jury defined "confessions," forbade the jury from considering a confession unless voluntarily made, advised them they were the judges whether or not a confession was true, admonished them to view with caution the testimony of witnesses purporting to relate an oral confession or admission, and instructed: "But even if you should find that a confession was false, either entirely or in part, it remains nevertheless evidence for your consideration, to be given such significance as your judgment may determine, under instructions that I shortly shall give concerning false statements made by a person accused of a crime." The giving of the portion quoted is assigned as prejudicial error. We conclude that it was error, but not prejudicial.

[10] Such an instruction was deemed prejudicially erroneous in People v. Ford, 89 Cal.App.2d 467, 472–473, 200 P.2d 867. However, in that case there was only slight evidence of guilt aside from the confession and there was additional error which the court held reversible. The vice of the instruction is that in effect it "permits the jury to infer the guilt of an accused from the falsity of his confession, and the italicized portion [the portion quoted above] would appear to be clearly erroneous when given without direct qualification by appropriate limiting instructions. * * * Assuming that under some circumstances a jury might be told that a voluntary but false confession has some probative value, the instruction should, nevertheless, be carefully qualified to point out the evidentiary effect of such a confession." People v. Woods, 35 Cal.2d 504, 510–511, 218 P.2d 981, 985. A false confession "is not evidence from which the jury may infer that the one who falsified committed the illegal act. When the confession is false, it may not be used to prove the truth of that which has been 'confessed'. Without explanation concerning the purpose of admitting a false confession the instruction is erroneous, although under certain circumstances, with adequate clarification for the guidance of the jury, it may be given. If the instruction here challenged was given to inform the jury that a false confession, when relevant, may be used to prove a fact other than the matter confessed, the charge was completely inadequate for that purpose. If the purpose of the instruction was to tell the jury that a false confession may be considered in connection with the issue as to the credibility of a witness, it was likewise incomplete without supplementary explanation." People v. Liss, 35 Cal.2d 570, 575, 219 P.2d 789, 792. In our case we find no instructions given that could appropriately serve to qualify, explain and clarify the

questioned instruction. See People v. Chessman, 38 Cal.2d 166, at page 181, 238 P.2d 1001, 1010, for "instruction correctly explaining the possible evidentiary value or immateriality of false statements".

[11] However, in the Woods and Liss cases, the instruction was deemed nonprejudicial in view of the fact that there was evidence other than the confessions which amply supported the convictions. Likewise, in our case, there is other evidence, the testimony of Frudakis, amply substantial in character, which supports the verdicts. For that reason we deem the giving of the questioned instruction, though erroneous, was not prejudicial. For like reasons, similar instructions were held erroneous but not prejudicial in People v. Mize, 100 Cal.App. 2d 584, 587–588, 224 P.2d 452, and People v. Harmon, 110 Cal.App.2d 545, 549–552, 243 P.2d 15.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.



115 Cal.App.2d 670

HARTZELL et al. v. MYALL.

Civ. 15140.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1953.

Rehearing Denied Feb. 28, 1953.

Hearing Denied March 29, 1953.

Action by vendors against real estate salesman, involving allegedly fraudulent sale of vendors' house. The Superior Court, Alameda County, James A. Agee, J., entered judgment upon verdict for plaintiffs, and defendant appealed. The District Court of Appeal, Jones, J. pro tem., held that evidence of deception practiced by defendant in procuring signature of vendor to seller's instructions and to deed, afforded solid basis upon which proper inference of fraud and malice could be predicated by the jury, and sustained verdict for both compensatory and punitive damages.

Judgment affirmed.

1. Appeal and Error ⇐110

Order denying motion for new trial was not appealable. Code Civ.Proc. § 963.

2. Appeal and Error ⇐930(1)

Upon an appeal, every intendment is to be indulged in which tends to support the judgment, and every reasonable inference which tends to support a finding must be accepted.

3. Appeal and Error ⇐930(1)

Upon appeal, evidence is to be construed most strongly in favor of respondent, and all conflicts resolved in support of verdict.

4. Appeal and Error ⇐1001(1)

Contention that evidence is insufficient to sustain findings requires appellant to demonstrate that there is no substantial evidence to support the challenged findings.

5. Appeal and Error ⇐989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

6. Appeal and Error ⇐996

When two or more inferences can reasonably be deduced from facts, reviewing court cannot substitute its deductions for those of the trial court.

7. Brokers ⇐38(4)

In action by vendors against real estate salesman, involving allegedly fraudulent sale of vendors' house, evidence of deception practiced by salesman in procuring signature of vendor to seller's instructions and to deed, afforded solid basis upon which proper inference of fraud and malice could be predicated by jury, and sustained verdict for compensatory and punitive damages. Civ.Code, §§ 3294, 3343.

8. Fraud ⇐64(1)

In determining an adequate sum to award as punishment and for an example in cases of fraud, jury has wider discretion than in case of compensatory damages. Civ.Code, §§ 3294, 3343.

9. Action ⇐1

A "cause of action" arises when there is a breach of duty by one person toward another which invades the latter's rights, and is made up of the facts upon which plaintiff's right to sue is based and out of which defendant's duty has arisen, taken in connection with facts that constitute defendant's wrong.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Action".

10. Fraud ⇐43, 47

A cause of action for fraud and deceit is stated when facts constituting fraud are alleged and a resulting injury is pleaded.

11. Damages ⇐1

"Damages" constitute the relief which the law affords for the invasion of the right, and the extent of the relief depends upon the proof, the relief being limited by the measure of the damage which the law prescribes.

See publication Words and Phrases, for other judicial constructions and definitions of "Damages".

12. Damages ⇐141

Measure of damages need not be pleaded, nor is a plaintiff required to state in his pleading the manner in which he computes the amount of the damages which he demands, since these are matters which are to be regulated upon trial in accordance with prescribed legal limitations.

13. Fraud ⇐43, 47

Complaint which set forth facts going to make up fraud and trickery, alleged to have been maliciously and designedly executed, and a resultant injury to plaintiff, stated good cause of action for recovery of both compensatory and punitive damages. Civ.Code, § 3294.

Breed, Robinson & Stewart and Richard K. Dutton, Oakland, for appellant.

Richards & Rankin, Oakland, for respondents.

JONES, Justice pro tem.

[1] This appeal is from a judgment entered upon the verdict of a jury awarding respondents both punitive and compensatory damages. The action involves an allegedly fraudulent sale of a furnished boarding house located at 608—27th Street in the City of Oakland. The appeal is also from the order denying appellant's motion for a new trial, but since such an order is nonappealable, the purported appeal therefrom should be dismissed. Code of Civ.Proc. § 963; 2 Cal.Jur. sec. 34, p. 173; Roberts v. Brae, 5 Cal.2d 356, 54 P. 2d 698.

Respondents are husband and wife. Mrs. Hartzell was formerly Clara E. Noble and under that name, and before her marriage, she purchased the property involved in the sale. The purchase was made partly by cash and partly by a note secured by a trust deed on the property. There remained unpaid on this note the sum of $5,430.87 at the time of the transaction which is the basis of this litigation. The controversy centers about the value of Mrs. Hartzell's equity in the property, and the appeal hinges on whether the value of this equity was pleaded and proven in such manner and to the extent that the jury could apply the measure of damages prescribed by sec. 3343 of the Civil Code. Appellant challenges the sufficiency of respondents' complaint to state a cause of action and charges that there is no evidence in the record of sufficient substantiality to sustain the verdict.

[2–6] Upon an appeal every intendment is to be indulged in which tends to support the judgment, Hind v. Oriental Products Co., Inc., 195 Cal. 655, 661, 235 P. 438, and every reasonable inference which tends to support a finding must be accepted. Estate of Bristol, 23 Cal.2d 221, 223, 143 P. 2d 689. The evidence is to be construed most strongly in favor of the respondent and all conflicts resolved in support of the verdict. Patten & Davies Lbr. Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429. And where appellant urges the insufficiency of the evidence to sustain the findings of the jury the rule is that, "Such contention *requires defendants to demonstrate* that there is no substantial evidence to support the challenged findings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. (Emphasis added.) It is said in Crawford

v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, that: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Reviewing the record in the light of the rules applicable on an appeal it appears that the defendant, a real estate salesman, appeared at the premises of Mrs. Hartzell on the 8th day of June, 1949, and on his positive representation that he would secure $7,000 in cash for her for her equity in the property she signed a written authorization to him to sell the property for $17,000. Within a few days he secured an offer of $15,000 for the property executing a deposit receipt to the prospective purchaser for $100. This deposit receipt he submitted to Mrs. Hartzell on June 10, and on that date she endorsed her acceptance thereon in the following language:

"Accepted June 10, 1949. I agree to sell the property described on the reverse side hereof on the terms and conditions therein stated and agree to pay the agent named thereon as commission the sum of Seven Hundred Fifty Dollars ($750.00) or one-half the deposit in case same is forfeited by purchaser, provided the same shall not exceed the full amount of the commission. (Signed) Mrs. Clara E. Noble Hartzell."

That part of the reverse side of the deposit receipt material here reads:

"Deposit Receipt

"Oakland, California, June 10, 1949

"Received from Janet Helen Charleston the sum of One Hundred (ck) Dollars as a deposit on account of the purchase price of the following described property, situate in the City of Oakland, County of Alameda, State of California, to-wit: 608—27th St for the purchase price of Fifteen Thousand Dollars ($15,000.00). The balance of the purchase price is to be paid within (word not decipherable) days from date hereof, as follows, to-wit: $1000 as Dn Payment Balance payable at $125.00 per mo. @ 6% int. Sold furnished *list to follow* Subject to Owners acceptance." (Emphasis added.)

On June 15 appellant reappeared at the Hartzell premises and submitted to her a list of the furnishings sold with the house, which, at his instigation, she signed, as she explained, in three places. Her testimony as to what occurred at the time is:

"Q. And now, Mrs. Hartzell, at the time that Mr. Myall came into your house, how was he holding the group of papers? A. He held them all together.

"Q. Would you illustrate to the jury how he held them, just using those as dummies? A. He had these all together as this, and he had the furniture listing typed, which I looked and seen they were right close together. You couldn't see, you know; they were all the same size. And—

"Q. You were sitting at the table, were you? A. When he first showed them to me, was in the dining room —in the kitchen; then we walked to the dining room and he laid them down at the table before me and I said, 'Here's the furniture listing.' And he remarked, what a time he had having them typed, and he said, 'Now this furniture list will authorize me to sell the furniture with the house.' And he said, 'Now one copy you will get in the mail; one will go to the buyer; and one to the title insurance company.' And so I figured that, not having—selling real estate—that they did have to be signed separate. So when he sat down at the table, he just put them like that, so you could just see the lines.

"Q. You are demonstrating that? A. That's right.

"Q. That he had lines to sign? A. That he had lines to sign. That was the way I seen just lines to sign. And I signed 'Clara E. Noble' and I signed 'Mrs. Clara E. Noble.' And as I signed 'Mrs. Clara E. Noble', he says, 'Oh, no; don't sign it that way.' He said, 'Sign it like you did the first time.' Well, so I became confused and so he went like that. He said, 'Oh, no, that's all right; you will get this copy in the mail. This will be your copy.' So I signed the papers and there was no more said.

"Q. Now Mrs. Hartzell, after you signed the papers, were they given to you to read? A. No. He picked the papers up and took them. * * *

"Q. Did you sign it with a pen? A. Yes.

"Q. And do you know how many instruments you signed? A. No, I don't.

"Q. And do you know what the instruments were that you signed? A. He said only that it was the furniture listing; he said nothing else."

Appellant testified as to what occurred in her house at that time as follows:

"Q. * * * Now Mr. Myall, I show you a copy of the Seller's instructions, Plaintiffs' Exhibit 7— A. Yes?

"Q. —signed Clara E. Noble. A. That's correct.

"Q. Now the writing on that instruction is Mr. McCullough's handwriting, isn't that correct? A. That's correct.

"Q. And where was it written? A. At the title company.

"Q. By Mr. McCullough? A. That's correct.

"Q. And Mrs. Noble was not there, was she? A. That's correct.

"Q. So you had Mr. McCullough write out the escrow instructions; then you took them back to Mrs. Hartzell's house and had her sign it? A. That's right. Ninety per cent of the deals are done that way, Counsellor.

"Q. Now Mrs. Hartzell signed the deed at her house, didn't she? A. That's correct.

"Q. And Mr. McCullough acknowledged the deed, didn't he? A. That's correct.

"Q. But Mrs. Hartzell did not appear before Mr. McCullough, did she? A. That's correct.

"Q. You told Mr. McCullough that Mrs. Hartzell had signed the deed? A. I vouched for those signatures, yes.

"Q. You vouched for them with Mr. McCullough? A. That's correct."

The next substantial information which Mrs. Hartzell received concerning the transaction came by way of a statement from the title company into whose possession appellant gave the deed and the Seller's instructions. This statement is:

"Clara E. Noble
608-27th St.,
Oakland, Calif.

June 17th, 1949	Escrow No. 422232	
Deed Demand—to Charleston		$15,000 00
Pro rata taxes		6.31
Pro rata insurance		28.08
First Loan assumed by purchaser	$5430.87	
Second deed of trust from buyer	8569.13	
Revenue stamps	11.00	
Drawing papers and notary fee	10.00	
Broker's Commission	750.00	
Check Herewith	263.39	
	$15,034.39	$15,034.39

We enclose Note in the amount of $8569.13 dated June 15, 1949."

The upshot of the transaction was that respondents received $1,000 in cash, less sales charges, instead of $7,000 as promised by appellant, with a second deed of trust to secure the $8,569.13 balance of the purchase price. The value of the property is given by the appellant. In response to questions by his own counsel, he testified:

"Q. Mr. Myall, you just testified that you thought the market value of the property might be around $15,000? A. That's right.

"Q. Does it make any difference in computing what you think the market

value is, whether or not it is an all cash sale or a note and deed of trust that is received? A. It wouldn't make any difference, no.

"Q. Then the market value would be $15,000 irrespective of whether it was cash or note and deed of trust? A. That's correct."

The argument is made that although Mrs. Hartzell received $1,000 in cash instead of $7,000 she sustained no loss. This argument is based on the premise that the note secured by the second deed of trust was worth its face value. The record discloses, however, that respondents were able to sell it for only $3,500 after much effort. The witness Austin, a person of forty-five years experience in dealing in second mortgages in West Oakland, and who was well acquainted with the Hartzell property, testified that the market value of this particular deed of trust was $3,750. Austin's testimony with respect to the value of this second deed of trust stands uncontradicted.

[7,8] The deposit of $1,000 plus the value placed on the second deed of trust by Mr. Austin gave the Hartzells $4,750 for an equity the value of which as fixed by appellant amounted to the difference between $15,000 and the first deed of trust of $5,430.87 or $9,569.13. Within the scope of these figures the jury was free to find the amount of damages sustained by respondents and the verdict of $2,560.70 cannot be said to be beyond the scope of the evidence. On the contrary, it is abundantly supported by appellant's own testimony.

It is provided in section 3294 of the Civil Code that, "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." In this case the deception practiced by the defendant in procuring the signature of Mrs. Hartzell to the Seller's instructions and to the deed to her property affords a solid basis upon which a proper inference of fraud and malice could be predicated by the jury. The reviewing court may not substitute an inference different from that arrived by the jury if such inference is reasonable. Crawford v. Southern Pacific Co., supra, 3 Cal. 2d 427, 429, 45 P.2d 183.

Nor has appellant pointed to any factual or legal basis in support of his contention that $1,000 is excessive as exemplary damages, this sum being less than one-half of that given as the compensatory award. Upon the question of what is an adequate sum to award as a punishment and for an example in cases of fraud the jury has a wider discretion than in the case of compensatory damages. 8 Cal.Jur. 866; Boyes v. Evans, 14 Cal.App.2d 472, 480, 58 P.2d 922. As the award of compensatory damages is also amply supported by substantial evidence, neither may it be disturbed on appeal on the ground that it is excessive. The facts disclosed by the record, and which we have summarized, fail to support appellant's contentions that the verdict with respect to either compensatory or punitive damages is contrary to the instructions given by the court, or against law, or that it is contrary to the evidence, and these contentions cannot, therefore, be sustained.

[9–13] The attack upon the complaint is limited to its sufficiency to state a cause of action. A cause of action may be said to arise when there is a breach of duty by one person toward another which invades the latter's rights. It is the violation of an obligation to another to his injury, Panos v. Great Western Packing Co., 21 Cal. 2d 636, 134 P.2d 242, and is made up of the facts upon which plaintiff's right to sue is based and out of which defendant's duty has arisen taken in connection with the facts that constitute defendant's wrong. Hutchinson v. Ainsworth, 73 Cal. 452, 15 P. 82. Appellant evidently has failed to distinguish between the remedy or relief which the law affords for the invasion of a right, and the cause of action or ground for the relief. Thus in an action for fraud and deceit a cause of action is stated when the facts constituting the fraud are alleged and a resulting injury is pleaded. Damages constitute the relief which the law affords for the invasion of the right and the ex-

tent of the relief depends upon the proof, the relief being limited by the measure of the damage which the law prescribed. This measure need not be pleaded, nor is the plaintiff required to state in his pleading the manner in which he computes the amount of the damages which he demands. 15 Am.Jur. 747. These are matters which are to be regulated upon the trial in accordance with prescribed legal limitations. Since the complaint sets forth the facts going to make up the fraud and trickery, alleged to have been maliciously and designedly executed, and a resultant injury to respondents, it states a good cause of action for the recovery of both compensatory and punitive damages.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



115 Cal.App.2d 585

PEOPLE v. MORRIS.

Cr. 2399.

District Court of Appeal, Third District, California.

Jan. 28, 1953.

Proceedings on motion by defendant to dismiss state's appeal from order of the Superior Court, Merced County, Gregory P. Maushart, J., setting aside information charging defendant with escape. The District Court of Appeal held that dismissal on ground that original commitment was void and illegal, and that defendant could consequently not be convicted of escape, accompanied by discharge of the jury, was in effect a dismissal of the action and a final termination thereof from which there was no appeal by the state.

Appeal dismissed.

252 P.2d—43½
Cal.Rep. 251-252 P.2d—41

Criminal Law ⇐1024(2)

Where dismissal of jury and of information charging defendant with escape was stated by judge to be on ground that the original commitment was void, and that there could consequently be no conviction for escape, there was in effect a dismissal of the action and final termination thereof from which no appeal could be taken by the state. Pen.Code, §§ 647, 1238, and subd. 1, 4532.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Leo V. McInnis, Deputy Attys. Gen., for appellant.

Joseph J. Lebeda, Public Defender, Atwater, for respondent.

PER CURIAM.

This is a motion by defendant and respondent to dismiss appellant's appeal from the order setting aside the information in the above-entitled action.

The record shows that the District Attorney, on July 18, 1952, filed an information in the Superior Court of the State of California, in and for the County of Merced, charging defendant with a violation of section 4532 of the Penal Code of the State of California, as follows: "The said Isiah Morris, on or about the 18th day of October, 1951, at and in the said County of Merced, and State of California, and prior to the filing of this information, did wilfully and unlawfully, while a prisoner convicted of a misdemeanor and confined in the Rehabilitation Center of Merced County (Industrial Farm), escape from such Rehabilitation Center (Industrial Farm)."

On July 21, 1952, the defendant was arraigned and entered a plea of not guilty. He requested a jury trial. On August 13, 1952, a trial by jury was started, defendant being represented by the Public Defender, Joseph J. Lebeda. Evidence was adduced and during the course of the prosecution's case the court ordered that the information against the defendant be dismissed on the grounds that the commitment under section 647 failed to specify any particular sub-

section, thereby being a void and illegal commitment and one upon which a defendant could not be convicted or escape.

On August 21, 1952, an appeal was taken by the people of the state of California from this order of the court dismissing the information against defendant in the above-entitled matter.

Respondent, in arguing for a dismissal of the appeal, contends that the order appealed from was an order dismissing the action during the course of the trial and hence was not an appealable order under section 1238 of the Penal Code.

Section 1238 of the Penal Code enumerates the decisions from which the people may appeal. Subsection 1 thereof provides that an appeal may be taken, "1. From an order setting aside the indictment, information, or complaint".

The Reporter's Transcript shows the following:

> "The Court: Let's not waste any time with this, gentlemen. The information against the defendant is hereby dismissed on the grounds that the commitment under Section 647 failed to specify any particular subsection, thereby being a void and illegal commitment, and upon a void or illegal commitment you cannot be convicted of escape."

The Clerk's Transcript shows the following:

> "The Court on its own motion hereby orders that the information against the defendant be dismissed on the grounds that the commitment under Section 647 failed to specify any particular sub-section, thereby being a void and illegal commitment."

We think it is clear from the foregoing that the action of the trial court was in effect a dismissal of the action, and was a final termination thereof and that it was within the category of judgments. The jury had been impaneled, evidence had been introduced, and the trial was proceeding until the trial judge, upon his own motion, made the order terminating the proceeding. While the trial judge did state that he was dismissing the information, the grounds stated were that the commitment introduced in evidence did not specify any particular subsection of Penal Code section 647, and that defendant could not be convicted of escape upon a void or illegal commitment, and the dismissal of the information and the discharge of the jury must be construed as a judgment to that effect.

In People v. Knowles, 27 Cal.App. 498, 155 P. 137, after the jury had been impaneled and the trial was about to proceed, counsel for defendant moved the court to dismiss the action " 'upon the ground that the grand jury, finding the indictment, did not comply with section 1324 of the Penal Code.' " The motion was granted by the court and the court granted a further motion to dismiss the indictment and discharge the jury. In denying a hearing after decision by the District Court of Appeal, the Supreme Court said, 27 Cal.App. at page 506, 155 P. at page 140:

> "It is apparent to us that the appeal should have been dismissed on the ground that the order appealed from was not an appealable order. The cases in which an appeal may be taken by the people are specifically set forth in section 1238, Penal Code, and it is well settled that such an appeal will not lie except in a case so specified. The order here appealed from was both in form and in substance and effect one dismissing the action against this defendant. The only subdivision of section 1238, Penal Code, that could by any possibility be suggested as including the order before us is subdivision 1, which provides that an appeal may be taken by the people 'from an order setting aside the indictment or information.' As we have said, the order under consideration here was one granting a motion to dismiss the action. The motion therefor was made on the trial, after issue joined on the merits by plea of not guilty, and was not based on any ground specified in our law as cause for setting aside an indictment, but was designed solely to prevent the further prosecution of the action for the reason stated in the

opinion of the District Court of Appeal. The order here made was based solely on the ground specified in the motion. The appeal here cannot be held to be an appeal from an order setting aside an indictment within the meaning of subdivision 1 of section 1238, Penal Code. The superior court had the *power* to dismiss the action, and, the Legislature having restricted the right of appeal by the people to certain specified cases of which this is not one, there can be no review of its action. The case is like many others under our law, one in which the superior court is the ultimate tribunal as long as it does not exceed its jurisdiction, and where error *in the exercise of its jurisdiction* may not be reviewed by any other tribunal."

And in People v. Garcia, 120 Cal.App. Supp. 767, at page 769, 7 P.2d 401, at page 402, the court said:

"This clause refers to sections 1237 and 1238 of the Penal Code, but we need to consider here only section 1238, which provides in what cases the people may appeal. In it we find no provision for an appeal from a judgment such as this; that is, one rendered in favor of the defendant after the trial has been commenced. In fact, it has been held under that section that there is no appeal from an order dismissing the action after the trial has been entered upon. People v. Knowles, 27 Cal.App. 498, 506, 155 P. 137. That case is somewhat similar to this, for there also the trial court had acted upon the ground that the prosecuting authorities had violated the rights of the defendant before the prosecution commenced, the particular violation being that he was compelled to incriminate himself. It was held that a dismissal for such reasons did not come within any of the provisions of section 1238."

See, also, People v. Brussel, 122 Cal. App.Supp. 785, 7 P.2d 403; People v. Depavo, 39 Cal.App. 336, 178 P. 731.

We are convinced that while the trial court was undoubtedly in error in concluding that the commitment was void, it did not exceed its jurisdiction, and the order dismissing the action and discharging the jury was a final determination of the matter. As the Supreme Court said in People v. Knowles, supra: "The superior court had the *power* to dismiss the action, and, the Legislature having restricted the right of appeal by the people to certain specified cases of which this is not one, there can be no review of its action." And as stated in People v. Garcia, supra: "* * * this is one of the cases where the action of the trial court, no matter how erroneous, is final." We therefore hold that the order appealed from was in effect a dismissal of the action and a final termination of the action and that there is no appeal from such an order.

The appeal is dismissed.



115 Cal.App.2d 615

ERTELL v. LLOYD'S FOOD PRODUCTS, Inc. et al.

Civ. 15250.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1953.

Action by real estate broker for commission under contract entitling broker to commission on sale of property by him, owner, or anyone else, where owner had sold part of land and leased other part. The Superior Court, County of Santa Clara, John D. Foley, J., rendered judgment for broker for $285 as commission on land sold, but refused commission on land leased and broker appealed. The District Court of Appeal, Patterson, J., pro tem., held execution of lease by owner had not prevented performance, but where broker had failed to produce purchaser ready, able, and willing to buy with or without lease, broker was not entitled to commission.

Judgment affirmed.

1. Brokers ⇐11

A broker may recover damages for the breach of an agreement granting an exclusive right to sell where the owner by his conduct prevents the broker from selling it.

2. Brokers ⇐11

In action by broker on contract entitling him to commission on sale of property by him, by owner, or by another agent, while contract was in force, evidence failed to show that sale of part of property by owner interfered in any way with sale by broker of remaining part.

3. Brokers ⇐11, 54

Where broker was given contract, entitling him to commission on sale of property by him, by owner, or by anyone else, while contract was in force, owner's execution of lease on part of land did not prevent performance and broker who failed to produce a purchaser ready, able and willing to buy, either with or without the lease, was not entitled to commission.

John H. Machado, San Jose, for appellant.

Crist, Stafford & Peters, Elton F. Martin, Palo Alto, for respondent.

PATTERSON, Justice pro tem.

The plaintiff, a real estate broker, brought an action to recover a commission in accordance with the terms of an agreement signed by the defendant authorizing the plaintiff to sell three acres, more or less, of land in Santa Clara County. A portion of the land was improved with a building which had been used as a cannery, and the balance was unimproved. The authorization to sell provided that the agent should have exclusively and irrevocably for a period of 120 days from date the right to sell the property described in the agreement for the sum of $52,500. It further provided that the defendant pay the agent as commission five per cent of the selling price whether the said property was sold by the agent or by defendant, or by another agent, or through some other source, or whether said property was transferred or conveyed during the time set forth. There was also a provision that in the event the property was sold within thirty days after the expiration of the agreement to anyone to whom the broker had shown it he would be entitled to a commission. The authorization was in full force and effect to and including July 21, 1949.

Within the 120 days set forth in the agreement defendant in the early part of July, 1949, without the consent of the plaintiff, leased the improved portion of the property for a period of five years. The balance of the land, 1.8 acres more or less, which was unimproved, was sold by defendant within the 120-day period to one Drew for $5,700. The plaintiff had shown the property to Drew. On July 5th, and before the expiration of the 120-day period, the plaintiff by letter notified the defendant that he had shown this property to Drew as a complete unit and had also mentioned to him a sale of part of the acreage. The letter further stated that he had shown the property to a Mr. Adair and requested that he be given customary protection "as per our exclusive agency agreement." The parcel on which the cannery was situated was never sold and the plaintiff did not at any time produce a purchaser ready, able and willing to purchase the property. No commission was paid. Plaintiff filed this action upon a common count to recover the reasonable value of his services in the sum of $2,625, which is five per cent of the sale price mentioned in the agreement. The Court gave plaintiff judgment for the sum of $285 which is five per cent of the sale price of the 1.8 acres. The plaintiff appeals from the judgment.

[1] Plaintiff claims the right to recover under the rule that an agent may recover damages for the breach of an agreement granting an exclusive right to sell where the principal by his conduct prevents the agent from selling it. Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585.

[2] Plaintiff first contends that the sale of the 1.8 acres of unimproved property prevented performance by him. However, he himself claimed the right under his agreement to sell the property in separate parcels and, in fact, attempted to sell the

same acreage separately to Drew. There was no showing that it interfered in any way with the sale of the property on which the cannery was situated. If he had sold this acreage separately and had been unable to sell the remainder, under the contract he would have been entitled to the sum of $285, the amount awarded him by the judgment. Under the facts it does not appear that this prevented a performance by the plaintiff.

[3] Plaintiff next contends that the leasing of the cannery property for five years prevented performance as far as this parcel was concerned. The property was never withdrawn from sale and there was evidence that it was more saleable with the lease than without it. A similar question was before the Court in Dinkelspiel v. Nason, 17 Cal.App. 591, 120 P. 789. In that case the broker had a listing which by its terms was to continue until withdrawal in writing. The owner during the effective period of the listing leased the property for five years with an option to purchase. Some five years later the option to purchase was exercised. In the broker's action to recover a commission, the owner demurred on the grounds that the action was barred by the statute of limitations. He claimed the leasing of the property prevented performance and started the statute running. The Court held that the leasing of the property did not give rise to a cause of action for a commission. In considering the contention, 17 Cal.App. at page 597, 120 P. at page 791, "That the property, by the act of the owners, was withdrawn from sale, and thereby the broker was prevented from obtaining a purchaser; and hence he should be held entitled to his commission" the Court said, "The answer to this is that there was no agreement to this effect. The parties contracted that the plaintiff should have his commission only in case of a sale. If, during the life of the option, he had produced a purchaser ready, willing, and able to buy, he probably would have earned his commission, notwithstanding the lease; but no such question arises here."

Under the facts here, instead of being prevented from performing, the plaintiff was in a more favorable position for he would be entitled to a commission if he produced a purchaser ready, able and willing to buy either with or without the lease. The execution of the lease did not prevent performance.

Considerable significance is attached to the plaintiff's own testimony that Mr. Adair, a prospective purchaser whom he had sent to view the premises, later reported to him that the key to the building on the premises had been taken from him. However, it does not appear who it is claimed took the key. Neither does it appear at what stage of the examination of the property it was taken. Adair was not called as a witness. The president and vice president of the defendant company denied any recollection of such an incident.

The facts here are to be distinguished from the cases cited by plaintiff to the effect that where an owner conveys the entire property to a third person either by way of sale or exchange the broker is thereby prevented from performing and is entitled to a commission. Plaintiff places great reliance upon Alderson v. Houston, 154 Cal. 1, 96 P. 884. There the owner gave a broker the exclusive right for a period of eighteen months to sell a number of lots on commission agreeing to furnish with each a certificate of clear title. He allowed street assessment liens to accrue against the lots which he refused to discharge. The broker produced buyers for some of the lots who were willing to buy upon the furnishing of certificates of clear title and the sales were lost due to failure of the owner to furnish them. The Court also pointed out that there was uncontradicted evidence showing that it was extremely probable the broker could and would have sold all the lots in the time specified if the owner had been willing to clear the title. There are no comparable facts in the present case. The plaintiff not having produced a buyer ready, able and willing to purchase the cannery property he is not entitled to a commission on that parcel.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

PEOPLE v. NORTHUM et al.

Cr. 2856.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1953.

Rehearing Denied Feb. 13, 1953.

Hearing Denied Feb. 26, 1953.

Prosecution for burglary in the first degree. The Superior Court, Santa Clara County, William F. James, J., rendered judgment, and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that where only evidence connecting defendants with the crime, other than possession of allegedly stolen property and admittedly false statement of one of defendant's that allegedly stolen fur coat belonged to such defendant's wife, were out of court oral statements, failure to instruct that evidence of oral admissions of a party ought to be viewed with caution was prejudicial error.

Reversed.

1. Criminal Law ⇐781(1), 1173(2)

In prosecution for burglary in which only evidence connecting defendants with the crime, other than possession of allegedly stolen property by defendants and admittedly false statement of one of defendants that allegedly stolen fur coat belonged to such defendant's wife, were out of court oral statements, case was one of the "proper occasions" upon which to instruct that evidence of oral admissions of a party ought to be viewed with caution as required by statute upon such proper occasions, and, hence, failure to so instruct was prejudicial error. Code Civ.Proc. § 2061, subd. 4.

See publication Words and Phrases, for other judicial constructions and definitions of "Proper Occasions".

2. Criminal Law ⇐826

Where evidence of admissions of one of two defendants was given without objection by co-defendant and such evidence tended to implicate co-defendant, co-defendant's request for limitation of scope of the admissions should have been addressed to the trial court at the proper time.

Moerdyke, Anderson & Evans and Stanley R. Evans *, Palo Alto, for appellants.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendants Ralph R. Northum and Lawrence Coburn have appealed from a judgment rendered upon conviction of two counts of burglary, first degree, and from an order denying their motion for a new trial.

Questions: Did the trial court commit prejudicial error in failing, even though not requested, to give instructions (1) that the evidence of the extra-judicial oral admissions of a party ought to be viewed with caution, and (2) that the extra judicial oral admissions of Coburn outside the presence of Northum could not be considered as evidence against Northum?

[1] Two homes in the vicinity of San Jose, California, were broken into during the absence of the occupants: that of John Gasner between 6:00 p. m. on December 31, 1951, and 9:00 a. m. of the next day; that of Ugo Orsi between 2:00 p. m. of December 31, and 11:45 p. m. the next day. Various articles were taken from each home.

The defendants were apprehended in Los Angeles, January 2, 1952, as Northum was entering a pawnshop carrying a fur coat.

That coat, also papers, a safe deposit key, a watch, bank books, clothing, jewelry and a jewelry box, Mrs. Orsi identified as items taken from her home. Defendants also had in their possession a pistol, shells, and two watches which Mr. Gasner identified as taken from his home.

Both defendants testified that they purchased all of this property in Oakland on New Year's morning, from a stranger, for $25.00, and that they drove to Los Angeles on the inland route via Tracy, Manteca and Bakersfield, and were not in the vicinity of San Jose between the hours of 2:00 p. m. of December 31, and 11:30 p. m. of January 1.

* Stanley R. Evans was appointed as counsel by the District Court of Appeal for the indigent defendant.

The only evidence, other than their possession of the stolen property, which tended to connect the defendants with the commission of either crime consisted of extra-judicial oral statements made by them to the police.

Police officers testified that Northum, when asked whose fur coat it was as he came out of the pawnshop, said "my wife's" and that the other clothing in his car belonged to him and his wife; that later he said he never heard of a fur coat, and still later, that he had purchased all of the articles above mentioned, except the gun and the coat, from a fellow in a bar in Oakland, about a week or ten days before January 2; that upon another occasion Northum and Coburn said that Coburn bought the gun in Oakland for $25.00 about December 14, 1951; and that on January 4 Northum said he had purchased all of the property from someone he did not know, all of the articles being together in a large bag. One of the police officers testified that on January 4 Coburn stated to him, with no one else present, that Coburn and Northum met in Oakland on New Year's Eve and decided to go to Los Angeles in Northum's car; that they stopped at several places on the way, he was not sure where the places were; at one place they had a beer and then went to a secluded district, kicked in a door at a house, went in a window and gathered up some clothing, the clothing they were arrested with; that this was in the night time; that he did not know anything about a gun; that if there were a gun involved it must belong to Northum. A day or two later Coburn told this officer that he believed they (Coburn and Northum) came through San Jose, as well as he could remember, but did not state definitely that they came that way.

On and after January 9 when questioned separately or together, defendants stated they purchased all the property in Oakland for a total of $25.00 from a man they did not know, one defendant paying $15.00 and the other $10.00. Upon the stand Northum admitted that when first stopped by the officer in Los Angeles he said the fur coat belonged to his wife; that he had had a few drinks and made that reply on the spur of the moment. Coburn denied having said they bought the gun on December 14, denied having told the officer that the gun belonged to Northum, asserted that he told the officer the gun was in with the other articles. He denied having told the officer that they had broken into a house in a secluded residential district.

The trial judge instructed the jury that mere possession of stolen property is not sufficient to justify conviction; that in addition to proof of possession of such property, there must be proof of corroborating circumstances tending of themselves to establish guilt; and that such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendants. But he gave no cautionary instruction, as required "on all proper occasions," that "the evidence of the oral admissions of a party [ought to be viewed] with caution". Code of Civ.Proc. § 2061, subd. 4. We entertain no doubt that this case presented a "proper occasion" for such an instruction and that it was error, prejudicial error, not to give it.

Other than their possession of the stolen property and Northum's admittedly false statement that the fur coat belonged to his wife, the defendants' out of court oral statements furnished the only evidence which connected them with the commission of the crime and placed them near the scene of the crime. It was the only evidence of first degree burglary at the Orsi home,—commission in the night time. There was no evidence that they had a deadly weapon other than the revolver taken from the Gasner home and no evidence that the Gasner home was entered prior to the Orsi home. The state refers to certain testimony of Northum and incorrectly claims he testified to having been in San Jose before going to Los Angeles. He was asked about the gun that was in the defendants' car. He said the first time he saw it was in the City Hall in Los Angeles; that Coburn said he put it in the car, that it was among the "stuff" they bought; Coburn told him that after they were in San Jose; Coburn did not

tell him that until after they got to San Jose; Northum asked him after they "came up here." Obviously, Northum had reference to coming to San Jose after the apprehension of the defendants at Los Angeles, not prior to their going to Los Angeles. The state also claims that the defendants' account, given upon the witness stand, of how they acquired the stolen property, was inherently improbable and as such was evidence of defendants' guilt. Nevertheless, it was for the jury to determine the credibility of that story. They might have believed it. We can not say they would not have believed it. Considering the entire record, we can not say that a different verdict would have been improbable had the cautionary instruction been given. People v. Bemis, 33 Cal.2d 395, 398–401, 202 P.2d 82; People v. Cornett, 33 Cal.2d 33, 39–40, 198 P.2d 877.

The state's reliance, in large part, upon cases which antedate the Bemis and the Cornett cases is not convincing. Nor are we persuaded, as the state claims, that the ruling in the Bemis case should be confined to those situations in which the prosecution relies entirely upon extra judicial admissions to connect a defendant with the crime. In the Cornett case there was other evidence of a substantial character which connected the defendant with the crime independently of any extra-judicial admissions. Nor are we here concerned with the "testimony" of an "accomplice," the corroboration of such testimony, or cautionary instructions concerning such testimony, as the state in a portion of its argument seems to assume. Instead, we are concerned solely with the "oral admissions" of a "party" and the need for a cautionary instruction concerning such admissions. For failure to give such an instruction, the judgment must be reversed.

[2] Defendants' other point, relating to the evidentiary effect of oral admissions made by Coburn outside the presence of Northum, is not well taken. It was not error to admit proof of those admissions without limiting them to Coburn and without later instructing the jury not to consider them as evidence against Northum. Evidence of the making of those admissions by Coburn was given without the interposition by Northum of any objection of any kind. His request for a limitation of the scope of Coburn's admissions should have been addressed to the trial court, at the proper time.

The judgment and the order appealed from are reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



115 Cal.App.2d 589

BEEBE v. RICHARDS et al.

Civ. 4489.

District Court of Appeal, Fourth District, California.

Jan. 28, 1953.

Action by tenant who operated beauty salon for possession of alleged trade fixtures or their value and for damages for their detention, wherein defendants counterclaimed for unpaid rent and for damages to the freehold caused by the removal of the fixtures pursuant to court order. The Superior Court, Riverside County, Clarence L. Kincaid, Judge assigned, entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Mussell, J., held, inter alia, that the evidence supported the finding that the property in question constituted trade fixtures, and held that the judgment would be reversed for the purpose of determining the issues raised by the counterclaims.

Reversed with directions.

1. Fixtures ⇐35(2)

In action by tenant who operated beauty salon for possession of certain property or its value and for damages for its detention, evidence supported finding that items in question were trade fixtures. Civ.Code, § 1019.

2. Fixtures ⇐15

Trade fixtures were removable by tenant upon termination of lease.

3. Fixtures ⇐35(3)

In action by tenant who operated beauty salon for possession of trade fixtures or their value and damages for their detention, whether the items involved were removable without injury to the freehold was a question of fact.

4. Fixtures ⇐35(6)

In action by tenant who operated beauty salon for possession of trade fixtures or their value and for damages for their detention, evidence supported damage award of $366.45.

5. Fixtures ⇐35(6)

In action by tenant who operated beauty salon for possession of trade fixtures or their value and for damages for their detention, evidence established that one defendant was the owner of the hotel wherein the salon was located and the other two defendants were his employees, acting as managers, and, therefore, judgment against the three defendants was not error.

6. Tender ⇐28

In action by tenant for possession of trade fixtures or their value and for damages for their detention, evidence supported finding that tenant had tendered rent by check and that defendants had refused such tender.

7. Appeal and Error ⇐991

In action by tenant who operated beauty salon for possession of trade fixtures or their value and for damages for their detention, record showing that tenant had agreed to pay $21.68 rent for certain period of occupancy and that it had not been paid raised question of whether defendant should be allowed a credit for that amount.

8. Fixtures ⇐35(5)

In action by tenant who operated beauty salon for possession of trade fixtures or their value and for damages for their detention, wherein defendants counterclaimed for rent and for damage alleged to have been caused by constable's removal of trade fixtures, whether defendants suffered damage by removal of the fixtures which was allowable as a counterclaim was a question which should have been covered by appropriate findings and conclusions.

9. Appeal and Error ⇐1071(6)
Trial ⇐391

Where an action is tried before the court without a jury, in absence of a waiver, findings are required upon all material issues presented by pleadings and the evidence, and if court renders judgment without making such findings, the judgment must be reversed.

10. Appeal and Error ⇐1071(6)

Where trial court sitting without jury failed to make findings on material issues presented by counterclaims for unpaid rent and for damages caused the freehold by removal of trade fixtures, and findings had not been waived, judgment for the tenant for possession of the fixtures and for damages for their detention would be reversed for the purpose of determining the issues raised by the counterclaims.

Tudor Gairdner, Los Angeles and Eugene E. Therieau, Palm Springs, for appellant.

Willard H. Winder, Riverside, for respondent.

MUSSELL, Justice.

Plaintiff lived in Palm Springs and, under an oral lease, operated a beauty salon at the Del Tahquitz Hotel. The beauty parlor was operated on a seasonal basis and the rent was paid one-half at the beginning of the season and the balance when the season ended. The lease covered an empty room in the hotel and plaintiff moved in equipment consisting of four driers, four drier bowls, two manicure tables, one shampoo bowl, three dresserettes, five mirrors and other miscellaneous items. Plaintiff attached the shampoo bowl, the dresserettes and the mirrors to the walls of the room by means of lag screws or bolts and installed a Neon sign over the beauty salon.

On March 24, 1950, defendant Richards, manager of the hotel, and employed by the owner, J. H. Norman, in a conversation with plaintiff, informed her that he had orders to raise her rent or require her to move. When plaintiff inquired as to how long she had to move, Richards replied

"Immediately". Plaintiff then procured a truck and hired a man to move her equipment. On the night of March 24th, about 8:00 o'clock P.M., while plaintiff was moving her equipment, Henry Norman, an employee of the hotel, and defendant Richards, prevented the plaintiff from removing her property and locked the driers, drier bowls, dresserettes, mirrors, shampoo bowl and manicure tables in the shop. Demand was then made on plaintiff for the sum of $21.68 rent claimed to be due to March 24th. Plaintiff complied with the demand by tendering her check therefor, which was refused. The impounded equipment was removed by the constable by virtue of a court order on April 6th and retained by him until April 10th, when he delivered it to plaintiff.

Plaintiff filed this action on April 4, 1950, claiming the property or its value and damages for its detention. The trial court gave plaintiff judgment for the possession of the property and damages in the sum of $366.45.

[1–3] Appellants argue that the court erred in finding that none of the articles were so attached as to become part of the realty. The evidence was sufficient to support the finding that the said articles were trade fixtures. As such, they were removable by the plaintiff. Civil Code, section 1019; 12 Cal.Jur. 577. Whether they were removable without injury to the freehold was largely a question of fact. Borchers Bros. Co. v. Ciaparro, 211 Cal. 507, 511, 295 P. 1035.

[4, 5] We find no merit in defendants' contention that the court erred in finding that plaintiff suffered damages from the wrongful acts of the defendants and in fixing the damages in the sum of $366.45. The sum of $54.45 (Constable's charges) was included in this amount, apparently by stipulation and a pretrial court order. The allowance of $300 as additional charges is supported by plaintiff's testimony that she was deprived of the use of her equipment and that her earning power was thereby affected; that she could not operate her business and that the net earnings of the shop were approximately $150 per week; that defendants removed the Neon sign and transformer and put them in the trash at the rear of the hotel; that the sign was worth $125 and that plaintiff did not recover it. Likewise, there was no error in rendering judgment against the three defendants since there was evidence that J. H. Norman was the owner of the hotel and the other two defendants were his employees, acting as managers for him.

[6, 7] Defendants contend that the trial court erred in its finding that plaintiff tendered the delinquent rent and that the defendants refused said tender. In this connection plaintiff testified that the rent was payable one-half at the beginning and the balance at the end of the season, about the middle of May; that when she and defendant Richards were arguing about the rent, Richards estimated the amount due as the sum of $21.68; that she "went to write him a check and he refused it". The evidence was sufficient to support the questioned finding. However, the record shows that plaintiff agreed to pay the rent in the amount stated and that it has not been paid. The question of whether defendants should be allowed a credit for this amount was presented by the evidence and the allegations of the counterclaim. No finding was made on this material issue.

[8, 9] The court also failed to find on the issue raised in the counterclaim as to damage to defendants' property alleged to have been caused by the removal of the trade fixtures. There was evidence that the walls of the leased premises were damaged by the constable in the process of removing the lag screws by which the fixtures were held in place. There is some indication in the record that the constable removed the property by virtue of a court order but the order is not in evidence nor are the proceedings by which the property was taken before us. Whether defendants suffered damages by the removal of the property which were allowable as a counterclaim is a question which should have been covered by appropriate findings and conclusions. As was said in Severance v.

Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4, 13, 172 A.L.R. 1107:

"It is settled law in California that where an action is tried before the court without a jury, in the absence of a waiver, findings are required upon all material issues presented by the pleadings and the evidence. If the court renders judgment without making such findings, the judgment must be reversed. Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260; James v. Haley, 212 Cal. 142, 147, 297 P. 920; Wilcox v. Sway, 69 Cal.App.2d 560, 564, 160 P.2d 154; Bertrand v. Pacific Electric Ry. Co., 46 Cal.App.2d 7, 13, 115 P.2d 228."

[10] We conclude that the trial court erred in failing to make findings on the material issues presented by the counterclaims herein.

Judgment reversed for the purpose of determining the issues raised by the counterclaims.

BARNARD, P. J., and GRIFFIN, J., concur.



115 Cal.App.2d 619

BUCKLEY v. OLSEN.

Civ. 15269.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1953.

Action by automobile guest for personal injuries. The Superior Court, City and County of San Francisco, Theresa Meikle, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Patterson, J. pro tem., held that where automobile guest was assisting in changing tire on automobile parked in passing lane of four lane highway when defendant ran into rear of automobile and injured guest, question whether guest was guilty of contributory negligence was a question of fact for trial court's determination.

Judgment affirmed.

1. Automobiles ⇐245(39, 43)

In action for personal injuries suffered by automobile guest, who was assisting in changing tire on automobile parked in passing lane of four-lane highway when defendant ran into rear of automobile, questions of defendant's negligence as to speed and lookout were fact questions for the court.

2. Automobiles ⇐245(75)

In action for personal injuries suffered by automobile guest, who was assisting in changing tire on automobile parked in passing lane of four-lane highway when defendant ran into rear of the automobile, whether guest was contributorily negligent was question of fact for trial court's determination.

3. Appeal and Error ⇐989

The duty of a reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings and conclusions of the trial court, and it is immaterial that the evidence might have supported contrary findings.

Fred A. Watkins, San Francisco, for appellant.

Joseph F. Mannion, San Francisco, for respondent.

PATTERSON, Justice pro tem.

Appeal by defendant from a judgment in the sum of $10,000 in favor of plaintiff for personal injuries arising out of an automobile accident after trial before the Court sitting without a jury.

Plaintiff, a sixteen year old boy, was riding in a car with five other boys. They were on their way to a dance. The car was driven by the owner, Lawrence J. Davis. While proceeding in a southerly direction on Bernal Avenue in San Francisco about 9:20 p. m. a rear tire went flat Davis was traveling on the inside or passing lane. He traveled for two hundred

feet before bringing the car to a stop. Bernal Avenue has four lanes, two in each direction, and a concrete safety island in the middle. The car was brought to a stop in the lane next to the traffic island and about two hundred feet north of an intersecting street. The lights on the car were burning. There was light at this point coming from an industrial plant across the street. Dan Toomey, one of the boys, was placed about seventy feet to the rear of the car with a flashlight to signal drivers into the other lane of traffic. Twenty to twenty-five cars passed and were diverted to the other lane. The door of the trunk was open and plaintiff was searching for a jack when the defendant approached from the south. The Davis car was struck from the rear and plaintiff thrown some distance and suffered severe injuries. Defendant testified he saw Toomey waving the flashlight and thought he was going to cross the street. However, the police officer who investigated the accident said defendant told him at the scene of the accident that he had not seen the flashlight. On cross-examination defendant testified he did not see the plaintiff prior to the accident. One witness testified that at the scene of the accident he asked the defendant if he could see the car and the defendant said, "No, I couldn't see anything." Davis testified he estimated defendant's speed at seventy miles per hour. Another boy estimated the defendant's speed at sixty-five to seventy miles an hour. Each of them had just a glance at the car before the impact. A skidmark fifty-three feet long was laid down by defendant's car. The point where the accident occurred was on a straight stretch of highway. The facts stated are those disclosed by the record as most favorable to the plaintiff.

[1] Defendant contends that there was no evidence of negligence shown on the part of the defendant and that the plaintiff was guilty of contributory negligence as a matter of law. From the foregoing statement of facts the Court may have properly concluded that defendant was traveling at a rate of speed which was not reasonably prudent under the circumstances. The Court may also have properly concluded that the failure of defendant to observe either the plaintiff, the car or the boy with the flashlight was not the exercise of that due care imposed by the law upon a driver of a motor vehicle under the circumstances. The Court's finding that the defendant was negligent is supported by the evidence.

[2, 3] On the issue of the contributory negligence the defendant argues that the plaintiff voluntarily placed himself in a position of peril and it constituted contributory negligence for him to assist in the changing of a tire on a vehicle which was illegally parked in the passing lane. He cites Basinger v. Yarian, Ohio App., 49 N.E.2d 104, for the proposition that where a passenger at night places himself at the rear of a car to repair a tire he assumes the risk of injury by his act. The Court there held that the question whether plaintiff's conduct constituted contributory negligence was a question of fact which had properly been submitted to the jury. In the present case the plaintiff did not park the car and there was nothing in the evidence which would warrant imputing any negligence on the part of the driver to the plaintiff. Whether or not the plaintiff's conduct under all the circumstances constituted contributory negligence was a question of fact for the trial court to determine. It is a well established rule that the duty of a reviewing Court "begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support * *" the findings and conclusions of the trial court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690. It is immaterial that the evidence might have supported contrary findings.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

115 Cal.App.2d 551

FRAZIER v. FRAZIER.

Civ. 15207.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1953.

Contested action in which both parties sought a divorce. The Superior Court, County of Contra Costa, Harold Jacoby, J., granted divorce to husband on ground of extreme cruelty, and awarded custody of two year old daughter to husband, while awarding custody of eight year old boy to wife, and the wife appealed. The District Court of Appeal, Peters, P. J., held that under the circumstances revealed, trial court had not abused its discretion in awarding the daughter to the husband, notwithstanding the award of the boy to the wife.

Judgment affirmed.

See also Cal.App., 252 P.2d 698.

1. Divorce ⇐301

On question whether husband, who had been granted divorce on ground of extreme cruelty, was entitled to custody of two year old daughter even though wife had been given custody of eight year old son, testimony by husband and his witnesses, as to various acts upon which finding of cruelty was predicated, was relevant, but only in so far as it might indicate attitude of parents toward the two children.

2. Parent and Child ⇐2(3)

Where contest for custody of child is between opposing parents, both of whom are fit to care for the child, statutory provision that, other things being equal, child of tender years should be given to mother, must be read in connection with provision that best interests of child must be considered; but in determining best interests of child, court has broad discretion in ascertaining whether other things are equal, and in exercising this discretion and in evaluating the best interests of the child against the elements of its tender years, it is entitled to consider the status quo. Civ.Code, § 138(1, 2).

3. Divorce ⇐296

In divorce proceeding, where husband was awarded divorce on ground of extreme cruelty, trial court did not, under the circumstances, abuse its discretion in awarding custody of two year old daughter to husband, even though it had awarded custody of eight year old son to wife. Civ. Code, § 138(1, 2).

Alfred E. Graziani, San Francisco, Raymond N. Baker, San Francisco, of counsel, for appellant.

A. F. Bray, Jr. and John F. Baldwin, Martinez, for respondent.

PETERS, Presiding Justice.

In a contested action in which both parties sought a divorce, the trial court granted the divorce to the husband on the ground of extreme cruelty, divided the community property between the parties, and divided between the parents the custody of their two children, awarding the custody of the boy, aged eight, to the mother, and the custody of their girl, aged two, to the father. On this appeal by the wife her sole contention is that she, having been found to be a fit and proper custodian for the boy, was entitled, as a matter of law, to the custody of the daughter, a child of tender years. The appeal lacks merit.

The trial court found that the husband was entitled to the divorce, finding that the wife has "nagged and harassed" her husband; has "yelled and shouted" at the two children; that she "has constantly criticized" her husband's relatives; that she has "repeatedly refused to join organizations and to go places with" her husband; and that she "has threatened to commit suicide and to, at the same time, kill the two children."

The court then found that the daughter of the parties was presently in the custody of the father; that he "is a fit and proper parent to have the care, custody and control of said minor daughter; that it is for the best interest of said minor daughter to remain in the care, custody and control" of respondent. The court then made an identical finding in reference to the son of the parties, substituting appellant for respondent, and awarded the custody of the son to

appellant. She was also awarded $75 a month for the son's support.

The argument of appellant is predicated upon the language of section 138, subd.(2), of the Civil Code. Section 138, subd.(1), provides that in awarding custody the court is to be guided "By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare * * *." Subdivision (2) provides that "As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother * * *." It is the theory of appellant that since she has been found to be a fit and proper person to have custody of the boy, other things have been found to be "equal" within the meaning of section 138, and therefore, she, as a matter of law, is entitled to have the custody of the girl awarded to her. This theory not only disregards the wide discretion of the trial court in such cases but disregards the evidence upon which the trial court made this somewhat unusual award of custody.

These parties were married in 1941, and at the time of trial (March and April, 1951) were in their middle thirties. Both parties testified that appellant was pregnant at the time of marriage and that the boy was born shortly thereafter. This caused respondent to refer to the boy as his wife's child, stating that she should take care of him. The parties lived in San Francisco for about a year after the marriage, and then the husband was called into the army where he served until 1945. During this army period appellant and the boy lived with appellant's mother in San Francisco. When respondent returned from the army the parties moved to Oakland where the girl was born in December of 1948. In 1950 they moved to a home they had bought in Concord, Contra Costa County, near the respondent's place of employment.

[1] Neither party got along with their respective mothers-in-law, appellant complaining because they were moving farther and farther away from her mother who lived in San Francisco, and also complaining that respondent's mother, who lived in Oakland, unduly interfered with her. The respondent and his witnesses testified as to the various acts upon which the finding of cruelty is predicated, and although this testimony was contradicted by appellant and her witnesses, the trial court believed respondent and his witnesses, and the finding is supported by his and other testimony. This testimony is now relevant only insofar as it may indicate the attitude of the parents towards the two children.

The respondent testified that when he returned from the service in 1945 the boy was undisciplined and unruly; that appellant would make adverse comments about his relatives before the boy; that his wife would not allow the child to play with other children. However, until the girl was born in December of 1948, the parties got along fairly well together.

There is substantial evidence that appellant did not want, and feared having, another child, and that, after she became pregnant, she made several unsuccessful attempts to induce a miscarriage. Except for securing a crib, she made no other preparations for the arrival of the child. When the daughter was born appellant told respondent that the baby was "his" and that he could take care of her. The evidence shows that respondent, when at home, assumed the care of this child, feeding and bathing her. The respondent and his witnesses also testified that appellant was a poor housekeeper, that while under her care the boy was "grubby," and the baby "kept dirty." They also testified that the appellant would scream at the children, and that, as a result of her treatment, the baby became frightened and unhappy and would cringe and cry like a "scared rabbit."

About four months after the birth of the daughter, appellant, for three or four days before her recurring menstrual periods, began to suffer from severe pain and cramps, and from severe headaches. Severe depression accompanied these conditions. Appellant was uncooperative about seeking medical assistance, and what doctors she did see were unable to render much assistance. In July of 1949 appellant took an excessive number of pills given to her by a doctor to kill pain. This necessitated the

calling of an ambulance and the police by a neighbor. The respondent testified that appellant had left a suicide note, but this was denied by appellant. The next month, however, being August of 1949, appellant admitted that she tried to commit suicide by swallowing the contents of a bottle of a sedative, and again the police were called. In October or November of 1949 appellant had an hysterical attack and the police were again called. According to respondent, during these sick periods appellant made frequent threats to kill the children and herself. Appellant denied these threats, but did admit the suicide attempt above mentioned, and also admitted that on another occasion she intended to kill herself with a butcher knife, but was restrained by respondent.

In May of 1950 appellant had another severe attack. Upon her refusal to see a doctor, respondent took her, at her request, to her mother's home in San Francisco. She requested that the children not be brought along. Respondent told appellant to see a doctor and to get an operation if one were needed. Appellant did go to a new doctor who ascertained that appellant had a tumor and recommended an immediate operation. Respondent approved of the operation and it was performed on June 9, 1950, a tumor and most of the female organs being removed. Appellant can have no more children.

Before the operation the respondent informed appellant that he was going to secure a divorce, but he took appellant to the hospital for the operation, having authorized it and, to some extent, having arranged for it.

After the separation, the respondent took the two children and went to live with his mother in Oakland. After appellant had been operated on he sent the boy over to visit her and she did not send him back, keeping him at her mother's home where she was staying. Appellant conceded that respondent and his mother, on the whole, gave the girl proper care. Respondent's witnesses testified that since the baby has been removed from appellant's care she is less nervous, more friendly and is now plump, jolly and good natured, in contrast to her frightened nervous condition under appellant's care. The appellant visits her daughter once every two weeks. The respective homes where the two children are kept are adequate. The respondent requested custody of both children but stated that if their custody was to be divided he preferred having his daughter, because she had been cared for by him since her birth, while the boy had been separated from him during the war. The appellant indicated no preference, requesting custody of both. Appellant's testimony is uncontradicted that since her operation she has recovered completely from the mental and physical condition that existed prior to the separation.

It is appellant's theory that the "tender years" provision of subdivision (2) of section 138 of the Civil Code giving preference to the mother is here applicable and that the trial court abused its discretion in awarding the custody of the daughter to respondent. Appellant claims that "other things" were "equal" because, in awarding custody the trial court must consider only her present witness and could not consider events that occurred during the period she was sick, inasmuch as she has now fully recovered. She also places considerable reliance on the finding that she is a "fit and proper" person to have custody of the boy. In support of these contentions appellant places her greatest reliance on the cases of Bemis v. Bemis, 89 Cal.App.2d 80, 200 P.2d 84, and Wilkinson v. Wilkinson, 105 Cal.App.2d 392, 233 P.2d 639. The Bemis case involved a somewhat unusual factual situation. By the divorce decree the father was awarded custody of the son, aged 5½, and of the daughter, aged 7. The mother was not then found unfit. The father put the children into an unsatisfactory boarding school, and, when they became ill, voluntarily surrendered them to the mother. The uncontradicted evidence was to the effect that the mother gave the children a fine home and excellent care. The mother petitioned for a modification of the custody order which was denied by the trial court. The appellate court reversed, holding that the mother should have been awarded custody of both children. In so

holding, the court used some strong language to the effect that when the facts make section 138, subd. (2), of the Civil Code applicable, "it is not within the discretion of the court to ignore it", and "Where the court finds that 'other things' are equal, young children are invariably given into the custody of their mother", 89 Cal.App.2d at page 90, 200 P.2d at page 90, but that was not the basis of the court's decision. The court placed its greatest emphasis on the fact that because the father had transferred the children to the care of the mother, the requested modification of the custody order was intended not to change but to preserve the status quo as it existed before the request was filed. Thus the appellate court emphasized that the denial of the request for a modification by the trial court resulted in a complete change in the children's mode of living, a factor always given great weight by the courts.

Wilkinson v. Wilkinson, 105 Cal.App.2d 392, 233 P.2d 639, and the somewhat similar case of Robertson v. Robertson, 72 Cal.App.2d 129, 164 P.2d 52, are not in point. Both involved contests between grandparents and a mother. In both cases the court applied the rule that before custody can be awarded a grandparent as against a parent there must be a finding supported by the evidence that the parent is unfit. Both cases do contain language emphasizing the importance of a mother's care for small children. The Wilkinson case also emphasized the rule that it is present and not past fitness that is relevant, and that past acts are admissible only insofar as they tend to show present fitness. That rule has frequently been stated. Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; Guardianship of Jones, 86 Cal.App.2d 35, 194 P.2d 141; Guardianship of Casad, 106 Cal.App.2d 134, 234 P.2d 647.

There are also a few cases of which Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96, is typical which have reversed awards of custody to fathers where such awards were made on petitions to modify existing orders awarding custody to the mothers. The rationale of those cases is that before a modifying order is justified there must be evidence of a change in circumstances, and that there was no such showing there made. These cases are not in point.

[2] The respondent relies on the well-settled rule that where the contest is between opposing parents, both fit, the "tender years" provision of subdivision (2) of section 138 of the Civil Code must be read with the provisions of subdivision (1) of the section making the welfare of the child a factor that must be considered. The trial court, when faced with two fit parents, must give consideration to the best interests of the child, and in determining that fact has a broad discretion in determining whether other things are equal. Cases emphasizing the broad discretion existing in the trial court are legion. The following are typical: Hamilton v. Hamilton, 104 Cal.App.2d 111, 231 P.2d 69; Bush v. Bush, 81 Cal.App.2d 695, 185 P.2d 38; Munson v. Munson, 27 Cal.2d 659, 166 P.2d 268; Morgan v. Morgan, 103 Cal.App.2d 776, 230 P.2d 130; Phillips v. Phillips, 48 Cal.App.2d 404, 119 P.2d 736; Priest v. Priest, 90 Cal.App.2d 185, 202 P.2d 561; Noon v. Noon, 84 Cal.App.2d 374, 191 P.2d 35.

In exercising this discretion, and in evaluating the best interests of the child against the "tender years" provision of the section, the courts are entitled to consider the status quo. Thus in Fine v. Derby, 111 Cal.App.2d 402, 244 P.2d 983, the appellate court refused to upset an award to the father of the custody of a 7-year old boy, where the father had had custody of the child for four years. Much of what is said in the opinion is applicable here. At page 403 of 111 Cal.App.2d, at page 984 of 244 P.2d appears the following:

> "The mother's position on appeal is that since the evidence shows that both parents are equally fit and proper persons and each has a suitable home it was an abuse of the court's discretion to award custody of a boy of tender years to the father. In taking this position the mother relies upon that portion of section 138, Civil Code, which provides that 'other things being equal, if the child is of tender years, it should be given to the mother'.

"In the application of this statutory provision the court has a wide discretion and in determining whether other things are equal the primary consideration is what will promote the best interests of the child. [Citing cases.] Here in determining the best interests of the child the trial court was not confined to the question of the fitness of each parent and the suitability of each home, but was entitled to give due weight to the fact that from a very tender age Edward was accustomed to living in the custody of his father, and with only the fourteen month interruption when his mother refused to return him to his familiar home, his father had cared for him to the exclusion of the mother from age two to age six, from 1946 to 1951. We cannot be insensitive to the fact, to which we must assume the trial court gave proper consideration, 'that the stability of the home life of the children is an important and vital factor', Washburn v. Washburn, 49 Cal.App.2d 581, 587, 122 P.2d 96, 100 and 'that a change of custody would disturb the child's established mode of living', Bemis v. Bemis, 89 Cal.App.2d 80, 91, 200 P.2d 84, 91. In view of this factor we cannot hold that the trial judge in continuing Edward's custody in the father was not entitled to find that other things were not equal, and that it was to Edward's best interest not to have his accustomed mode of living and home environment again abruptly changed." The case is directly in point.

Another case in point is Norton v. Norton, 112 Cal.App.2d 358, 245 P.2d 1108. There a modification awarding a 9-year old boy to the father was affirmed. The court frankly admitted that both parents were fit and both homes were proper, but held that the award was justifiable because it kept the boy with his father where he had been in the past. It should be mentioned that there was a strong dissent in this case containing arguments in favor of the mother that are similar to the arguments here advanced, but the Supreme Court denied a hearing without a dissenting vote.

In Juri v. Juri, 61 Cal.App.2d 815, 143 P.2d 708 same case on subsequent appeal, 69 Cal.App.2d 773, 160 P.2d 73, the court affirmed an award of children aged 2 and 3 respectively to the father, even though the court was extremely sympathetic to the mother. The court stated, 61 Cal.App.2d at page 820, 143 P.2d at page 711:

> "Under the facts and circumstances of the present case and the statement by the trial court that both parties were 'proper persons to have the custody of the children,' which was in effect a ruling that everything was equal as between the parents, we think that, in view of the provisions of section 138 of the Civil Code, and the tender years of the children, the trial court, in the exercise of its discretion, should have awarded the custody of said childen to the mother.
>
> "However, this court in the case of Phillips v. Phillips, 48 Cal.App.2d 404, 119 P.2d 736, held that the qualifying clause of subsection (2) of said section 138, 'other things being equal,' leaves a large measure of discretion with the trial court. Here the trial court, in the exercise of its discretion, has impliedly found that although the mother is a fit and proper person, the best interests of the children will be served by dividing their custody between their parents.
>
> "As we are unable to say that said court abused its discretion, we are constrained to sustain the order from which both parents have appealed."

[3] In the instant case we cannot say that the trial court abused its discretion. It was entitled to consider past acts insofar as they reflected or had a tendency to reflect present fitness. It had the right to consider that the daughter was, so far as the mother is concerned, an unwanted child; that since birth the father has assumed the main burden of the child; that admittedly the father has had sole custody and care of the child since the separation of the parties in May of 1950, and that to award her custody to the mother would disturb the status quo. The court could

also consider the change in the baby's demeanor since the father has had her custody. While the evidence is to the effect that appellant's failure as a mother was largely due to a sickness from which she has now recovered, the trial court was entitled to consider that the trial of this case was but ten months from the date of the operation, and that it might well be to the best interests of the child to keep her from a mother whose grave physical and emotional condition had been brought to a focus by the birth of the child. The court, under such circumstances, might well have felt that the boy, who had been largely brought up by the wife and her mother, should be kept by his mother, while the best interests of the girl required that she remain with the father. The determination to award the girl to the father was well within the discretion of the trial court.

The judgment appealed from is affirmed.

FRED B. WOOD, J., and DOOLING, J.(Assigned), concur.



115 Cal.App.2d 560

FRAZIER v. FRAZIER.

Civ. No. 15336.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1953.

Contested action in which both parties sought a divorce. The Superior Court, County of Contra Costa, Harold Jacoby, J., granted husband divorce on ground of extreme cruelty and wife filed notice of appeal and moved for counsel fees on appeal. The trial court entered order awarding wife $150 counsel fees and wife appealed from such order. The District Court of Appeal, Peters, P. J., held that, under the circumstances revealed, trial court did not abuse its discretion.

Order affirmed.

1. Divorce ⇐182

A wife, in a proper case, is entitled to obtain counsel fees for the prosecution or defense of an appeal in a divorce action, but the amount of such award rests largely in the discretion of the trial court. Civ. Code, § 137.3.

2. Appeal and Error ⇐1013

A reviewing court is not authorized to revise the lower court's judgment even if it should be of the view that it would have dealt more liberally with appellant had matter been submitted to its judgment in first instance, and only a clear abuse of discretion will justify its interference with judgment of the trial court.

3. Divorce ⇐182

In divorce proceeding, where court had already awarded counsel fees of $500 to wife, who had been given $4,435.28 from community property totaling $9,640.56, who was receiving benefits of continued payments on husband's life insurance policy and was receiving $75 a month for support of son, but who had not secured employment even though she was physically able to do so, it did not abuse its discretion in awarding wife only $150 more counsel fees for an appeal. Civ.Code, § 137.3.

Alfred E. Graziani and Raymond N. Baker, San Francisco, for appellant.

A. F. Bray, Jr., and John F. Baldwin, Martinez, for respondent.

PETERS, Presiding Justice.

This appeal grows out of an order made after the final judgment involved in Frazier v. Frazier, Cal.App., 252 P.2d 693.

On the day the notice of appeal from the judgment was filed appellant petitioned for alimony and for support of her son pending the appeal, and for costs and counsel fees on the appeal. Subsequently appellant abandoned her motion for alimony, the respondent agreed to comply with the child support order, the parties were restrained from disposing of the community property pending the appeal, costs on appeal were granted appellant, and the motion for coun-

sel fees was dropped from the calendar. Later appellant filed a second notice of motion for counsel fees, supported by affidavits averring that she believes her appeal to be well founded, that she has no funds to pay her counsel, that she is recovering from a serious operation and is making an effort to secure employment, that respondent earns $120 a week and has other income, and is able to pay. No counter-affidavits were filed. The motion was granted, the court awarding appellant $150 for such counsel fees. From this order the wife appeals, contending that the award is inadequate as a matter of law.

In the divorce proceeding the trial court found that respondent earns $112 take-home pay a week. During that trial the husband first paid $150 on account of counsel fees to the wife, and then the parties stipulated that counsel fees for both parties would be paid out of a certain savings account prior to the division of community property. By its decree the court awarded counsel for the wife an additional $350, thus making a total fee of $500. Similar fees were awarded counsel for the husband. It should also be mentioned that community property totalling $9,640.56 was divided $5,205.28 to the husband and $4,435.28 to the wife. In addition, the husband was ordered to continue payments on a designated insurance policy for the benefit of the wife and children. The husband was required to pay $75 a month for the support of his son, and by stipulation this payment has continued during the pendency of this appeal.

[1, 2] There can be no doubt, of course, that a wife, in a proper case, is entitled to obtain counsel fees for the prosecution or defense of an appeal in a divorce action. Section 137.3 of the Civil Code, which was effective when the last affidavit was filed and when the minute order was made, reads as follows: "During the pendency of any action for divorce or for separate maintenance, or for the support, maintenance or education of children, the court may order the husband or wife or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary." The cases have fully enforced this right, even to the extent of holding that the award should be made even if the wife has some moderate amount of capital. See, as typical, Fallon v. Fallon, 86 Cal.App.2d 872, 195 P.2d 878; Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670; Kyne v. Kyne, 74 Cal.App.2d 563, 169 P.2d 272. But it is well settled that the amount of such award rests largely in the discretion of the trial court. The rule is stated as follows in Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032, 1033: "A reviewing court is not authorized to revise the lower court's judgment even if it should be of the view that it would have dealt more liberally with the appellant had the matter been submitted to its judgment in the first instance. A clear abuse of discretion only will justify its interference with the judgment of the trial court." See, also, Kyne v. Kyne, 74 Cal. App.2d 563, 169 P.2d 272; Smith v. Smith, 85 Cal.App.2d 428, 193 P.2d 56; Sweeley v. Sweeley, 28 Cal.2d 389, 170 P.2d 469; see cases collected 3 Cal.Jur. p. 718, § 114. In Bailey v. Bailey, 60 Cal.App.2d 291, 140 P.2d 693, the court had awarded the wife $500 for attorney's fees during the trial, the precise amount here allowed. Later the court awarded but $50 for such fees on appeal. The appellate court held that in exercising its discretion in fixing the amount of such fees on appeal, the trial court could properly consider the amount already awarded at the trial. At page 297 of 60 Cal.App.2d, at page 697 of 140 P.2d, the court stated: "With regard to the question of attorney's fees, the record reveals that counsel had been awarded a total of $500 as attorney's fees, which fact the court in all probability took into account in fixing [at $50] attorney's fees for the appeal. In the circumstances, notwithstanding the opportunity for a difference of opinion with respect to such matters, the showing is insufficient to warrant any interference with such order on appeal."

[3] That rule is applicable here. The trial court had already awarded counsel for appellant $500. In addition, it had divided substantial community property almost equally between the parties. The court was also permitted to consider the fact that at the trial appellant had testified that she had fully recovered from her operation and felt fine. Nevertheless, she had not secured employment. While the award here granted is very small, and perhaps smaller than we would have granted under the circumstances, we cannot say that in making the award the trial court abused its discretion.

The order appealed from is affirmed.

FRED B. WOOD, J., and DOOLING, J. (Assigned), concur.



115 Cal.App.2d 711

PEOPLE v. STAVER et al.

Cr. 4815.

District Court of Appeal, Second District, Division 1, California.

Feb. 2, 1953.

Hearing Denied March 2, 1953.

Certain of the defendants were convicted in the Superior Court of Los Angeles County, Stanley N. Barnes, J., of criminal conspiracy, grand theft, and violation of the Corporate Securities Act, and they appealed. The District Court of Appeal, White, P. J., held that evidence sustained conspiracy and grand theft convictions, but did not sustain convictions under the Corporate Securities Act.

Judgments reversed in part and affirmed in part.

1. False Pretenses ⇐7(1)

A "false pretense" is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce person, to whom it is made, to part with something of value.

See publication Words and Phrases, for other judicial constructions and definitions of "False Pretense".

2. False Pretenses ⇐9

In grand theft prosecution for obtaining money by false pretense, it was not necessary to prove that false representations made by defendants were the sole inducing cause of owner parting with his money or property.

3. False Pretenses ⇐41

In grand theft prosecution for obtaining money by false pretense, circumstantial background against which various contracts made by defendants were projected, should not be overlooked.

4. False Pretenses ⇐7(5)

The form of words, in which false pretense is couched is immaterial, and if words intended to create and did create impression that defendant was making a representation as to a present or past fact, the pretense is a "false pretense."

5. False Pretenses ⇐7(3)

It is a "false pretense" to take the property of another by force of an opinion asserted in bad faith and with a design to mislead.

6. False Pretenses ⇐7(5)

One who promises to do an act, when, at the time he makes such promise, he entertains a present intention of not performing his contract, is guilty of perpetrating a fraud.

7. False Pretenses ⇐49(1)

Evidence sustained convictions of grand theft for obtaining money by false pretenses.

8. Licenses ⇐42(3)

Where proof in prosecution for violating Corporate Securities Act, did not correspond with allegations in indictment charging that defendants sold and issued and caused to be sold and issued for value a security, to wit, shares of stock in a corporation to be organized for profit without first having applied for and having received a permit to do so, convictions could not be sustained. Gen.Laws, Act 3814.

9. Conspiracy ⇐47

Evidence was sufficient to sustain conviction for conspiracy to commit grand theft by obtaining money through false pretenses.

10. Criminal Law ⇐1134(6)

Where defendants, when they sought to introduce certain exhibits in evidence, urged that they were admissible for a certain purpose, defendants could not successfully contend on appeal that trial court erred in refusing to admit the exhibits, on ground that exhibits were admissible for a purpose other than that urged in trial court.

11. Criminal Law ⇐1045

Where court reserves a ruling on an objection, defendant must later secure a ruling thereon, or he will be presumed to have waived a ruling.

Bertram H. Ross, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County, the three above-named defendants were accused in one count with criminal conspiracy; 37 counts charged the offense of grand theft, and in each of 10 counts a violation of the corporate securities act was alleged.

As to defendant Whitmer, a prior conviction of forgery, a felony, allegedly committed in Cook County, Illinois, was charged.

A prior conviction of conspiracy, a felony, allegedly committed in Cook County, Illinois, was charged as to defendant Stinson.

The prior convictions were admitted, with the further admission that each of the last two mentioned defendants served a term of imprisonment therefor in the state prison.

Upon the completion of the people's case in chief and before the defendants had entered upon their defense, the indictment was dismissed as to defendant Staver upon motion of the district attorney pursuant to section 1099 of the Penal Code, in order that said defendant might become a witness for the prosecution.

Also, at the conclusion of the people's case, Counts, 21, 26, 27, 28, 38, 39, 46, 47 and 48, all charging grand theft, and Counts 29 and 40 charging violations of the Corporate Securities Act, Gen.Laws, Act 3814, were dismissed. The trial proceeded as to the remaining 37 counts.

The two defendants did not take the witness stand in their own behalf.

The jury returned verdicts finding them guilty on all 37 counts that were not dismissed.

Defendants' motions for a new trial were denied and judgments were pronounced against them, by which they were sentenced to state prison, with directions that the sentence on each count was to run concurrently.

From the judgments and the order denying their motion for a new trial, defendants Whitmer and Stinson prosecute this appeal.

Since in the operations of appellants in dealing with those allegedly defrauded, a uniform pattern or plan was utilized insofar as the alleged false representations were concerned, it becomes unnecessary to unduly prolong this opinion by narrating in detail the testimony given with relation to each of the 37 counts upon which appellants were adjudged guilty. It will suffice to epitomize the testimony as reflected by the record by saying that defendant Staver (against whom the indictment was dismissed) lived in Freeport, Illinois, where he was well and favorably known in the real estate business. He was also a director and vice-president of the State Bank of Winslow, Illinois. That appellants and defendant Staver were negotiating for the opening of a building material operation in Southern California is evidenced by a letter written by Staver on the bank's stationery, dated April 7, 1948, and addressed to appellant Whitmer at Glendale, Los Angeles County, California, reading in part as follows:

> "I have had several meetings with the various members of the Staver

family, together with some of my Chicago associates, and they have approved the program of opening up thirty building material yards in the Los Angeles area for the Staver Building Material Company.

"We are pleased that you think well of the Associate Manager plan, and you are hereby authorized to proceed along the lines suggested, and I am enclosing a lease properly executed on the home office located at 2560 Glendale Boulevard., Los Angeles. I am also enclosing Power of Attorneys so that you can have the proper persons function during my absence. * * *".

By the terms of the power of attorney referred to in the letter, Staver designated appellant Stinson and Florence G. Whitmer (wife of appellant Whitmer) as attorneys in fact to act for him in his name. Among the powers designated are the following: "* * * and to do all things necessary and required of the Building Material Business known as Staver Building Material Co., with the principal office located at and doing business at 2560 Glendale Boulevard in the City of Los Angeles, State of California."

Said power of attorney was recorded in Los Angeles County and a certificate of fictitious name was filed and published to the effect that said Staver was the owner of a business known as Staver Building Material Company.

Thereafter, the following advertisement appeared in a Los Angeles daily newspaper:

"A Challenge

"Where can you invest $10,000 with Services, with minimum return of $5200 yearly & % of profits without jeopardizing your capital? We eliminate risk, assured profits. Permanent managership available. Experience unnecessary, but you must be 100% O.K. Address Box T–7660 * * *".

The plan of action on the part of appellants is contained in a résumé of the testimony of Louis R. Petrucci, the alleged victim in Counts 1, 16, 17, 18, 19 and 20. This witness answered the aforesaid newspaper advertisement and received a reply to his letter. He contacted appellant Stinson at 2560 Glendale Boulevard in Los Angeles County. This was in June, 1948. Appellant Stinson told him that they proposed to open thirty stores in Los Angeles and vicinity; that a Mr. Staver from Chicago was going to be the backer; that for the initial investment they would match it dollar for dollar. Two or three days later, Mr. Petrucci was introduced to appellant Whitmer. The conversation at this time was just a résumé of what was said at the first meeting, namely, that Mr. Staver was to match Mr. Petrucci's investment dollar for dollar; that Mr. Staver was well known in Chicago; that he was the original Staver who had been connected with the Staver-Studebaker Company; that later the Studebaker people bought out Staver; that the money Petrucci was to put in was to go for materials that were to be given to him; that the money which Mr. Staver was to put in to match the investor's money dollar for dollar was to be used for the buying of material and equipment, or whatever was needed to operate the store; that for the $10,000 which he (Petrucci) invested he was to get 10,000 shares of stock in a corporation already started to be formed and which would be completed in the near future as he and Mr. Staver were to meet in Denver and go to Nevada and start proceedings to have the stock "initiated".

Mr. Petrucci signed a contract similar in form to those signed by the other investors. By its terms he paid the sum of $10,000 and the Staver Building Material Company agreed to set up for operation a building material and supply business or yard, and "to furnish a man experienced in the building material and supply trade for the purpose of teaching and instructing the party of the second part in the usual practices pertaining to the operation and management of the business * * *". Mr. Petrucci was granted the right and privilege to operate under the registered name of Staver Building Material Company and was to be paid for his services as manager of said business, the sum of $100 per week, and to receive in addition thereto, "a 50 per cent share of all the net profits ac-

cruing from the operation of said enterprise * * *, and a further commission or bonus of 10 per cent of the net profits on all carload sales and/or carlot business secured by him or emanating from the yard under his management".

It was further agreed that the parties to the contract, "mutually agree and covenant to form a corporation at a subsequent date", at which time Mr. Petrucci was to "assign all of his interest in the said building material and yard * * * to the proposed corporation in consideration of said corporation issuing to him its fully paid and non-assessable stock based upon inventory value of the said yard at the time of issuance of said stock".

Mr. Petrucci paid in all the sum of $20,000. As to the total amount of money obtained by appellants there was testimony by C. B. Flowers, Auditor of the Division of Corporations of the State of California, that he examined the books of the Staver Building Material Company and believed that the item appearing in the financial statement as "Net invested capital, P. W. Staver, $174,500.00" was the correct figure of the money invested by the various investors. He also testified that appellant Stinson received as salary, traveling expenses and commissions the sum of $6,370.57, and that appellant Whitmer received the sum of $5,012.73. That the store managers (investors) received in salary and expenses the sum of $30,044.95.

The enterprise lasted less than a year when it wound up in the bankruptcy court.

With few exceptions, the investors testified that appellants represented to them that Mr. Staver would put up dollar for dollar for every dollar said investors put into the company, and that they believed such representation and had it not been made they would not have parted with their money. Other investors testified that no direct representation was made to them as to the amount that Staver would invest in the enterprise.

Testifying as a witness for the prosecution, Staver stated that he made a financial contribution of $4,200 to the enterprise.

As a first ground for reversal, appellants urge that the evidence is insufficient to establish the crime of grand theft. In this regard it is contended that before a representation can be regarded as sufficient to establish the crime of grand theft it must relate either to an existing or past fact. That in each instance the only representation made to the complaining witness was that Mr. Stover *would* either match dollar for dollar or *would* put money into the enterprise in the future.

[1] It is elemental that "* * * A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." 12 Cal.Jur. p. 452. Appellants rely on People v. Wasservogle, 77 Cal. 173, 19 P. 270; People v. Walker, 76 Cal.App. 192, 244 P. 94; People v. Moore, 82 Cal.App. 739, 256 P. 266; People v. Robinson, 107 Cal.App. 211, 290 P. 470, and People v. Reese, 136 Cal.App. 657, 29 P.2d 450, all of which undoubtedly enunciate the foregoing principle of law.

[2, 3] However, though it be conceded that the representation as to what Mr. Staver *would* do, might not of itself be sufficient to sustain the charges of grand theft, it tends strongly to establish the fraudulent intent necessary to constitute the crimes. And it is not necessary to prove that the false representations made were the sole inducing cause of the owner parting with his money or property, People v. Chait, 69 Cal. App.2d 503, 514, 159 P.2d 445. The circumstantial background against which the various contracts made by appellants were projected must not be overlooked, People v. Jackson, 24 Cal.App.2d 182, 201, 74 P.2d 1085.

[4, 5] Regarding appellants' contention that the representation concerning Mr. Staver's investment related exclusively to the future and hence could amount to nothing more than a mere prediction or expression of opinion, we deem it proper to say that in effect these representations were that if the persons to whom they

were made would sign the aforesaid contracts and make an investment of $10,000 or more, such persons would derive certain definite returns, such as salaries payable monthly, stipulated bonuses, etc., all made possible, according to appellants' representations by the matching of such investments dollar for dollar by Mr. Staver. The falsity of representations and their fraudulent character may be inferred from all the evidence considered in its entirety. And "* * * The form of words in which the pretense is couched is immaterial; if they are intended to create and do create the impression that defendant is making a representation as to a present or past fact, the pretense is within the statute." 35 C.J.S., False Pretenses, § 17. Fraud sometimes consists in asserting pretended beliefs and opinions for the purpose of deceiving. "It is a false pretense to take the property of another by force of an opinion asserted in bad faith and with a design to mislead." People v. Gordon, 71 Cal.App.2d 606, 625, 163 P.2d 110, 124.

In People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353, 355, it is said: "* * * So pertinent to the establishment of defendant's guilt in proof of his commission of the crime of grand theft 'sounding in false pretenses' are these considerations: (1) whether there were representations of past events or existing facts as distinguished from a mere expression of opinion or promise of future action [citing authorities], though a promise, if unconditional and made without present intention of performance, will constitute actionable fraud [citing authorities]; (2) whether the representations were made with intent to defraud the owner of his property [citing authorities]; and (3) whether the owner was actually defrauded in that he parted with his property—both possession and title—in reliance upon the false representations [citing authorities]."

Bearing in mind, as heretofore noted, that the circumstantial background against which the complaining witnesses in the case at bar parted with their money should not be overlooked, and since the falsity of the representations and their fraudulent character may be inferred from all the evidence in the case, we are persuaded that a review of the evidence herein depicts a well laid plan and scheme to obtain money by false pretenses and representations through the device of the fictitious firm name of Staver Building Material Company, which appellants represented would later be incorporated.

A reading of the record herein discloses that appellants utilized a uniform plan or formula in their representations to prospective investors. They painted a word picture of Mr. Staver as a man of outstanding integrity, ability and financial rating. They selected Southern California as the field for their activity. To give their plan and scheme a legitimate appearance, appellants leased a combination office and warehouse at 2560 Glendale Boulevard, in Los Angeles County, where prospective investors were interviewed. These "prospects" were obtained through an advertisement (heretofore set forth) in Los Angeles daily newspapers, in which the readers thereof were assured that they would obtain property without risk and without jeopardizing their capital, with a yearly return of $5,200 as managers, provided they had $10,000 to invest.

To all who answered such advertisements the same general inducing statements were made, viz. that the Staver Building Material Company was going to open up a chain of building material stores and wanted a manager for each store who could invest $10,000; that the manager would receive a weekly salary of $100 and fifty per cent of its net profits; that a corporation would be formed and each manager would receive shares or certificates of stock in the corporation according to the amount that he invested; that each store would be stocked with at least $10,000 worth of merchandise and that Mr. Staver would match each investor's money dollar for dollar. When asked who Mr. Staver was appellants said that he was from a very wealthy fine old family in Freeport, Illinois, which at one time operated the Staver Wagon Company and later was connected with Staver-Studebaker Company; that the Staver family was going to invade California with a chain of thirty stores and

that Mr. Staver could finance the business up to whatever was necessary, could write his check for a quarter of a million dollars and even more than that, if it took that to put over the building material operation, but thought it best to have managers invest $10,000 each and in that way the managers would try to build up the business.

It cannot be denied that the representations made by appellants, that the Staver family was very wealthy and that Mr. Staver could write his check for a quarter of a million dollars or more, were representations of a present fact. When these representations are considered in connection with the further representation made by appellants that Mr. Staver *would* match the investors' money dollar for dollar, then this later representation also became a representation of a present fact. If this were not so, then how could Mr. Staver put over the building material operation successfully, as represented by appellants, unless he presently matched the investors' money dollar for dollar if, as also represented, each store was to be stocked with at least $10,000 worth of merchandise.

Mr. Staver testified that such representations were not authorized by him. That only through the aforesaid power of attorney did be give appellants authority to represent his financial worth and that he had no recollection of ever authorizing them to represent to any person that he would match such person's investment dollar for dollar in the Staver Building Material Company. And, the power of attorney is bereft of any such authorization. Concerning his financial worth, Mr. Staver testified that all the money he contributed to the enterprise was approximately $4,200. When two of the investors called upon him at Freeport, Illinois, informing him of the precarious financial condition of the company and asked him if he would do something about it because he "was supposed to be the backer of the company", Mr. Staver stated that he "was in no position to do anything".

That Mr. Staver was in no position to finance the "invasion" of California with a chain of thirty building material stores and that all of the representations made by appellants as to Mr. Staver's financial worth were false, is further established by the financial statement which appellant Whitmer ordered prepared and submitted to the managers at the February meeting and which showed an investment in the business by P. B. Staver of $174,500. When this item was discussed at the meeting, appellant Whitmer falsely stated that this was money that Mr. Staver had put in and that the managers hadn't put in any money.

[6] While it has been held that a false representation must relate to a past or present fact to support a conviction, it is also established that one who promises to do an act when at the time he makes such promise the promisor entertains a present intention of not performing his contract, is guilty of perpetrating a fraud, People v. Mason, 86 Cal.App.2d 445, 449, 195 P.2d 60. Appellants' statements to the complaining witnesses that the Staver Building Material Company was going to open up a chain of thirty building material stores was an implied representation that the company was financed for extensive operations.

[7] The record in this case, disclosing as it does a course of conduct on the part of appellants teeming with fraud and replete with intrigue, deception and duplicity, coupled with the authorities herein cited, dissipates any reasonable doublt of appellants' guilt of the charges of grand theft upon which they were convicted.

It is next contended by appellants that the evidence is insufficient to sustain their conviction on Counts 4, 8, 11, 15, 20, 25, 32 and 43, each of which charged a violation of the Corporate Securities Act.

As stated by appellants, each of the counts involving a violation of the Corporate Securities Act is practically a repetition of the allegations of Count 4 of the indictment, in which the charging part thereof alleges that appellants did "willfully, unlawfully, feloniously and knowingly, sell and issue and cause to be sold and issued for value, to Burton S. Beless, a security, to wit: shares of stock in a cor-

poration to be organized for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a permit so to do."

The foregoing counts involving the Corporate Securities Act are grounded on the agreements that appellants signed as agents in fact for Staver with each investor-manager who came into the enterprise. There are two classes of agreements involved in the various counts. One class of agreement and that involved in Count 4 of the indictment provides in general terms that in consideration of the sum of Six Thousand ($6,000) dollars Staver Building Company, an organization with its principal office and place of business in the City of Los Angeles, agreed to set up a building material outlet containing a stock of materials and supplies sufficient for operation thereof, and that the company would at all times use its purchasing power and employ its best efforts to furnish all materials and supplies ordered by the manager at the lowest possible market price. The agreement also provided that the manager should receive Fifty-two Hundred ($5,200) Dollars a year in salary, at the rate of One Hundred ($100) Dollars per week and that he should have a fifty (50%) per cent interest in the profits of his particular store, the other fifty (50%) per cent going to Staver Building Material Company.

This agreement contains the following language relating to a corporate set up:

> "The parties hereto mutually agree and covenant to form a corporation at a subsequent date and in consideration of the mutual covenants and agreements herein contained, the party of the second part hereby agrees to assign all of his interest in the said building material and supply yard at 2560 Glendale Blvd., in the City of Los Angeles, County of Los Angeles, State of California, to the proposed Corporation in consideration of said Corporation issuing to him its fully paid and non-assessable stock in an amount based upon inventory value of the said yard at the time of issuance of the stock. Subject to ratification by the Corporation, no assignor, or manager shall receive more than $100.00 per week remuneration, plus commissions and bonuses, unless authorized by the Board of Directors of said company."

The next general form of agreement is that involved in one transaction which is set forth in Count 25 of the indictment. This agreement is practically identical with the one discussed above except that it contains no language with regard to the formation of a corporation and the issuance of stock; it does however, contain the other provisions relative to the management agreement, division of profits, and the One Hundred ($100) Dollar a week salary.

With commendable fairness, the Attorney General concedes that insofar as the agreements provided that the investors contracted to render personal services and to reap a profit from their own services or other active participation in the business venture, the contracts, under the authority of People v. Syde, 37 Cal.2d 765, 768, 235 P.2d 601, and People v. Gould, 37 Cal.2d 885, 235 P.2d 604, cannot be considered as a security. However, the Attorney General urges that notwithstanding the holding in the Syde and Gould cases, supra, the convictions must be sustained because the agreements in evidence constituted pre-organization subscriptions for stock.

It is not the taking of subscriptions for shares of a domestic or foreign corporation made prior to the inception thereof that is prohibited. Corp. Code, Sec. 25153. What is prohibited by the section is the collection of any portion of the consideration to be paid on account of subscriptions made prior to incorporation, unless a permit has been issued by the commissioner authorizing such collections.

[8] Here we are confronted with a situation wherein the agreement of the contracting parties was that they would form a corporation in the future, and that when such corporation was organized the manager of each store being operated by the Staver Building Material Company would take stock in the corporation based upon the inventory value of his business and other considerations. It cannot be

assumed in a criminal prosecution that any stock would be issued without the permission of the Commissioner of Corporations. We fail to perceive wherein the agreements here in question can be regarded as a collection of a consideration to be paid on account of subscriptions for stock made prior to such incorporation. There is a failure of proof to establish the facts and circumstances necessary to constitute the crime charged. And, the proof does not correspond with the allegations in the indictment which charge that appellants "did sell and issue and cause to be sold and issued for value to * * * a security, to wit, shares of stock in a corporation to be organized for profit without first having applied for and received * * * a permit so to do". The convictions on Counts 4, 8, 11, 15, 20, 25, 32 and 43 cannot be sustained.

[9] Appellants challenge the sufficiency of the evidence to justify their conviction on Count 1 of the indictment which accused them of criminal conspiracy to cheat and defraud by criminal means, and to obtain money and property by false pretenses and through false promises with fraudulent intent not to perform such promises. Included in the 25 overt acts set forth in this count are allegations of false and fraudulent pretense, representations and promises made to prospective investors. As we have heretofere held, the guilt of appellants as to the substantive offenses of grand theft is well established. That there was agreement and accord between appellants and that the object of such agreement was the commission of unlawful acts is equally well established. Cogently descriptive of the operations of the appellants in the case now engaging our attention is the language of the court in People v. Gordon, 71 Cal.App.2d 606, 627, 163 P.2d 110, 124, wherein it is said: "So interrelated and harmonious were the operations of defendants as disclosed by the documents and the testimony of the vendees that, based solely upon them, honest deduction could not but reasonably have inferred their conscious collaboration with a definite purpose. In fact, so marked with perfidy was their behavior that no strain of conscience was requisite to an inference of the existence of a conscious criminal accord to conduct a campaign of wilful plunder. Their bold efforts to beguile the innocent rendered the latter impotent as against the artifices of trained minds and aggressive personalities. The conspirators were so resolved to break all sales resistance that no peace was allowed an investor until all of his savings had been taken away. Indeed, were they so constant of purpose that a sinister and malign influence fringes the border of every scene."

Finally, appellants assert error by the court in its rulings on the admissibility of certain evidence.

[10] In this regard, appellants assign as error the ruling of the court relative to their offer of eight books and the carbon of checks and other material of the Staver company as an exhibit. The record reflects that the stated purpose of this offer was to put in evidence the audit made by Mr. Shields, the company's accountant. The audit in question was admitted in evidence as defendants Exhibit "E" without objection. After the audit was admitted into evidence the purpose of the offer was accomplished. Appellants now urge that the testimony given by their auditor varied in many particulars from that given by Mr. Flowers, an auditor for the Commissioner of Corporations; that the testimony of both came from the same source, viz., the books offered in evidence. That by reason of the variance existing in the testimony of the two auditors, the appellants were entitled to have the books and records themselves introduced into evidence. But such was not the avowed purpose of appellants in the trial court, and they cannot prevail on appeal when they state a purpose different from that given at the time of their offer in the trial court, People v. Monson, 102 Cal.App.2d 308, 313, 227 P. 2d 521. Had the purpose of the offer of the original books and records been presented to the trial court in the form it is addressed to us, the ruling might have been different, but the purpose of the offer, as stated to the trial court, was to secure the admission into evidence of a summary of the books and records as prepared by appellants' auditor. When the audit was ad-

mitted into evidence, the purpose of the offer of the books and records no longer existed.

[11] Appellants assign as error the failure of the trial court to finally rule on the admissibility into evidence of certain proffered documents of the U. S. District Court in the bankruptcy proceeding affecting the Staver Building Material Company. In this regard it appears that as part of their defense appellants offered in evidence a photostatic copy of a judgment and decree of the U. S. District Court affirming the findings of the referee in bankruptcy and that the purpose of this offer was to show that it was there adjudicated that the transactions between the complaining witnesses and appellants were joint ventures or partnership arrangements, which would have a bearing on the counts charging violations of the Corporate Securities Act. The trial judge stated that he didn't think these documents were admissible, but marked them for identification (Defts. Exhs. "Q" and "R") pending a final ruling. Appellants state that the Court failed to ever rule on the admissibility of these documents, but appellants do not point out in the record where their offer was renewed or that they later insisted upon such final ruling. Apparently, appellants were satisfied that the documents were inadmissible as being immaterial. When the Court reserves a ruling upon an objection, the defendant must later secure a ruling thereon or he will be presumed to have waived a ruling. 8 Cal. Jur. pp. 501, 502; People v. Pratt, 77 Cal. App.2d 571, 578, 175 P.2d 888. Furthermore, since the documents in question related only to the counts charging violation of the Corporate Securities Act, and a reversal of the conviction on these counts is being ordered, appellants were not prejudiced by the court's failure to rule.

For the foregoing reasons, the judgments and the order denying the motion for a new trial are reversed as to Counts 4, 8, 11, 15, 20, 25, 32, and 43. As to the remaining 29 counts the judgments and order denying the motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

GUIDI v. STATE et al.*

Civ. 15407.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1953.

Rehearing Denied Feb. 20, 1953.

Hearing Granted March 20, 1953.

Action by fair patron against State and State Agricultural Society for injuries allegedly sustained by fair patron who was injured when horse, frightened by fireworks display, ran into, knocked down and trampled fair patron. The Superior Court, City and County of San Francisco, William T. Sweigert, J., granted motion by the State and Society for judgment on the pleadings and judgment was entered in favor of the State and the Society, and fair patron appealed. The District Court of Appeal, Goodell, J., held that the holding of a state fair by the State Agricultural Society was a governmental function and hence State and State Agricultural Society was not liable for alleged acts of negligence.

Affirmed.

1. Agriculture ⇐5

Under the authority given to the Board of Agriculture to provide for an annual fair, to alter the constitution, and to make needful rules, the authority to provide for an admission fee may be implied, but the charging of an admission fee does not imply that the State Agricultural Society is organized for gain. Const. art. 9, § 1.

2. Courts ⇐91(1)

The District Court of Appeal must accept the settled law as it finds it.

3. Evidence ⇐20(1)

It is a matter of common knowledge that fairs and exhibitions throughout the land always have entertainment and amusement features.

4. Pleading ⇐343, 350(3)

A motion for judgment on the pleadings is essentially the same as a general demurrer to the complaint, but only the complaint itself may be considered in passing on the motion, and general rule that all facts well pleaded are admitted as true on demurrer does not extend to an admission of a conclusion of law, construction of an instrument pleaded in complaint, facts

* Subsequent opinion 262 P.2d 3.

impossible in law, or allegations contrary to facts of which court may take judicial knowledge.

5. Agriculture ⇐4(3)
States ⇐112

The holding of a state fair by State Agricultural Society is a "governmental function", and, hence, State and State Agricultural Society were immune from liability to fair patron who was allegedly injured by horse which had been frightened by fireworks display at fair. Const. art. 9, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Governmental Function".

6. Pleading ⇐345(1.4)

In passing on defendant's motion on the pleadings in action against State and State Agricultural Society for injuries sustained by fair patron who was allegedly injured by horse which had been frightened by fireworks display, it could not be held that state fair was conducted by State Agricultural Society in a proprietary capacity as a matter of law, regardless of allegation to that effect in complaint. Const. art. 9, § 1.

7. Evidence ⇐5(1), 29, 43(3)

Courts take judicial notice not only of all legislation and decisions relating to state fairs but of facts that are regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence.

8. Nuisance ⇐48

In action by fair patron against State and State Agricultural Society, complaint which alleged that fair patron had been injured by a horse which had been frightened by fireworks display, alleged acts of negligence and did not state a cause of action based on nuisance.

Remington Low and Clarence B. Knight, San Francisco, for appellant.

Dana, Bledsoe & Smith and Joseph W. Rogers, Jr., San Francisco, for respondent.

GOODELL, Justice.

Appellant sued the State of California, the State Agricultural Society, several individuals, and a private corporation, to recover damages for personal injuries sustained in the State Fair grounds at Sacramento. A motion of the State and the Society for judgment on the pleadings was granted and judgment was entered in favor of respondents, from which this appeal was taken.

By an amended complaint plaintiff alleged that on September 3, 1950 he paid for admission to the fair grounds, and while there "the defendants so carelessly and negligently controlled, operated, supervised, and maintained the said fair grounds and the fireworks exhibition at said fair that a certain horse * * * became frightened and was caused to and did run into, knock down and trample the plaintiff." The second and third counts differed somewhat from the first but all three alleged a liability arising ex delicto. The filing of a claim before suit was duly alleged.

The State and the Society answered, denying plaintiff's allegations, and pleading the defenses of contributory negligence and governmental immunity. They then moved for judgment on the pleadings, based on the latter ground. In granting the motion the court held that in conducting the State Fair the State did not act in a proprietary capacity, hence there was governmental immunity.

[1] In a written opinion the court relied on Melvin v. State of California, 121 Cal. 16, 53 P. 416, as authority for its ruling. In that case Melvin, who had paid an admission fee to the same fair grounds during the 1891 State Fair, was injured when the grand stand collapsed while he was watching a horse race. He recovered a $10,000 judgment, but a motion for new trial "was granted upon the ground that the state is protected from liability by reason of its sovereignty, and by reason of the several statutes applicable, or deemed applicable, to the facts as presented." In affirming the order the court after discussing the legislation on the subject said:

"The legislature found ample authority for its action in the constitution. Section 1 of article 9 of that instrument is as follows: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.' The act in question pursues the line thus indicated. The board constituted thereby is but the agency through which the sovereign authority of the state is carried out. The state appropriates its money, and the society receives it in aid of the benign objects in view. The state receives no pecuniary return. One object of requiring the annual report from the board of its receipts and expenditures doubtless is that the legislature may become familiar with the needs of the society, and gauge its appropriations accordingly. Respondent contends that, as there was no statute expressly authorizing the board of agriculture to charge admission fees to the state fair, their conduct in so doing was without authority of law and void. We are of opinion, however, that under the authority given to the board to provide for an annual fair, etc., to alter the constitution and to make needful rules, etc., the authority to provide for an admission fee may be implied. It does not follow, however, that the society is organized for gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state. [Citation.]"

The constitution reads the same to-day as it did then, and the Supreme Court has several times restated its holding in that case. In Chafor v. City of Long Beach, 174 Cal. 478, 491, 163 P. 670, 675, L.R.A. 1917E, 685, it said that therein it had "held that the state board of agriculture was a mere corporate agency of the state for public and governmental functions, saying: 'We find none of the elements of a private corporation in its creation, its powers, or the mode of their exercise. Its objects are public and educational. * * * It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state.'" In People v. Superior Court, 29 Cal.2d 754, 759, 178 P.2d 1, it again, and in the same language, restated its holding in the Melvin case. See, also, Denning v. State, 123 Cal. 316, 322, 55 P. 1000, and Kellar v. City of Los Angeles, 179 Cal. 605, 610, 178 P. 505. The authority of the Melvin case has never been questioned by the courts.

[2] Appellant argues that "There is a drastic need for re-examination of the doctrine of governmental immunity for tort in California", citing Madison v. City & County of San Francisco, 106 Cal.App.2d 232 et seq., at pages 253–254, 234 P.2d 995, 236 P.2d 141, where that was strongly suggested. The question of governmental versus proprietary action arises respecting the activities of counties, municipalities, and occasionally a consolidated city and county government, as well as various State agencies under special statutes. On the present record, however, it is presented in connection with a project in a class by itself (the only thing of its kind in the State) which does not come into competition with business, industry or labor, see Muses v. Housing Authority, 83 Cal.App. 2d 489, 502, 189 P.2d 305, and which has been definitely characterized by the Supreme Court as governmental. If there is need for a re-examination of the doctrine of governmental immunity for tort it must be made, so far as the present controversy is concerned, by the court which for a half century has adhered to its original holding in the Melvin case. As this court said in Lathan v. Santa Clara County Hospital, 104 Cal.App.2d 336, 340, 231 P.2d 513, 516, "an intermediate appellate court must accept the settled law as it finds it."

Appellant argues that the State Fair in 1898 was "an entirely different affair than it is to-day." That is true at least in the sense that in the last half century there have been important inventions which have

influenced the exhibits and displays on the scientific, industrial and agricultural side of the fair; mechanical milking is a ready and sufficient example. If that be true it is but natural that in the same half century there should also be radical differences on the entertainment and amusement side; television in 1950, the magic lantern in 1898, is again a ready and sufficient example. Entertainment and amusement features may or may not be educational (many are), but at the very least they are *attractions* which bring patrons to the fair where they are exposed to, and can gain, scientific, agricultural and industrial knowledge, thereby serving the purposes declared in article IX, § 1, of the constitution.

[3] The real question is whether such innovations and modernization, inevitable in the march of time, alter in any essential respect the purposes and functions of the institution itself. Amusement and entertainment are but incidental to the educational departments. Horse-racing, for instance, always has been one of the big features of the fair, but the legislature certainly did not institute the State Fair just for that sport. "The incident follows the principal, and not the principal the incident" § 3540, Civil Code, and it cannot be said that the essential purposes of the fair have been changed in any material respect, despite the many ways in which all its departments have been modernized, improved and extended from year to year. It is a matter of common knowledge that fairs and exhibitions throughout the land always have entertainment and amusement features.

[4, 5] Appellant's contention that "The question of governmental or propriety capacity cannot be determined on a motion for judgment on the pleadings" is somewhat related to the subject just discussed. Appellant says that he was entitled to plead, and could have pleaded, facts which would establish the proprietary character of the fair as now conducted, or at least that it is partially proprietary and partially governmental.

It is true, as claimed, that a defendant's motion for judgment on the pleadings is essentially the same as a general demurrer to the complaint and that although an answer is on file the court can look only to the face of the complaint. Hibernia S. & L. Society v. Thornton, 117 Cal. 481, 49 P. 573; North Side etc. Ass'n v. Hillside Memorial Park, 70 Cal.App.2d 609, 613, 161 P.2d 618. However, the judicial knowledge possessed by the courts is controlling. In Griffin v. County of Colusa, 44 Cal.App. 2d 915, 918, 113 P.2d 270, 272, it was said: "Plaintiff relying upon the rule that all facts well pleaded are admitted as true upon demurrer, contends the allegation in the amended complaint 'that at all the times herein mentioned the County of Collusa * * * maintained * * * and conducted in a proprietary capacity, a county hospital, known as the Colusa Memorial Hospital', must be accepted as true. This general rule of pleading, however, *does not admit* a conclusion of law, nor does it admit the construction placed on an instrument pleaded in the complaint, or facts impossible in law, or *allegations contrary to facts of which a court may take judicial knowledge.*" (Emphasis added.) See, also, Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987, and cases cited, and Walker v. City & County of San Francisco, 97 Cal. App.2d 901, 907, 219 P.2d 487.

[6–8] State Fairs, which have been held annually for many years, have been declared to be governmental functions. The courts take judicial notice not only of all the legislation and decisions relating to them, but of "facts that are regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence." Takahashi v. Fish and Game Commission, 30 Cal.2d 719, 732, 185 P.2d 805, 813. The courts, therefore, have judicial knowledge of the evolution and development of State Fairs since they are matters of general and common knowledge and part of the State's history. Moreover under § 1875, Code Civ.Proc. the courts have recourse to all the records of the Society and other public records dealing with the subject. The trial judge had such

knowledge when he ruled on this motion. Nothing could have been alleged which could have controlled such knowledge, under the authorities already cited.

Appellant argues that the issue in the present case is similar to that raised in Beard v. City & County of San Francisco, 79 Cal.App.2d 753, 180 P.2d 744, but that is not true since that case "went no further than to hold that a consolidated city and county might, in its *municipal* capacity *as a city,* conduct a proprietary hospital." Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, 339, 231 P.2d 513, 516.

[9] Finally, appellant claims that the complaint states a cause of action based on nuisance. The complaint alleges acts of negligence in the control, operation, supervision and maintenance of the fair grounds in that a horse, frightened by fireworks, ran into, knocked down and trampled the plaintiff. Such acts do not come within the definition of a nuisance, which is: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully *obstructs the free passage or use, in the customary manner, of any* navigable lake, or river, bay, stream, canal, or basin, or any public park, square, *street, or highway* * * *." § 3479, Civ.Code; (emphasis added.)

The case of Landau v. City of New York, 180 N.Y. 48, 72 N.E. 631 is cited by appellant. There death resulted not from the setting off of fireworks in the usual way, but from an explosion (cause unknown) in the street of fireworks. The foundation for the holding was *the unlawful use and obstruction of the streets.* See § 3479 supra, also Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625. The court said [180 N.Y. 48, 72 N.E. 633]:

"While a municipal corporation is not liable for the failure to pass ordinances prohibiting the discharge of fireworks in the public streets, it is bound to exercise due care to keep its streets in a safe condition, and is liable for permitting dangerous obstructions or nuisances therein. * * * Fireworks in certain streets may or may not be a nuisance, according to the circumstances, which usually present a question of fact. In the case now before us, we have to do with a crowded street [Madison Avenue], near the center of the largest city on the continent, 'where any misadventure in managing the discharge would be likely to result in injury to persons or property.' Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found such as matter of fact." There is no similarity between that case and this.

In Miller v. City of Palo Alto, 208 Cal. 74, 76, 280 P. 108, 109 the appellant conceded "that a municipal corporation is not liable for damages caused by its negligence, or that of its employees in the exercise of governmental functions, unless it is expressly made liable by statute" but claimed that the deposit of burning rubbish constituted a nuisance. The court in rejecting this contention said "as held by the trial court, the complaint does not allege a nuisance within our statutory definition of such, nor does it allege facts from which a nuisance may be inferred. It alleges a single act of negligence on the part of the city."

The same may be said in this case. The complaint alleges acts of negligence of the defendants, and nothing that would bring the case within § 3479 defining nuisances.

We are satisfied that the motion was properly granted.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

115 Cal.App.2d 628

SIGESMUND v. SIGESMUND.

Civ. 19062.

District Court of Appeal, Second District, Division 2, California.

Jan. 29, 1953.

Rehearing Denied Feb. 24, 1953.

A husband brought an action against his wife for divorce and the wife filed a cross-complaint. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., granted an interlocutory decree of divorce to plaintiff and awarded physical custody of children of the parties to defendant and plaintiff appealed. The District Court of Appeal, Fox, J., held that trial court did not abuse discretion as matter of law under record in awarding physical custody of the children of the parties to the wife over plaintiff husband's contention that wife was morally unfit to have custody of children.

Affirmed.

1. Divorce ⇐312.6(7)

In divorce action it was for trial court to determine credibility of witnesses on question of moral fitness of defendant wife to have custody of children of the parties, and to resolve inconsistencies as well as conflicts between defendant's out-of-court, recorded statements and defendant's testimony.

2. Divorce ⇐312.6(3)

On husband's appeal from portion of divorce decree awarding defendant wife custody of children of parties, evidence would be viewed in light most favorable to determination of trial court that wife was a fit and proper person to have care and custody of children.

3. Infants ⇐19

In custody matters paramount interest of court is welfare of children.

4. Divorce ⇐296

In action wherein husband obtained interlocutory decree of divorce, trial court did not abuse discretion as matter of law under record in awarding custody of the four children of the parties to the wife over husband's contention that wife was morally unfit to have custody of children.

5. Divorce ⇐308

$900 monthly award made to mother for support of the four children of parties in action in which father of such children obtained interlocutory divorce decree, was not as a matter of law unreasonable under record in view of father's wealth, earnings, and earning capacity.

6. Divorce ⇐223

Where trial court could reasonably conclude that, in view of standard of living of parties, all of wife's income from her property would be required for her own living expenses and that to compel wife to pay fee for her attorney, allowed in addition to fee plaintiff husband was required to pay to defendant wife's attorney on order to show cause, would make inroads on her capital, trial court in action wherein husband obtained interlocutory divorce decree did not abuse discretion in requiring husband to pay such additional fee despite fact that wife had property from which wife derived income of between $350 and $400 monthly.

7. Divorce ⇐223, 286

Amount of fee to be awarded wife's counsel in husband's divorce action is within sound discretion of trial court and order fixing such fee will not be reversed except upon showing of an abuse of discretion.

8. Divorce ⇐223, 286

$5,000 attorney fee awarded to wife's counsel in husband's successful divorce action wherein wife was awarded custody of children of the parties, which fee was in addition to $5,000 fee husband was required to pay wife's attorney on order to show cause, was not an abuse of discretion by trial court under record, so that such order could not be reversed on appeal.

Burby & Broderick, William E. Burby, Los Angeles, for appellant.

Bautzer, Grant, Youngman & Silbert, Bernard M. Silbert, Ralph A. Fields, Beverly Hills, for respondent.

FOX, Justice.

The parties were married in March, 1937, and separated in March, 1950, after

having lived together for 13 years. There are four children issue of the marriage, two girls and two boys. At the time of the separation the girls were respectively 8 and 12 years of age; the boys were 2 and 5. An interlocutory decree of divorce on the ground of extreme cruelty was granted to the plaintiff virtually without contest. There was, however, a bitter contest over the physical custody of the children, which was awarded to the defendant, it having been stipulated that the legal custody of the children be awarded to the parties jointly.

Plaintiff's first contention is that the court abused its discretion in awarding physical custody of the children to the defendant. The court found that defendant "is a fit and proper person to have the physical custody of the minor children; that the welfare, benefit, education and well-being of the children require that their physical custody be with the mother;" that "said minor children are well behaved and well adjusted; and that they have a feeling of security;" that the showing of neglect of the children on the part of the mother was slight; that although defendant had been guilty of marital misconduct and indiscretions, such misconduct and indiscretions were not committed in the presence of the children.

Plaintiff argues that the evidence establishes defendant is morally unfit to have the children's custody. He bases this largely upon alleged admissions of defendant in recorded conversations between him and his wife in their home and between her and a domestic employee. Defendant testified her recorded statements were not true and that those made to her husband were for the purpose of tormenting him and making him jealous. No specific findings were made on these matters.

[1] It was, of course, for the trial court to determine the credibility of the witnesses, and to resolve the inconsistencies as well as the conflicts between defendant's out-of-court, recorded statements and her testimony. Peterson v. Peterson, 74 Cal. App.2d 312, 319, 168 P.2d 474; Hansen v. Bear Film Co., 28 Cal.2d 154, 184, 168 P.2d 946; People v. Frankfort, 114 Cal.App.2d 680, 251 P.2d 401.

[2] Inasmuch as the court found that defendant was a fit and proper person to have the physical care and custody of the children, and since we must view the evidence in the light most favorable to such determination Estate of Isenberg, 63 Cal. App.2d 214, 216, 146 P.2d 424, and since the alleged admissions of defendant, if true, would seriously militate against her fitness, we must infer that the trial court did not find the alleged admissions to be true.

Other testimony (some of which is denied) to which plaintiff directs our attention, while justifying criticism of defendant's conduct, did not require a finding adverse to her on the question of her fitness to have the physical custody of the children.

The evidence shows that defendant is devoted to her children and their welfare; took great interest in their schooling, including special instruction in music, swimming, and tennis for the older children; regularly took them to Sunday school; painstakingly provided for their medical and dental needs; and gave consideration to their dietary requirements.

After visiting with the children in chambers, the trial judge commented that they were "well behaved, alert, healthy, and apparently well adjusted" and that "they had a high degree of affection for both parents * * *"

[3, 4] In custody matters the paramount interest of the court is the welfare of the children. In passing on charges and proof of conduct on the part of a parent a very broad discretion is vested in the trial court to determine the effect on the children of established behavior. It is only when a clear abuse of such discretion is made to appear that a reviewing court will interfere with the determination of the court below. Civil Code, sec. 138; Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; Taber v. Taber, 209 Cal. 755, 290 P. 36. Applying these principles and bearing in mind the ages of the children and the undesirability of

separating them, it cannot be said as a matter of law that the trial court abused its discretion in awarding defendant their physical care and custody subject to the further order of the court.

[5] Plaintiff's contention that the trial court abused its discretion in awarding $900 per month for the support of the children cannot be sustained. The parties are wealthy and have maintained a rather high and expensive standard of living. Plaintiff admitted that their living expenses during the year prior to their separation had been $15,000 though he claimed this figure included an excessive amount for clothing for defendant. She, however, testified that their living expenses had been substantially higher. She submitted an itemized statement of the amount necessary to take care of and provide for the children. It was in excess of the amount allowed by the court and furnishes substantial support for the award in view of the standard of living which the parties had maintained It cannot be said as a matter of law that the award is unreasonable in view of the plaintiff's wealth, his earnings, and his earning capacity.

[6] Plaintiff's final contention is that the court abused its discretion in allowing defendant's counsel $5,000 additional fees. On the order to show cause plaintiff was required to pay defendant $5,000 on account of legal services, the balance, if any, to be fixed at the time of trial. The plaintiff complied with this order. Plaintiff first argues that defendant should be required to pay the balance of this fee because she has property of the approximate value of $100,000 from which she derives an income of between $350 and $400 per month. Plaintiff is worth more than $400,000 and is actively engaged in the securities and investment business. In this connection it should be pointed out that defendant is not receiving any alimony and is not gainfully employed but must devote her time to making a home for and taking care of the children of the marriage. Defendant must therefore look to her own property and the income therefrom for her support and maintenance. In view of the standard of living of the parties the trial court could reasonably conclude that it would require all defendant's income from her property for her own living expenses. To compel her to pay this additional attorneys' fee would make an inroad on her capital, from the earnings of which she must support herself. However, "the law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate." Westphal v. Westphal, 122 Cal.App. 388, 390, 10 P.2d 122; Fallon v. Fallon, 83 Cal.App.2d 798, 806, 189 P.2d 766; Cameron v. Cameron, 85 Cal.App.2d 22, 29, 192 P.2d 89; Larsen v. Larsen, 101 Cal.App.2d 862, 866, 226 P.2d 650; Spreckels v. Spreckels, 111 Cal.App.2d 529, 244 P.2d 917; Civ.Code, sec. 137. Under such circumstances, therefore, it was not an abuse of discretion to require the plaintiff rather than the defendant to pay the additional attorneys' fee.

[7,8] Plaintiff also questions the reasonableness of the fee. The amount of such an award is within the sound discretion of the court and an order fixing such fee will not be reversed except upon a showing of an abuse of discretion. Heck v. Heck, 63 Cal.App.2d 477, 480, 147 P.2d 114. Plaintiff points out that the divorce was virtually uncontested. However, the custody of the children, and the provision for their support, were important and inseparable phases of the case. The settlement of the property rights of the parties was also important. Counsel for defendant spent more than 600 hours in preparation for the trial, made 9 appearances in court prior thereto, took 14 depositions which cover approximately 1,000 pages of transcript, spent some 30 to 40 hours on the case out of court during the course of the trial, and 8 days in actual trial. While the award for attorneys' fees appears to be liberal, we cannot say as a matter of law, in view of all the circumstances, that the court abused its discretion.

The judgments and the portions thereof from which plaintiff appeals are affirmed.

MOORE, P. J., and McCOMB, J., concur.

115 Cal.App.2d 749

PEOPLE v. CONLEY.

Cr. 4931.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1953.

Application for writ of error coram nobis wherein applicant contended that trial court was without jurisdiction to impose sentence on guilty plea to charge of receiving stolen property because on preliminary hearing magistrate had committed defendant for trial on burglary charge and had dismissed charge of receiving stolen property. The Superior Court, Los Angeles County, William B. Neeley, J., entered judgment denying the writ, and applicant appealed. The District Court of Appeal, McComb, J., held that applicant's remedy was by appeal, not by writ of error coram nobis.

Affirmed.

1. Criminal Law ⇐997

A writ of error coram nobis will not issue to grant relief from that for which a statutory remedy is available.

2. Criminal Law ⇐997

Questions of constitutionality of statute providing for filing of information against defendant after preliminary examination and of jurisdiction of trial court were matters which could properly have been raised upon appeal from judgment of conviction and were not matters which were reviewable in a proceeding for writ of error coram nobis. Pen.Code, § 739.

3. Criminal Law ⇐997

Where defendant failed to appeal from judgment of conviction for receiving stolen property, trial court properly denied application for writ of error coram nobis based upon alleged lack of jurisdiction of trial court to impose sentence because on preliminary hearing magistrate committed defendant for trial in superior court on burglary charge and dismissed the charge of receiving stolen property. Pen.Code, § 739.

Terrell Conley, in propria persona.

Edmund G. Brown, Atty. Gen., Frank Richards, Asst. Atty. Gen., for respondent.

McCOMB, Justice.

Defendant appeals from an order denying his motion for a writ of error *coram nobis*.*

Facts: Defendant pleaded guilty to receiving stolen property as charged in Count II of an information whereupon Count I which charged defendant with the crime of burglary was dismissed. He was sentenced to the state prison. Defendant did not appeal from the judgment.

About four months later he filed in the trial court an application for a writ of error *coram nobis*, contending that the trial court was without jurisdiction to impose sentence because at the preliminary hearing the magistrate committed him for trial in the superior court on the burglary charge and dismissed the charge of receiving stolen property.

[1, 2] *Question: Is the writ of error coram nobis a proper remedy for reviewing the alleged error occurring in the trial court?*

No. A writ of error *coram nobis* will not issue to grant relief from that for which a statutory remedy is available. The questions of (a) constitutionality of section 739 of the Penal Code, and (b) the jurisdiction of the trial court were matters which could properly have been raised upon an appeal from the judgment and are not matters which are reviewable in a proceeding for the issuance of a writ of error *coram nobis*. (People v. Coyle, 88 Cal.App.2d 967, 978[16], 200 P.2d 546 (hearing denied by the Supreme Court); People v. Thompson, 94 Cal.App.2d 578, 586 [11], 211 P.2d 1 (hearing denied by the Supreme Court); see also cases cited in 7 McKinney's New Calif.Digest (1945) Crim.Law, sec. 1038, p. 614, and pocket supplement thereto for 1952.)

* The material part of the notice of appeal reads:

"Please take notice that Terrell Conley, defendant * * * appeals to the District Court of Appeal * * * from the order therein entered in the said superior court on the 21st day of August, 1952, denying petition for Writ of Error Coram Nobis and from the whole thereof relative to the Order * * *."

[3] Defendant, having failed to avail himself of his remedy by appeal, the trial court properly denied the instant application for relief.

Affirmed.

MOORE, P. J., and FOX, J., concur.



115 Cal.App.2d 440

STILLMAN POND, Inc. et al. v. WATSON.

Civ. 18934.

District Court of Appeal, Second District, Division 3, California.

Jan. 21, 1953.

Hearing Denied March 19, 1953.

Proceeding for writ of mandate to compel real estate commissioner to vacate his order revoking petitioners' real estate brokers' licenses. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment denying writ, and petitioners appealed. The District Court of Appeal, Wood, J., held that evidence justified revocation of licenses.

Judgment affirmed.

1. Brokers ⇐3

Evidence sustained findings that real estate brokers unlawfully commingled deposit money of purchasers with their own funds, dishonestly claimed increased commission, fraudulently represented to purchasers that they owned certain lots, and that they would make improvements thereon if property were purchased, failed to furnish purchasers with copy of commissioner's public report before accepting deposit, as required by law, and made false representations to purchasers as to the quality of soil on a lot, justifying revocation of real estate licenses. Business and Professions Code, §§ 10176(a, b, e, i), 10177(d, f).

2. Mandamus ⇐168(4)

In proceeding for writ of mandate to compel real estate commissioner to vacate his order revoking real estate brokers' licenses, evidence of a judgment entered against broker based upon a complaint alleging that broker had fraudulently induced plaintiff in such action to execute a note as accommodation maker, and had defaulted, with result that plaintiff was forced to pay note, was not legally sufficient to support an order revoking license. Business and Professions Code, § 10177(f).

3. Corporations ⇐1

In proceeding for writ of mandate to compel real estate commissioner to vacate his order revoking real estate brokers' licenses, issued to individual and corporate brokers, evidence sustained finding that the corporate broker was the alter ego of the individual broker. Business and Professions Code, §§ 10176, 10177.

Sprague & Sparks, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Heber Stillman Pond, individually, and Stillman Pond, Inc., Heber Stillman Pond, president, held real estate brokers' licenses. (The corporation was licensed to act as such broker through its president, Heber Stillman Pond.) In an accusation, filed by a deputy real estate commissioner, they were charged in 12 counts with violating their legal duties as such licensees. In a supplemental accusation they were charged with 3 additional counts of such violations. After a hearing, the real estate commissioner found that 6 counts of the accusation and 2 counts of the supplemental accusation were true. He revoked the licenses. The other counts were dismissed.

The licensees petition the superior court for a writ of mandate compelling the commissioner to vacate his order revoking the licenses. The matter was submitted upon the record of the proceedings before the commissioner. The petition was denied, and the licensees appeal from the judgment.

The trial court found that the findings of the commissioner are supported by the evidence.

One of the charges (No. 2), which the commissioner found to be true, was that in October, 1950, the licensees sold, for Mr. and Mrs. Rite, a certain lot near Lancaster for $795 upon an agreement that the licensees were to receive as commission 5 per cent of the purchase price up to $700 and 50 per cent on any amount over $700, or a commission of $82.50, and that the licensees unlawfully withheld and commingled $250 and refused to pay to sellers $167.50 to which they were entitled; that said acts of the licensees were in violation of Sections 10176(e),[1] 10176(i) [1] and 10177 (d) [2] of the Business and Professions Code.

[1] Appellants (licensees) contend that the evidence does not support the findings of the court (with reference to the Rite transaction) that they dishonestly neglected to place the $250 in a neutral depository but instead commingled it with their own money; that they neglected to inform the Rites that appellants customarily charge 10 per cent commission on the sale of unimproved property; and that they dishonestly claimed they were entitled to a 10 per cent commission. They argue that the only evidence as to commingling the deposit money is the testimony of Mrs. Rite that she could not say definitely whether the check she finally received from Pond was his personal check. Pond sold the lot in October, 1950, and received a deposit of $250. The escrow was closed in December, 1950, and the Rites received the money due them from the escrow. The Rites demanded on several occasions that Pond pay the deposit money that was due to them, and he promised to pay, but he did not pay until March 20, 1951. Section 2830 of the Administrative Code, Title 10, provides that every real estate broker, who does not immediately place all funds entrusted to him by his principal or others in a neutral escrow depository or in the hands of principals, shall maintain a trust fund account with some bank or recognized depository and place all such entrusted funds therein upon receipt. Section 2832 of said code provides that the failure to maintain a trust fund account when required and to deposit trust funds received promptly in said account may be construed to be commingling in violation of section 10176(e) of the Real Estate Law. When Pond, as a witness on cross-examination, was asked what he did with the money he received as a deposit on the sale of the Rites' lot, he refused to answer on the ground that answering the question would tend to incriminate him. One of the issues was whether Pond commingled the deposit money with his money. The question which he refused to answer related directly to that issue. An inference could be drawn from his refusal to answer said question that he did not immediately place the deposit money in a neutral escrow depository or in the hands of principals or maintain a trust fund account with a bank or a recognized depository. See Fross v. Wotton, 3 Cal.2d 384, 395, 44 P.2d 350. It is to be noted that Pond testified, with reference to funds that he kept for construction purposes, that he kept some of them in his pocket and "I don't do business with any bank of any kind." There were six unsatisfied judgments for money against Pond, the amounts of which ranged from approximately $3,700 to approximately $9,400. The evidence supported the finding that appellants commingled the deposit money in violation of Section 10176(e) of the Business and Professions Code.

Appellants argue, with reference to their claim for 10 per cent commission, that there was an honest dispute as to the commission arrangement. Mrs. Rite testified that Pond said that the commission would be 5 per cent up to $700 and 50 per cent on any amount over $700. The selling price was $795. Under a 5 per cent commission, he

1. Section 10176 provides: "The commissioner may * * * revoke a real estate license * * * where the licensee * * * has been guilty of * * *. (e) Commingling the money * * * of his principal with his own. * * * (i) Any other conduct * * * which constitutes fraud or dishonest dealing."

2. Section 10177 provides: "The commissioner may * * * revoke the license of any real estate licensee, who * * * has * * *. (d) Wilfully * * * violated any of the provisions of this part relating to real estate * * *."

would have been entitled to $82.50. On the basis of the 10 per cent commission, claimed by Pond, the commission would have been $117.50. The difference between the amounts of commission, on the basis of 5 per cent and the basis of 10 per cent, was $35. Although Pond conceded that the Rites were entitled, at least, to $132.50 of the deposit money, he held all the deposit money, $250, for approximately five months because he was claiming $35 more than 5 per cent commission. The findings to the effect that appellants did not inform the Rites that the commission would be 10 per cent, and that appellants dishonestly claimed 10 per cent commission, are supported by the evidence.

Another charge (No. 3), which the commissioner found to be true, was that about June 13, 1950, the licensees fraudulently induced Mr. and Mrs. Gately to buy a lot near Lancaster in Golden West Ranchos, and fraudulently represented that they would build a chicken house, and would furnish a new well and pump and "chicks and feed," without additional cost to the buyers; that the buyers relying upon such representations gave appellants a deposit of $750, and continued to make payments of $25 per month to appellants until December, 1950; that no escrow was opened until December, 1950, and the said promises of the licensees were never fulfilled; that said acts of the licensees were in violation of Sections 10176(b),[3] 10176(e), and 10176(i) of the Business and Professions Code.

Another charge (No. 7) which the commissioner found to be true, was that in said Gately transaction the licensees accepted a deposit from said buyers to be applied upon the purchase of said lot, and that prior to the acceptance of said deposit the licensees did not give the buyers a copy of the commissioner's public report; that said actions of the licensees were in violation of the Rules and Regulations of the Real Estate Commissioner as provided in Section 2795 of the Administrative Code.

Appellants contend that the evidence does not support the findings of the court to the effect that Pond was not the owner of the Golden West Ranchos. They argue that Pond was the owner of the Ranchos, that as owner he sold the lot to the Gatelys, and as owner he was not acting as a real estate agent. The commissioner's public report filed April 17, 1950, relating to the Ranchos, shows that on February 15, 1950, the title to said property was vested in Walter W. Middlecoff and Ralph A. Mochel. Middlecoff reported to the commissioner, by letter, on March 5, 1951, that on June 13, 1950, he and Mochel gave a contract to Helen F. Blackburn to sell said property to her, but she sold no lots and on February 15, 1951, she delivered to Middlecoff a quitclaim deed to said property; and that on February 23, 1951, Mochel conveyed his interest in the property to Middlecoff. Pond testified that Helen F. Blackburn was his nominee; that he had not issued any deed in connection with the property; and that Middlecoff issued some of the deeds, and Mochel issued some of the deeds, when Pond sold property in that tract. Middlecoff reported to the commissioner, by letter, on May 5, 1951, that he has no contracts with Pond, except Pond has a mere non-exclusive permission to bring customers, without obligation as to commission except as may be agreed upon when a sale is made. Stillman Pond signed the deposit agreement as a real estate broker. The finding that Pond was not the owner is supported by the evidence.

Appellants also contend, with reference to the Gately transaction, that the evidence does not support the finding that appellants made said representations, regarding proposed improvements, without any intention of carrying them into effect. They argue that the deposit agreement did not specify a time within which the improvements were to be built; that, according to Pond's testimony, he was not to make the improvements until the Gatelys had paid $2,000 down; that the fact the improvements were not

3. Section 10176 provides: "The commissioner may * * * revoke a real estate license * * * where the licensee * * * has been guilty of * * *.

(b) Making any false promises of a character likely to influence, persuade or induce."

made does not justify a conclusion that he did not intend to make the improvements. The Gatelys made a deposit of $750 on June 13, 1950, and paid $25 each month thereafter until December, 1950. No improvement of the property was commenced. Mrs. Gately testified that Pond said the well would be put in immediately; the balance of the $2,000 was to be paid on March 15, 1951, when Pond was to have the improvements ready. In October, 1950, the Gatelys demanded that an escrow be opened and that the money they had paid be deposited therein. About November, 1950, Pond started an escrow but instructions were not signed. The $875 which the Gatelys had paid was not put into escrow. The finding to the effect that Pond did not intend to make the improvements is supported by the evidence.

Appellants also contend, regarding the Gately transaction, that the finding that they commingled the Gately money with their own money is not supported by the evidence. As above stated, the money was not placed in escrow. When Pond, as a witness, was asked what he did with the Gately money he refused to answer on the ground that answering the question would tend to incriminate him. The discussion hereinabove, regarding commingling of money in the Rite transaction, is applicable here. The evidence supports the finding that appellants commingled the Gately money in violation of said section 10176(e).

Appellants assert that the evidence does not support the finding that they wilfully neglected to give the Gatelys a copy of the commissioner's public report. Mrs. Gately testified that she never saw that report. Pond testified that he gave the Gatelys a copy of the report, and that one of the reports is nailed to the wall, beside the Ranchos map, in his front office. Appellants argue that, although the evidence as to whether they gave the report to the Gatelys was conflicting, the evidence does not prove that the failure to give the report was wilful. Section 2795 of the Administrative Code provides that the owner, subdivider, or agent shall not accept a deposit on any lot in a subdivision until a true copy of the commissioner's public report on the subdivision has been given to the prospective purchaser and his receipt taken therefor. The evidence supports said finding.

Another charge (No. 4), which the commissioner found to be true, was that about November 19, 1950, the licensees fraudulently induced Mrs. Barrett to buy a lot in Golden West Ranchos, and fraudulently represented that prior to January 1, 1951, they would place a well and pump on the lot, and would build thereon a chicken house; that relying on these promises Mrs. Barrett paid $3,000 to licensees as a deposit; that no part of said agreement has been performed; that the actions of the licensees were in violation of Sections 10176(a),[4] 10176(b) and 10176(i) of the Business and Professions Code.

Another charge (No. 8), which the commissioner found to be true, was that on November 19, 1950, the licensees accepted a deposit from Mrs. Barrett to be applied upon the purchase of said lot, and that prior to the acceptance of the deposit they did not give her a copy of the commissioner's public report; that the said acts of the licensees were in violation of Section 2795 of the Administrative Code.

Appellants contend, with reference to the Barrett transaction, that the evidence does not support the finding that said representations of appellants, regarding proposed improvements, were made with no intention of performing but only for the purpose of inducing Mrs. Barrett (Marsiglia) to enter into said agreement and to pay $3,000 as a down payment. They argue that the fact that the improvements were not made does not justify a conclusion that he did not intend to make the improvements; and that the time for making the improvements was extended. On November 19, 1950, Mrs. Barrett paid $3,000 to Pond as a deposit on the purchase price of a lot in Golden West Ranchos. The deposit was paid as follows:

4. Section 10176 provides: "The commissioner may * * * revoke a real estate license * * * where the licensee * * * has been guilty of * * * (a) Making any substantial misrepresentation."

$1,000 cash, a check for $1,500, and a check for $500. The purchase price was $12,750. The deposit agreement was signed "Stillman Pond Real Estate Broker, License No. ——— By Stillman Pond, Salesman." That agreement provided that the seller would put a well on the lot and build "a 4000 sq ft chicken house," and would move a log cabin onto the lot. Mrs. Barrett testified that Pond told her that everything would be completed by January 1, 1951; that she asked Pond on several occasions to put the transaction through escrow, but an escrow was not opened; that she spoke to Pond approximately six times about digging the well and building the chicken house; that, upon his request, she extended the time for completing the chicken house to January 30th. The log cabin was placed on the lot. The construction of the chicken house was started in the latter part of January, 1951 (the record does not show to what extent it was started). No other improvement was commenced. She made three or four demands upon Pond for the return of her money, but no part of it was returned. Mrs. Barrett also testified that about January 10, 1951, when she was in Pond's office, he told her he had something he wanted her to sign, and then he went to his automobile, brought his brief case in, put a paper in front of her, placed his hand in the middle of the paper, and told her to sign the document—that it was exactly like the other copy, that he was in a hurry; that she signed the document, but did not read it. It was not a copy of the original document (deposit agreement), which she had signed on November 19, 1950, but was an "Agreement for Sale of Real Estate." Pond testified that at the time he asked her to sign the second document he told her he had her contract of sale completed and that it was the same amount as the amount in the deposit receipt. The finding to the effect that Pond did not intend to perform his agreement regarding improvements is supported by the evidence.

Appellants assert that the evidence does not support the finding that they wilfully neglected to give Mrs. Barrett a copy of the commissioner's public report. Mrs. Barrett testified that she did not see that report. The discussion hereinabove, regarding the public report in the Gately transaction, is applicable here. The evidence supports said finding.

Another charge (paragraph V of supplemental accusation), which the commissioner found to be true, was that about February 11, 1951, the licensees entered into negotiations to sell to Mr. and Mrs. Grider a lot in Golden West Ranchos for $12,750; that in the negotiations licensees represented that the soil on the lot was sufficient to grow anything except citrus fruits, that the soil was excellent for growing alfalfa, the soil was not alkaline, a plentiful supply of water at a depth of 100 feet was guaranteed for a year; that in reliance thereon the Griders agreed to buy said lot, and they paid to licensees $500 as a deposit; that said representations were false and the licensees knew they were false when they made them; that said acts of the licensees were in violation of Sections 10176(a), 10176(b), 10176(i) and 10177(f) [5] of the Business and Professions Code.

Another charge (paragraph VI of supplemental accusation), which the commissioner found to be true, was that prior to the acceptance of the deposit referred to in said paragraph V the licensees did not give to the purchasers a copy of the commissioner's public report.

Appellants contend, with reference to the Grider transaction, that the evidence does not support the findings to the effect that appellants falsely represented to the Griders that the soil was sufficient to grow anything except citrus fruits, it was excellent for alfalfa, the soil was not alkaline and there was ample water; that appellants dishonestly neglected to show the commissioner's report to the Griders. They argue that Pond was acting as owner of the property

5. Section 10177 provides: "The commissioner may * * * revoke the license of any real estate licensee, who * * * has * * *. (f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license."

in making the sale, and he was allowed to do what is known as seller's puffing; that the evidence tended to prove that he believed his statements to be true; that the Griders did not rely upon his representations because they were familiar with alkaline soil, they asked him about the nature of a visible deposit of alkali on the land, and they immediately checked for information concerning the soil. Mrs. Grider testified that Mr. Grider asked Pond whether the soil would grow alfalfa, and Pond replied that it would grow anything except citrus fruits; that there were spots on the land where evaporation left a white residue, and she asked Pond if there was alkali in the soil; that he replied "No," and that leveling of the land would take care of the spots. The testimony of Mr. Grider, with reference to Pond's representations as to the soil, was in substance the same as the testimony of Mrs. Grider. Pond testified that he told the Griders that the soil all the way from Lancaster has an alkali condition; that he did not tell them there was no alkali on that land, and he did not tell them the soil would grow alfalfa and anything except citrus fruits; that any one who would put in two acres of alfalfa should have his head examined; that he said the soil would grow permanent pasture, garden, lawn, trees and flowers. Whether or not Pond made the alleged representations was for the determination of the commissioner. The evidence supports said finding. The evidence also supports the finding that appellants wilfully neglected to give the Griders a copy of the commissioner's report.

Another charge (No. 5), which the commissioner found to be true, was that about December 27, 1950, a judgment was entered by the superior court in a matter entitled "Waldo Willhoft vs. Stillman Pond and Vivian L. Pond"; the judgment was based upon a complaint wherein it was alleged that appellant Pond had fraudulently induced the plaintiff to execute a note as accommodation maker and as a result of a default on the part of Stillman Pond, the plaintiff was forced to and did pay to the payee $3,769.29; that the said acts of Pond were in violation of Section 10177(f) of the Business and Professions Code.

[2] The said allegations of the complaint regarding fraud, referred to in said charge, were in the second cause of action of the complaint. The first cause of action in said complaint did not allege fraud, but was to the effect that plaintiff as an accommodation maker paid the balance due on said note, namely, $3,769.29. Pond testified in the hearing before the commissioner to the effect that he did not contest the taking of judgment against him because plaintiff Willhoft agreed that a judgment based upon fraud would not be entered against him. There were no findings in that action. There was a recital in the judgment that all the allegations in both causes of action are true. Mr. Willhoft did not testify in the hearing before the commissioner and there was no evidence, other than the testimony of Pond, regarding the transaction upon which the judgment was based. Pond testified that he owned an orchestra that was in New York; that he told Mr. Willhoft that he needed $10,700 to finance it; that he used the money for the purpose for which he borrowed it. In Manning v. Watson, 108 Cal. App.2d 705, 239 P.2d 688, which was a proceeding in mandate to compel the real estate commissioner to annul his order suspending a real estate broker's license, a certified copy of a judgment of conviction of a misdemeanor was received in evidence by the commissioner. The court held therein that the copy of the judgment was admissible only for the purpose of supplementing or explaining some direct evidence as to the factual basis for the judgment. The evidence herein as to said charge No. 5 was not legally sufficient to support an order revoking the licenses.

[3] Appellants also contend that the evidence does not support the finding of the court that the corporation, Stillman Pond, Inc., was merely the alter ego of Heber Stillman Pond. Pond testified that the corporation, Stillman Pond, Inc., was incorporated in 1945 or 1946; he is president of the corporation; his wife is vice-president; another person is either secretary

or treasurer, but he does not remember his name; no stock was issued; no directors' meeting has been held since the corporation was organized. The deposit agreements in the Barrett and Grider transactions were signed by Pond as follows: "Stillman Pond Real Estate Broker, License No. ——— By Stillman Pond, Salesman." It could be inferred from such signatures that Stillman Pond, an individual, was acting as salesman for Stillman Pond, Inc., the corporation. If he were not so acting, then it would seem that he was purporting to act as salesman for himself. The evidence supports the finding that the corporation was the alter ego of Pond.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



115 Cal.App.2d 725

BEAR CREEK CO. v. JAMES et al.

Civ. 8149.

District Court of Appeal, Third District, California.

Feb. 2, 1953.

Rehearing Denied March 4, 1953.

Hearing Denied April 2, 1953.

Action on note, wherein plaintiff served attachment on garnishees, who allegedly were indebted to the maker. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment for plaintiff, and garnishees appealed. The District Court of Appeal, Schottky, J., held that, where, upon levy of attachment, garnishees' bookkeeper mistakenly stated that garnishees were indebted in sum of $1,300 to defendant in main action on note, garnishees could not be liable for more than actual damage resulting from bookkeeper's statement, and allowing recovery of $1,300, on basis of estoppel was error.

Judgment reversed.

1. Attachment ⇐175

The attaching creditor stands in debtor's shoes and can gain no greater rights than those debtor had.

2. Garnishment ⇐163

In action on note, wherein plaintiff served attachment on garnishees, who allegedly were indebted to the maker, refusal to admit garnishees' evidence for purpose of showing garnishees' mistake in stating to constable that, when attachment was levied, they were indebted to maker was error.

3. Garnishment ⇐127

In absence of estoppel preventing garnishees from showing that they were not in fact indebted to maker, who was being sued on note, showing of such mistake would be a complete defense, and, even if there were an issue of estoppel, such mistake would be a material fact to be considered by the court in weighing and determining the issue of estoppel.

4. Estoppel ⇐116

The party asserting an estoppel has the burden of proving all the elements thereof by evidence having some reasonable tendency to establish such fact.

5. Trial ⇐98

During progress of a trial, the court must not, for purpose of deciding on admissibility of evidence, assume that the jury will find that an estoppel exists.

6. Estoppel ⇐83(3)

Although plaintiff is induced by garnishee to begin action and garnishment solely on faith of garnishee's representations that he is indebted to defendant and holds defendant's funds which are liable to garnishment, garnishee is not thereby estopped from denying his indebtedness to the defendant but is at most liable to the plaintiff for actual expenses incurred by plaintiff in reliance upon garnishee's representations.

7. Garnishment ⇐105

Except in cases where there has been fraud or collusion between principal defendant and garnishee, or in case of an estoppel, as where plaintiff has been misled by principal defendant's apparent ownership of property involved and has given credit on faith thereof, or where plaintiff has some other superior equity, plaintiff cannot acquire by garnishment rights

against garnishee greater than those possessed by the principal debtor.

8. Garnishment ⇐110

Where, upon levy of attachment, garnishees' bookkeeper mistakenly stated that garnishees were indebted in sum of $1,300 to defendant in main action on note, garnishees could not be liable for more than actual damage resulting from bookkeeper's statement, and allowing recovery of $1,300, on basis of estoppel was improper and amounted to unjust enrichment of plaintiff at expense of garnishees.

Linneman, Burgess, Telles & Van Atta, Dos Palos, for appellant.

C. Ray Robinson, W. W. Gudmundson and William B. Boone, Merced, for respondent.

SCHOTTKY, Justice.

Defendants, James and Buckley, operating as copartners, were engaged in the business of packing and shipping melons and other perishable crops. Besides their packing and shipping operations they also financed the growing of these crops in the area. One Frank Lenci was one of the growers so financed during 1949. On June 3, 1949, plaintiff filed an action against Lenci on two promissory notes totaling over $4,000; attachment in the action was filed on August 12, 1949, and served on defendants on August 15, 1949. Defendants' bookkeeper advised the constable that $1,300 was owing Lenci by defendants for the sale of melons, and the constable showed that figure in his answer. Judgment for plaintiff against Lenci, in the sum of $4,671.50, was entered on November 9, 1949. When the constable attempted to levy execution on the judgment, on November 15, 1949, defendants asserted that Lenci was indebted to them and that there were no monies due Lenci from defendants. Plaintiff then brought action as judgment creditor against defendants as garnishees, for conversion of the property of the judgment debtor. Defendants' answer traversed the allegation that they were indebted to Lenci, either at the time of attachment or at any time subsequent thereto.

At the trial of this action, plaintiff's only witness was the constable, who testified to serving the writ of attachment on August 15, 1949, and getting the information from defendants' bookkeeper that they owed Lenci a balance of $1,300; he also testified that when he attempted to serve the writ of execution three months later, on November 15, 1949, defendant Buckley stated that Lenci had no money coming. On cross-examination, it was brought out that he had served the original writ of attachment rather late in the afternoon when defendants' office was fairly busy, and that he did not at that time ask whether defendants had any offsets nor was there any discussion whatever as to offsets. Plaintiff presented no further evidence, but rested after this single witness. Defendants put Mrs. Jewett, the bookkeeper, on, and she testified that the original writ was served during the latter part of the afternoon on August 15, 1949, when the office was quite busy; she further testified that she totaled up the accounts receivable for Lenci's account and then subtracted the packing, loading, harvesting and commissions before arriving at the figure of $1,300, although nothing was said at the time about any other expenses or advances which defendants had made to Lenci. At this point, defendants offered to prove the true status of Lenci's account on August 15, 1949, as showing a deficit, rather than a credit, because of advances made during the growing season, which advances had not been taken into consideration along with the harvesting costs when the $1,300 figure was arrived at. After considerable debate on the matter plaintiff's objection to this offer was sustained, and defendants were not permitted to show the deficit. Defendants then had brief testimony by each of the partners, which only reasserted their position that the figure given the constable merely represented what Lenci had coming from the sale of melons, rather than being a complete accounting between them. On cross-examination, defendant James admitted that he knew of the offsets at the time of original service, and, though he was in the office at the time, he did not volunteer that information to the constable; there was also some by-play between James and plaintiff's counsel in that James asserted

he was unfamiliar with attachment proceedings except for employees' salaries.

The court, sitting without a jury, gave judgment for plaintiff on the theory, as shown by its memorandum opinion, that defendants' bookkeeper, who was familiar with defendants' books and accounts, provided the constable with the figure of $1,300 as the balance due Lenci, and that both waiver and estoppel were effective to prevent defendants from showing that any other set-offs were in existence at the time of the original attachment. Extensive findings of fact were made, including findings to the effect that defendants knew they had been served with a writ of attachment and what the purpose, function and effect of such a writ was; that on August 15, 1949, they stated and represented to the constable that they held funds due to Lenci in the amount of $1,300, and that at that time they had full knowledge of all the facts surrounding their dealings with Lenci without consulting their books, that they did in fact check all their books and records and then determined, after deducting all set-offs and all other claims they had against Lenci, that they owed him a balance of $1,300, which they reported to the constable; that defendants did not at that time assert any claim of offset in any amount against the $1,300; that defendants at that time had full and complete knowledge of any right of set-off whatever against the $1,300; that all offsets were considered before defendants told the constable the balance due Lenci was $1,300; that defendants intended and believed that plaintiff would act in reliance upon their return to the constable; that plaintiff justifiably relied upon defendants' statements, to its detriment in that it did nothing further to protect itself; that the levy of execution was returned unsatisfied on November 15, 1949; that defendants appeared, on December 26, 1950, in supplementary proceedings in aid of the execution, which was the first time that plaintiff learned that defendants had any adverse claim to the $1,300, since it had reasonably and justifiably believed, from August 15, 1949 until December 26, 1950, that defendants were indebted to Lenci in the sum of $1,300; that Lenci had no other property to which plaintiff could look for satisfaction; that defendants were barred, precluded and estopped from setting up any adverse interest whatever to the $1,300; that defendants had waived any right whatever of set-off against the $1,300. The conclusions of law based on these findings were that defendants were estopped from asserting any adverse interest in the $1,300, that they had waived any right of set-off, and that plaintiff was entitled to judgment for $1,300.

[1–4] Defendants have appealed from the judgment and the principal point urged by them is that "The court erred in refusing to admit evidence for the purpose of showing mistake on the part of the garnishee in his statement to the constable when the attachment was levied."

Appellants cite the well-settled general rule that the attaching creditor stands in the debtor's shoes and can gain no greater rights than the debtor had. In re Estate of Bennett, 13 Cal.2d 354, 90 P.2d 84, 126 A.L.R. 771; Clecak v. Dunn, 95 Cal. App. 537, 272 P. 1104. Appellants argue that in actions between attaching creditor and garnishee the question is whether the garnishee is actually indebted to the debtor and that any offset available against the debtor is equally available against the attaching creditor. Appellants then argue that when the trial court refused to allow them to prove that they were not in fact indebted to the debtor Lenci, it deprived them of proving their defense to the action.

Respondent does not dispute the general rule stated by appellants but contends that appellants have waived any right to a set-off and are estopped to claim one. It argues that it is a general rule that one having a right of set-off may be precluded from asserting that right through waiver or estoppel, and cites the annotation at 143 A.L.R. 454, but as pointed out by appellants, this annotation deals only with the specific relation of a bank and its depositors.

Respondent cites the cases of Dresbach v. Minnis, 45 Cal. 223, and Bleven v. Freer, 10 Cal. 172, as holding that one who gives to

a sheriff an accountable receipt for property upon which a writ of attachment is levied as the property of another, is estopped from afterwards asserting ownership in himself, unless at or before the giving of the receipt he made known his claim to the officer.

Appellants argue that these two cases cited by respondent are not in point and have no application to the instant case. They state that in each of these cases the property owned by "A" was attached as the property of "B", and that in each case "A", in order to retain possession of the property, filed a receipt acknowledging "B" to be the owner of the property attached. They point out also that in the case of Dresbach v. Minnis, supra, "A" was a bidder at the execution sale and became the purchaser of the property, purchasing it as the property of "B". They argue further that since garnishment and attachment are statutory the cited cases have no application at the present time, as provision is now made that when property is attached as the property of another, the person claiming to be the owner thereof may file a third party claim, and that this rule does not apply to garnishment.

Respondent also cites Walters v. Bank of America Nat. Trust & Savings Ass'n, 9 Cal.2d 46, 69 P.2d 839, 110 A.L.R. 1259, as supporting the rule that where the garnishee's previous conduct is inconsistent with its present denial that it has credits belonging to the judgment debtor, the garnishee is held liable in accordance with such conduct. However, as pointed out by appellants, the Walters case does not support respondent's position because the bank's conduct in that case, after being served with the writ of attachment, was tantamount to fraud against the attaching creditor, as in that case the garnishee bank credited the amount of the judgment debtor's deposit against his indebtedness to them at the time of the service of the writ, but thereafter permitted him to draw checks against his account and even recredited him with the exact amount previously credited to the indebtedness, with no further deposits having been made in the interim. It was this conduct which caused the Supreme Court to affirm a judgment in favor of the garnisher against the bank and to state, 9 Cal.2d at page 57, 69 P.2d at page 844:

> "* * * This result does not disturb the rule that garnishment proceedings reach only a debt then owing by the garnishee to the judgment debtor. It merely protects the rights of the attaching creditor against any property in the possession of the garnishee. If the garnishee's subsequent conduct be inconsistent with its formal denial that it is possessed of credits belonging to the judgment debtor, and here it is indisputably so, the result is merely that it is held liable in accordance with such conduct. Its liability as a garnishee is clearly defined, and the rights of the attaching creditor may not be defeated by its arbitrary refusal to conform to its duties and obligations as such. Its liability is not determined by an agreement between itself and the judgment debtor as to the application of the fund, but by the law which defines its liability as such garnishee."

Respondent cites a number of cases which hold that one who stands by while property to which he has title is sold is estopped from setting up a claim of title against the purchaser, but such authorities are not applicable to the instant case because an attaching creditor is not within the classification of a bona fide purchaser but merely stands in the shoes of his judgment debtor.

Respondent cites Twisselman v. Reed, 43 Cal.App.2d 310, 110 P.2d 679, where it appeared that plaintiff represented to defendants, pending sale of certain property, that he held only an oral lease and defendants purchased the property without knowledge that plaintiff had a written lease. Upon these facts the court decided that plaintiff was estopped from claiming that he was holding under the written lease. However, in that case there was admitted fraud and misrepresentation, and there is no claim or evidence of fraud in the instant case.

Respondent then urges that it would be a fraud upon the court to allow appellants to now repudiate their representation to

an officer of the court, and this fact alone is sufficient to raise an estoppel, citing McManus v. Montgomery, 12 Cal.2d 397, 84 P. 2d 787. In reply appellants contend, we think correctly, that since that case deals with an attorney suing his former client for fees in excess of that awarded by the court in a divorce action, it pertains only to the duty owed to the court by an attorney and is not here applicable to support an estoppel.

The learned trial judge was firmly of the opinion that appellants were estopped from proving that they did not in fact owe anything to the judgment debtor at the time of the garnishment. In ruling on respondent's objection to appellants' offer of proof the court said:

> "Under your theory, Mr. Telles, as I gather it, no attachment of any kind would be valid. I mean what is the object of sending a Constable around with a writ of attachment unless it is to ascertain what assets the judgment debtor has?
>
> * * * * * *
>
> "Now the return was made at that time, admittedly to permit any evidence in here now concerning what the actual facts would be, would be an attempt to impeach something that has already been stated and it would also be an attempt to nullify an official act on which an official return has been made. I will sustain the objection.
>
> * * * * * *
>
> "I take the position that the return made voluntarily by the defendants in this case to the Constable estops them at this time from setting up any other fact. That is how I view the matter. I take the position that a return to a Constable means exactly what it says. If it doesn't, there is certainly no sense in ever attempting to levy an attachment."

We are satisfied that the trial court erred in excluding the offered testimony. In the absence of estoppel a showing that the garnishee was not in fact indebted to Lenci would be a complete defense, and even if there were an issue of estoppel it would be a material fact to be considered by the court in weighing and determining the issue of estoppel. For as stated in 10 Cal. Jur. 656:

> "The burden rests upon the party asserting an estoppel to prove all the elements constituting it, by evidence having some reasonable tendency to establish the fact. Estoppels cannot be based upon mere conjecture, even if a proper foundation is laid for them in other respects. And the party must prove facts from which an estoppel is clearly deducible. * * * The existence of an estoppel is a question of fact."

[5] This same citation then adds:

> "And during the progress of a trial, the court must not, for the purpose of deciding on the admissibility of testimony, assume that the jury will find that an estoppel exists; * * *"

And in 19 Am.Jur., at page 643, the rule is stated:

> "Estoppels must be certain to every intent and are not to be taken or sustained by mere argument or doubtful inference. No party ought to be precluded from making out his case according to its truth unless by force of some positive principle of law. Hence, the doctrine of estoppel in pais must be applied strictly and should not be enforced unless substantiated in every particular."

[6] The rule of estoppel against a garnishee to make defenses is stated in 5 Am. Jur., p. 64, as follows:

> "The general rules of estoppel against parties to a suit apply to estoppel against a garnishor. Nevertheless, it has been held that although the plaintiff was induced by the garnishee therein to begin the action and to garnish him, solely on the faith of representations made by the latter that he was indebted to the defendant in the action, and that he held funds of the defendant liable to garnishment, thus leading the plaintiff to incur expense and trouble, yet the garnishee is not thereby estopped from denying his indebtedness to the defendant, and he

is at most liable to the plaintiff for the actual expenses incurred by him in reliance upon the representations. To allow full recovery in such a case would produce a greater injury than it was intended to prevent."

[7] And in 38 C.J.S., Garnishment, § 176, pages 393–395, it is stated:

"Since the attaching creditor or garnisher claims through his debtor, the defendant, the rights of such creditor against the garnishee depend on, and are subject to, subsisting rights between the garnishee and the principal debtor, the liability of the garnishee to plaintiff being measured by his liability, or responsibility and relation, to defendant. Accordingly, it is generally held that, except in those cases in which there has been fraud or collusion between the principal defendant and the garnishee, or in case of an estoppel, as where the creditor has been misled by the debtor's apparent ownership of the property involved and has given credit on faith thereof, or where the creditor has some other superior equity, plaintiff by garnishment can acquire no greater rights against the garnishee than are possessed by the principal defendant. In other words, plaintiff is not to be placed in any better position, or the garnishee in any worse position, than he would be if defendant himself were enforcing his claim."

[8] As hereinbefore set forth, respondent's only witness was the constable who testified to serving the writ of attachment on August 15, 1949, and being informed by appellants' bookkeeper that they owed Lenci a balance of $1,300; and that when he served the execution three months later appellant Buckley informed him that Lenci had no money due him. There is a finding that Lenci had no other property to which plaintiff could look for satisfaction, but there is no evidence whatever that Lenci had any other property at or after the levy, or that respondent made any other levy, although the attachment was for $4,100 and the constable's return indicated that there was only $1,300 due Lenci from appellants. If Lenci had no property whatever it is difficult to understand how respondent could have been damaged by the statement of appellants' bookkeeper to the constable. Unless the statement caused respondent to refrain from taking steps that might have resulted in its collecting some money from Lenci, there would be no basis for estoppel, and there was no evidence of that nature. Both reason and authority justify the conclusion that if appellants mistakenly or negligently informed the constable that they were indebted to Lenci in the sum of $1,300, the very most that they could be held liable for would be the actual damage that resulted to respondent by reason of such statement. If Lenci had no other property respondent was not actually damaged by such information beyond the expense of levying the subsequent execution, although, of course, it must have been a disappointment to learn that appellants thereafter claimed that nothing was due from them to Lenci. To permit respondent to recover the sum of $1,300 from appellants upon the theory of estoppel would amount to unjust enrichment of respondent at the expense of appellants.

From the foregoing we conclude that the trial court erred prejudicially in excluding evidence as to whether appellants were in fact indebted to Lenci at the time the attachment was levied, and that, even if such ruling was not erroneous, the judgment in favor of respondent is not supported by the evidence.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

115 Cal.App.2d 790

MAWBY v. LAMB et ux.

Civ. 19198.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1953.

Action on note given by defendants to former husband of plaintiff. The Superior Court of Los Angeles County, Vernon W. Hunt, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that when note was community property, the husband's act in purporting to cancel makers' obligation thereon without payment or other consideration was tantamount to an attempt on his part to make a gift, and entire transaction was voidable in its entirety as to the wife.

Judgment reversed and cause remanded.

1. Husband and Wife ⇐265

Where note in which husband was named as payee was determined to be community property, act of husband in purporting to cancel obligation of maker upon the note without payment of amount due thereon or any other consideration, done for purpose of defeating wife's claim to possession of community property as incident of divorce proceedings, was an attempt to make a gift of the debt represented thereby to the makers, and was, as to the wife, voidable in its entirety. Civ.Code, § 172.

2. Divorce ⇐206

Where note in which husband was named as payee was community property, and wife brought divorce proceedings, and order was issued restraining husband and bank which had possession of note from transferring or assigning same, service of order on bank as husband's agent was as effective to bind husband as though order had been served upon him personally, and precluded husband from thereafter purporting to make gift of amount of note to makers thereof.

3. Husband and Wife ⇐265

Fact that interlocutory decree in wife's divorce action was entered subsequent to time husband purported to cancel note which was community property did not preclude wife from asserting her interest therein when only inference deducible from evidence was that attempted cancellation was a subterfuge to defeat wife's rights, and to prevent court from making appropriate disposition of note. Civ.Code, § 172.

4. Husband and Wife ⇐270(8)

In action upon note executed by defendants in favor of plaintiff's former husband, wherein it appeared that husband had attempted to cancel note prior to entry of interlocutory decree of divorce, evidence warranted finding that attempted cancellation was a subterfuge designed to defeat plaintiff's rights in note, and to prevent court in divorce action from making appropriate disposition thereof.

Chadeayne & Wilkinson, J. Kingsley Chadeayne, Tracy, for appellant.

Willis T. Lyman, Long Beach, for respondents.

PATROSSO, Justice pro tem.

In this action upon a promissory note, plaintiff appeals from a judgment in favor of the defendants. No appearance has been made in this court upon behalf of the respondents and the matter has been submitted upon the appellant's opening brief.

The promissory note in suit was executed by the defendants in favor of Lawrence S. Mawby. It is dated April 11, 1949, in the sum of $3,957, payable in monthly instalments of principal and interest in the sum of $35.03, beginning May 1, 1949. Three days after the note was executed it was by the payee deposited with the Security-First National Bank of Los Angeles (Long Beach branch) for collection, and remained in possession of the bank until surrendered to the receiver as hereinafter stated.

At the time of the execution of the note, appellant and Lawrence S. Mawby, the payee, were, and since 1926 had been, husband and wife, and continued to live

together until their separation in November, 1947. Some time prior to May 16, 1949 (the exact date does not appear), appellant instituted an action for divorce against her husband in the Superior Court in and for the County of Stanislaus, and on the latter date an amended complaint was filed therein in which the Security-First National Bank of Los Angeles was named as co-defendant. The amended complaint, among other things, alleged that the bank had in its possession community property of the parties; that the defendant was absent from the State of California and would continue to remain absent therefrom; that unless restrained from so doing, he intended to and would dispose of and liquidate all of the community property and remove the proceeds thereof from the State for the purpose of depriving appellant of her community rights therein. In addition to other relief, the amended complaint prayed for the appointment of a Receiver to take possession of all the community property of the parties within the jurisdiction of the court. Upon the filing of the amended complaint an order to show cause why such Receiver should not be appointed and why an order for alimony pendente lite and attorneys fees should not be made was issued as well as a restraining order restraining the defendant husband and the bank from transferring, assigning or otherwise disposing of any property of the parties. No service of the order to show cause or restraining order was had upon the defendant husband due to the fact that he was without the State, but the order was served upon the bank upon May 20, 1949 and on the following day the bank advised the husband by mail of the service of the order upon it. In the meantime the defendants had paid to the bank the instalment of $35.03 due on the note on May 1, and on May 26 likewise paid to the bank the instalment to become due thereon on June 1. On June 13 or 14 the bank received from the husband a letter dated June 8, reading as follows: "Please be advised by this letter that I have cancelled the note which you are collecting on the personal loan I made to Mr. and Mrs. Richard Lamb. They will make no further payments to you and you may remove this note from your file." The bank acknowledged receipt of this letter but advised Mr. Mawby that because of the restraining order it could not release the note.

Upon the hearing of the order to show cause in the divorce action on June 8, the court made an order appointing one Hanson as receiver directing him to take into his possession the property belonging to the parties including the promissory note in suit; ordering the payment by the receiver from the assets coming into his possession of alimony and attorneys fees in the amounts therein specified, and continuing in force the restraining order theretofore issued to the extent that disposition of the property was not otherwise authorized by the order. A copy of this order was served upon the bank on June 17, 1949, and on June 29 the bank surrendered to the receiver the property of the parties in its possession, including the promissory note in suit. On July 27 the receiver advised respondents of his appointment, and demanded payment of the instalment which became due on July 1, as well as all future payments to become due thereon. Despite this, however, the respondents during the month of August made two payments upon the note to the husband payee, one in the sum of $70.06 and the other in the sum of $35.03. Also during the month of September respondents made another payment of $35.03 to the payee.

On November 15, 1949 an interlocutory decree was entered in the divorce action whereby it was adjudged that the note in suit was a community property of the parties, and the same together with other property therein described was awarded to the appellant. Pursuant to this decree the receiver delivered possession of the note to her and she thereupon instituted the present action.

It is to be noted at the outset that no claim is made that any payments were made on the note by the respondents except as above stated nor that any consideration existed for the purported cancella-

tion thereof by the payee. Hence, unless the purported renunciation of the right to receive any further payments on the note by the husband is effective to defeat the rights of the appellant thereto, no defense to the action was established by the respondents.

Appellant assigns various reasons for a reversal of the judgment but we need consider but one of these for it is determinative of the controversy.

[1, 2] The act of the appellant's husband in purporting to cancel the maker's obligation upon the note without payment of the amount due thereon or any other consideration was tantamount to an attempt on his part to make a gift of the debt represented thereby to the respondents, and, inasmuch as the note was the community property of the appellant and her husband (there is no conflict in the evidence with respect to this and it was so adjudicated by the decree in the divorce proceeding), it was as to the appellant voidable in its entirety. Civ.Code, § 172; Britton v. Hammell, 4 Cal.2d 690, 692, 52 P.2d 221. Moreover, prior to that time an order had been issued and was then in force restraining the bank and the defendant husband from transferring or assigning the same. Although this restraining order was not served upon the defendant husband by reason of his absence from the State, service thereof was effected upon his agent, the bank which had the note in its possession, and hence the order as effectively bound the husband as though it had been served upon his personally. Furthermore, as we have already noted, the husband was notified of the restraining order and its service upon the bank prior to the time that he attempted to cancel respondents' obligation upon the note.

[3] As reflected by the findings, the trial court rested its judgment in favor of the defendants solely upon the fact that, as the interlocutory decree in the divorce action by which the note in suit was awarded to appellant was entered subsequent to the time that the husband purported to cancel the note, appellant "took nothing as to said promissory note by virtue of said interlocutory decree" and hence was not entitled to recover thereon. The answer to this is to be found in Kirby v. San Francisco Savings & Loan Society, 95 Cal.App. 757, 273 P. 609. There the plaintiff had instituted an action for divorce against her husband and obtained an order restraining the defendant, his agents, and servants, from selling, assigning or otherwise disposing or encumbering the community property of the parties including an account in the defendant Savings and Loan Society. In violation of this restraining order the defendant permitted the husband to withdraw the funds on deposit with it. Thereafter plaintiff was granted an interlocutory decree of divorce by the terms of which the deposit in question was awarded to her, and she thereupon instituted action against the Society to recover the sum so paid by it to the husband. 95 Cal.App. at page 761, 273 P. at page 610, the court says:

> "Defendant contends that, it having been determined in the divorce action that the property was the community property of the spouses, the husband had, under the provisions of section 172 of the Civil Code, full power to withdraw the same, at least until the deposit had by a judgment of the court been awarded to the wife. That the husband had such power may be conceded; but that, in the face of the restraining order, he had not the right to do so as against his wife is, we think, equally clear."

[4] The only inference deducible from the evidence is that the attempt of the appellant's former husband to cancel the maker's obligations upon the note in suit was a subterfuge designed to defeat the appellant's rights therein, and prevent the Superior Court in the divorce action from making appropriate disposition thereof. Nor do the respondents stand in any better light. While upon the trial they contended that the letter of July 8 addressed by the husband to the bank operated as a cancellation of any liability upon their part under the note, it is made to appear by their own evidence that thereafter, at a time when they had been advised by

the receiver of his appointment and right to receive payments due and to become due thereon, they nonetheless made payment of at least four instalments due thereon to the husband. As to such payments they clearly are not entitled to credit as against the appellant, and to permit respondents to escape liability upon their obligation would be to perpetrate a gross fraud upon the appellant.

The judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.



115 Cal.App.2d 651

SCHAEFFLE v. NOLAN et al.

No. 15376.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1953.

Action on promissory note. From a judgment of the Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., in favor of plaintiff, defendant appealed. The District Court of Appeal, Wood (Fred B.), J., held that the appellant, whose handwritten signature immediately followed the signatures of the admitted makers was not entitled to the benefit of the Negotiable Instruments Act subsection giving signature, effect of which is doubtful because of ambiguous location on instrument, effect of indorsement.

Affirmed.

1. Evidence ⇐423(6)

In applying the Negotiable Instruments Act subsection giving signature, effect of which is doubtful because of ambiguous location on instrument, effect of indorsement, court cannot seek aid of parol evidence to ascertain intent with which party signed where he did. Civ.Code, § 3098(3, 4, 6).

2. Bills and Notes ⇐243

Negotiable Instruments Act subsection giving signature, effect of which is doubtful because of ambiguous location on instrument, effect of indorsement, is designed to make certain that which is uncertain. Civ.Code, § 3098(3, 4, 6).

3. Bills and Notes ⇐243

Handwritten signature immediately following signatures of admitted makers of note was not so ambiguously located as to permit application of the Negotiable Instruments Act subsection giving signature, effect of which is doubtful because of ambiguous location, effect of indorsement. Civ. Code, § 3098(3, 4, 6).

4. Evidence ⇐448

Extrinsic evidence is admissible to explain an ambiguity in a negotiable instrument under same circumstances that it is admissible to explain ambiguity in any other contract in writing.

5. Bills and Notes ⇐519

Evidence sustained finding that defendant, whose handwritten signature appeared immediately following signatures of admitted makers, had in fact signed as a maker.

6. Bills and Notes ⇐487

Trial judge did not abuse his discretion, in action on promissory note, in refusing defendant's request for permission to amend his answer by pleading as additional defense that he was an accommodation party, in absence of request that trial of case be reopened for consideration of such issue.

7. Bills and Notes ⇐52

The Civil Code section enumerating cases in which a person "secondarily" liable is discharged has no application to a person "primarily" liable, and therefore would not be applicable to accommodation maker of promissory note. Civ.Code, § 3110, 3201(6), 3266a.

8. Bills and Notes ⇐140

One who appears as a primary party upon face of negotiable instrument, although in actuality a surety or accommodation maker, is not released by binding

extension agreement with the principal debtor made without his consent. Civ.Code, § 3110, 3201(6), 3266a.

9. Bills and Notes ⇐140

Action of payee in delaying cashing of payment checks at request of maker of promissory note did not constitute extension of time sufficient to discharge person secondarily liable on note, where delay was not for consideration or for any particular period of time. Civ.Code, §§ 3110, 3201(6), 3266a.

Joseph C. Meyerstein, San Francisco, for appellants.

Vernon F. Smith, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant Alexis L. Ehrman has appealed from a judgment against him and defendants Frank Nolan, Jr., and Annie Nolan as co-makers of a promissory note in favor of plaintiff Helene Bardin Schaeffle, payee.

Ehrman claims the trial court should have found (1) that he was an indorser and was discharged by failure of the plaintiff to give him notice of default on the note, and (2) that he was an accommodation party and was discharged by plaintiff giving an extension of time to the principal debtor without Ehrman's knowledge or consent.

(1) *Was Ehrman an indorser and as such discharged by the failure of the plaintiff to give him notice of default?*

The note, dated April 12, 1945, was in the principal sum of $12,000, payable at the rate of $250 per month, commencing May 15, 1945, and recited, "For value received, we jointly and severally promise to pay * * *."

The three defendants signed in the place usual for makers, i. e., in the right hand portion of the space below the text of the note. Frank Nolan's signature appeared first, below his came Annie's, and below hers we find Ehrman's, with this difference: Frank's and Annie's names had been typed and each signed on a line just above the typing; Ehrman's penned signature appeared below without a line or typing.

This circumstance, appellant contends, brings section 3098 of the Civil Code into play: "Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply * * * (6) Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser".

[1–3] It is difficult to see the applicability of this statute. Ehrman "placed" his signature precisely where one would look for the signature of a maker, not that of an indorser. There is nothing about that to make it "not clear" in "what capacity" he signed. Quite clearly he signed as a maker, one of the "we" mentioned in the note. The mere fact that the signature of each of the other two makers appears in a space specially provided therefor, does not change the location of Ehrman's signature "upon the instrument", does not move it to a "place" inappropriate for that of a maker.

In applying this statute we can not seek the aid of parol evidence to ascertain the intent with which Ehrman signed where he did. If the statute does apply, it declares Ehrman an "indorser." It sanctions no inquiry concerning his intent. Subdivision (6), like other subdivisions of the section, is designed to make certain that which is uncertain; e. g., "Where the instrument is not dated, it will be considered to be dated as of the time it was issued" (subd. 3), and "Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail". (Subd. 4.)

We have found no judicial decision in this state construing this statute. Shain v. Sullivan, 106 Cal. 208, 39 P. 606, decided long before the adoption of the Uniform Negotiable Instruments Act in this state, was a case of indorsement by the payees upon the face of the note, at the left hand end thereof. In People's State Bank v. Penello, 1922, 59 Cal.App. 174, 183–184, 210 P. 432, the court quoted the

Shain case to the effect that a signature on the face of a note may be an indorsement if so intended by the parties, but made no mention of section 3098. Figari v. Olcese, 1921, 184 Cal. 775, 195 P. 425, 15 A.L.R. 192, likewise contains no reference to section 3098. There the word "witness" appeared opposite the signature of a purported maker of the note. He was allowed to show by extrinsic evidence that he did sign as a witness, not as a maker.

Other states have had occasion to interpret the statute here involved, § 3098 of our Civil Code, § 17 of the Uniform Negotiable Instruments Act. Wisconsin, in 1906, gave it the same interpretation as have we. In Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N.W. 574, the significant portions of a note read as follows:

> "'Four months after date the Northwestern Straw Works promise to pay to the order of F. G. Bigelow * * *.
> "'The Northwestern Straw Works,
> "'E. R. Stillman, Treas.
> "'John W. Mariner.'"

The court held that the signature "John W. Mariner" was not so placed as to bring the statute into play and make him an indorser. The court said: "This provision, by its very terms, applies only to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or an indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to settle a doubt fairly arising from the ambiguous location of the name, and applies to no other. In the present case there is no doubt of this nature. The signature of Mr. Mariner is placed in the usual and proper, in fact the only proper, place for a maker." 109 N.W. at page 575.

The same view of this statute was enunciated in Illinois in 1930. A certain bearer note was originally executed by Charles Bidwell and Esther K. Bidwell as makers. When the holders sold the note, they added their signatures below those of the Bidwells. The court observed: "there is no ambiguity here as to the location or placing of the signature, or in fact in any other respect on the face of the instrument. From its face one conclusion only is deducible, namely, that appellant and his cosigners signed the note in the capacity of joint makers, and there is nothing in the proof regarding their intention that justifies a different conclusion." Peterson v. Swanson, 259 Ill.App. 80, 83.

Vermont construed and applied the statute in like manner in 1933. Four persons had placed their signatures on the face of a note, below its text, two on the right hand side and two to the left of the first two. The fact that two appeared to the left did not bring the statute into play. The statute, "in terms, applies only to a case where a doubt arises from the ambiguous location of the signature upon the instrument, such as at the end or across the face of the instrument. It was intended to solve such a doubt, and no other. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N.W. 574. These defendants [the two who signed to the left] signed their names in the proper place for a maker, and the only thing indicated which is at all unusual (if such it may be called) is that they placed their signatures 'slightly to the left of the signatures of the original makers.' But this circumstance, alone, does not create such a doubt as is contemplated by the statute." Greenwood v. Lamson, 106 Vt. 37, 168 A. 915, 916.

Massachusetts differs in not limiting the application of the statute to cases where "an ambiguity results solely because of the place where a signature is placed upon an instrument". La Caisse Populaire Credit Union v. Cross, 1936, 293 Mass. 190, 199 N.E. 548, 551. The view pioneered by Wisconsin is the more persuasive.

[4] But this does not necessarily terminate this branch of the inquiry. There is some basis for the admission of extrinsic evidence to explain Ehrman's signature in a case like this where the payee is the plaintiff. The very fact that the note was prepared for the signature only of Frank and

Annie Nolan is suggestive of a doubt. Were the Nolans originally to be the sole makers and Ehrman later included, or was the person who wrote the note unaware of the intention to include Ehrman as a maker, or was it the intention of the parties that Ehrman sign in some capacity other than a maker? It would appear that extrinsic evidence is admissible to explain an ambiguity in a negotiable instrument under the same circumstances that it is admissible to explain any other contract in writing. Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 499, 205 P.2d 727; Trigg v. Arnott, 22 Cal.App.2d 455, 457, 71 P.2d 330. Our case is somewhat like the Wisconsin case of Germania Nat. Bank v. Mariner, supra, 109 N.W. 574, in which John W. Mariner was permitted to prove that he signed as an officer (secretary) of the named promisor, "The Northwestern Straw Works." The note upon its face was ambiguous in that regard. Extrinsic evidence was admissible to resolve the ambiguity.

[5] We do not find it necessary to determine whether extrinsic evidence was admissible in this case. See Williams v. Silverstein, 213 Cal. 269, 276, 2 P.2d 165; Van Haaren v. Whitmore, 2 Cal.App.2d 632, 634, 38 P.2d 829; Seth v. Lew Hing, 125 Cal.App. 729, 736, 14 P.2d 537, 15 P.2d 190, on that question. The trial court admitted extrinsic evidence and that evidence supports the finding that Ehrman signed as a maker.

Plaintiff, the payee, testified that she had no agreement, oral or written, with Mr. Ehrman in connection with this note. She was not present when he signed the note. Ehrman testified that he had no agreement, oral or written with the payee other than his signature appearing on the note.

Over objection that it was calling for oral testimony to vary the terms of a written contract, Ehrman was allowed to state the circumstances under which he signed the note. He testified that Mr. Nolan came to him in his office, put a paper on the desk and asked Ehrman if he would sign it; Ehrman read the paper and said yes he would sign it; Nolan then said: "Indorse it if you will * * *. I am going to give it to Mrs. Schaeffle for part payment of the business;" Mrs. Schaeffle was not present; Ehrman never talked to her about the note; when Nolan brought the paper to Ehrman it had already been signed by Nolan and his mother. Then the following questions were asked and answers given:

"The Court: What did he say and what did you say? A. As near as I can remember, he said 'I have a note here for Mrs. Schaeffle I'm signing,' and I thought he said with his wife. He asked me if I would endorse the note. As near as I can remember that's what he asked me.

"Q. What did you say? A. I said I would.

"Q. What did you do? A. I endorsed it as he asked me.

"*Q. You mean you signed it? A. I signed it, yes.*" (Emphasis added.)

Clearly, the trial court was justified in finding that Ehrman signed as a maker. The witness said he meant that he "signed it" when he said he "endorsed it," and he signed in the place appropriate for a maker. These facts, plus the fact that the payee was not present during Ehrman's conversation with Nolan, nor when Ehrman signed, and that Ehrman had no agreement with the payee other than his signature appearing on the note, support the finding. Ehrman's deposition, taken earlier and introduced by him at the trial, additionally indicated that he was familiar with promissory notes and checks and knew that he signed in the place usual for a maker to sign. In his deposition he put greater emphasis upon the concept of "indorsing" when signing. At most, that tended to produce a conflict in his own testimony, which the trial court resolved against him.

(2) *Was Ehrman an accommodation party and as such discharged by plaintiff giving an extension of time to the principal debtor without Ehrman's knowledge or consent?*

[6] Plaintiff claims that Ehrman advanced this defense too late for consideration upon this appeal. Ehrman made no mention of it in his answer or during the taking of evidence. Instead, his contention then was that he signed as an indorser,

not as a maker. According to the record before us, he claimed to be an accommodation maker when on September 18, 1951, he filed a request, dated September 14, to add to the findings of fact and conclusions of law which the plaintiff had prepared, a finding that Ehrman "was an accommodation party, known to be such to the plaintiff at the time." This was nearly two months after the taking of evidence upon the trial, July 25, 1951. He states that in his brief to the trial court, prior to decision and presumably after July 25, 1951, he requested permission to amend his answer "to conform with the proof" by pleading as an additional defense that he was an accommodation party. There is no indication that he made any application to reopen the trial of the case for the consideration of this issue. Without such reopening, plaintiff would be without the benefit of presenting evidence or of cross-examining Ehrman on that issue. Under such circumstances it was quite within the province of the trial court to deny the request. We find no abuse of discretion in such a denial.

[7, 8] Moreover, even if Ehrman had pleaded and proved that he was an accommodation maker, he would not thereby have escaped liability. As a maker, whether an accommodation maker or not, he is one of the persons "who by the terms of the instrument is absolutely required to pay the same" and as such is "primarily" liable on the instrument. Civil Code, § 3266a. An accommodation party "is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Civ.Code, § 3110. Accordingly, section 3201 of the Civil Code can have no application to him. It enumerates the cases in which a person "secondarily" liable is discharged. It has no application to a person "primarily" liable. As said in Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, at page 122, 64 P.2d 138, at page 144, 108 A.L.R. 1080, "one who appears as a primary party upon the face of a negotiable note although in actuality a surety or accommodation maker, is not released by a binding extension agreement with the principal debtor made without his consent." See also People's Fin. & Thrift Co. v. Van Moon, 44 Cal.App.2d 223, 224–225, 112 P.2d 24.

[9] Even if section 3201 did apply, its subdivision (6) would not be applicable because the payee made no "binding" agreement to extend the Nolans' time of payment or to postpone the payee's right to enforce the instrument. Asked if she made an arrangement with Mr. Nolan to take his checks that were postdated, the payee replied: "The checks were not postdated. He sent them to me monthly, but Mr. Nolan had a little hard luck and asked me to hold them, which I did. I held three of them. They are still in existence." This does not indicate that the payee extended the time of payment or postponed enforcement for a particular period of time, or for a consideration; i. e., there was no "agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument," no agreement that would bring subdivision (6) of section 3201 into play even if Ehrman were a party "secondarily" liable, which he is not.

Finally, we would observe that we have found in the Negotiable Instruments Act no provision which deals with the discharge of persons primarily liable, except section 3200 which deals with the discharge of the instrument. Section 3200 does not list the extension of time to a party accommodated as the discharge of an accommodation party.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

THORP v. RANDAZZO.*

Civ. 8208.

District Court of Appeal, Third District, California.

Jan. 29, 1953.

Rehearing Denied Feb. 28, 1953.

Hearing Granted March 26, 1953.

Divorced wife's action against executor of the divorced husband's estate for a declaration of her rights under an insurance policy included in a property settlement agreement between plaintiff and the decedent. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Peek, J., held that notwithstanding the wife's agreement to waive benefits of policy and execute any instruments necessary to accomplish change of beneficiary, she had not thereby relinquished right to proceeds of such policy in case her husband died without changing beneficiary.

Reversed.

1. Husband and Wife ⇐266, 273(1)

Where wife, named as beneficiary in husband's life policy, releases her community interest in policy and husband revokes such designation of beneficiary, wife has no right to proceeds of policy on husband's death; but where he fails to revoke designation, wife is entitled to such proceeds, in absence of agreement between spouses that no right shall accrue to wife even if she remains beneficiary at time of husband's death.

2. Insurance ⇐586

The interest of life policy beneficiary, designated by insured having right to change beneficiary, is mere expectancy of gift at time of insured's death.

3. Assignments ⇐8

An assignment or release of an expectancy becomes enforceable in equity when expectancy develops into right.

4. Husband and Wife ⇐279(1)

Courts weigh carefully language of spouses' property settlement agreement before concluding that such agreement eliminates rights, disavowal of which is not necessarily connected with purpose of agreement.

5. Husband and Wife ⇐279(1)

General expressions or clauses in spouses' property settlement agreement may not be construed as including assignment or renunciation of expectancy, as of gift of proceeds of life policy on insured's death to his wife named as beneficiary.

6. Husband and Wife ⇐266

A wife, named as beneficiary in husband's life policy or will, retains status after execution of spouses' property settlement agreement, unless it clearly appears from such agreement that it was intended to deprive wife of right to take husband's property under will or policy, as well as to segregate spouses' property.

7. Husband and Wife ⇐265
Wills ⇐77

A husband's failure to revoke his will or change beneficiary of his life policy, naming his wife as beneficiary, amounts to confirmation of will or wife's designation in policy as beneficiary.

8. Husband and Wife ⇐266

Under spouses' property settlement agreement, wherein wife waived all benefits of life policies and agreed to execute any and all documents that might be required to accomplish change of beneficiary, wife did not relinquish right to proceeds of policies after husband's death without having changed beneficiary.

McAllister & Johnson, Sacramento, for appellant.

Donald B. Richardson, San Jose, Thomas J. Randazzo, San Jose, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from an adverse judgment in an action by which she sought a declaration of her rights under an insurance policy included in a property settlement agreement previously entered into between herself and her then husband, Nathan B. Thorp, deceased.

The facts, which are not in controversy, show that plaintiff and Nathan B. Thorp, were married on November 20, 1933; that

* Subsequent opinion 264 P.2d 38.

on September 29, 1943 they entered into a property settlement agreement; that shortly thereafter she was granted an interlocutory decree of divorce which became final on November 15, 1944. According to the testimony of plaintiff which was corroborated by other witnesses, including decedent's second wife, she and the deceased remained on friendly terms during the seven years intervening between the date of the execution of the property settlement agreement and his death. There was further testimony on behalf of plaintiff that the deceased had stated that he would take care of his former wife; that she would never want for anything and that he had left a life insurance policy to her. However, respondent Randazzo, over objection of plaintiff's attorney, testified that he and the deceased had discussed the policy on numerous occasions between 1943 and 1950; that the deceased had stated many times he intended to change the policy so as to make it payable to his estate; that in March 1948, decedent was under the impression that the policy had lapsed and he took no further action in regard to it.

The particular paragraph of said agreement which forms the basis of plaintiff's action is as follows:

> "Second party does hereby waive all claims to any benefits that she may have at present, or which may hereafter be derived from the following described life insurance policies upon the life of first party, including the community interest of second party therein, or in the premiums paid for said policies, and agrees to execute any and all documents that may be required by said insurance companies to complete the release of the interest of said second party in said insurance policies;
> Western States Life Insurance Company,
> Policy No. 422 482; and
> New York Life Insurance Company,
> Policy No. 16180557."

At the time of the execution of said agreement plaintiff also executed and delivered to either the deceased or his attorney a printed form entitled "Application for Change of Beneficiary" and the same remained in the attorney's possession until Nathan's death. The so-called application was never signed by Nathan nor was it ever delivered to the insurance company. The evidence further shows that sometime between 1943 and 1947 it was changed by Thorp thereby making the policy payable to his estate rather than to plaintiff who originally was named the beneficiary therein.

The pertinent findings of the trial court were that plaintiff had received and accepted all benefits to which she was entitled under the terms of said agreement; that deceased had performed all acts required of him thereunder; that plaintiff was estopped from asserting any claim to the proceeds of the policy for the reason that said agreement was a complete settlement of all the property rights of the parties and that by the terms thereof plaintiff waived all interest in said policy, its premiums or its proceeds; that by the execution of said agreement the parties intended to relinquish and waive all right to succeed or take any property from the estate of the other; that said waiver was effective from the date of the execution of said agreement, and that the defendant Randazzo, as executor of Nathan's estate, was the owner and entitled to the possession of the proceeds of said policy.

It is appellant's contention (1) that since she was the named beneficiary in said policy at the time of Thorp's death she was not barred by the terms of the property settlement agreement from receiving the proceeds of said insurance policy, and (2) that there is no evidence to support the finding of the trial court that she was estopped from asserting any claim to the proceeds of the policy. It would appear that the questions raised find complete answer in the cases of Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101 and Grimm v. Grimm, 26 Cal.2d 173, 157 P.2d 841.

In the Crane case, as here, there was a property settlement agreement and subsequent death of the husband. The contest was over a bequest to her of $1000.00. There it appeared that the agreement took

from the wife all right or claim to an interest in the property of the husband either by virtue of her status as a wife, a widow or an heir. However, the agreement contained no renunciation of the right to receive future gifts whether inter vivos, by devise or by bequest. And the court further said, "As applied to such gift, we find in the agreement no basis for an estoppel against appellant with respect to the legacy claimed in the will." [5 Cal.2d 218, 57 P.2d 478.] The court further notes that they continued on friendly terms and that the will in which the legacy was contained had been executed some time prior to the date of the property settlement agreement and that the testator lived more than two years thereafter. Likewise, in the present case the evidence shows that although the so-called change of beneficiary form had been executed at the time of the execution of the property settlement agreement the deceased had not changed the beneficiary at the date of his death in July 1950, almost seven years after the execution of those two documents. Again, here, as in the Crane case, the parties continued friendly relations during the interval between the execution of the agreement and Thorp's death.

In the later case of Grimm v. Grimm, supra, a property settlement agreement was executed which, among other things, included an insurance policy on the life of the husband wherein the wife was named as beneficiary. The agreement made the policy the separate property of the husband and gave him the right to change the beneficiary. However, he died slightly more than two years after the execution of the agreement without having made such a change. There, as in the present case, the beneficiary's claim to the proceeds of the policy was contested by the administrator of the husband's estate. In resolving the problem there presented the Supreme Court stated that although a wife released her interest in such an insurance policy she could still be a beneficiary thereof.

[1] This is true, the court there says, since "If she executes such a release and the husband revokes his designation of her as beneficiary she has no right to the insurance proceeds upon his death; but if he fails to revoke his designation of her as beneficiary, she is entitled, like any other beneficiary, to the proceeds of the policy at the time of his death." [26 Cal.2d 173, 157 P.2d 842.] However, the court noted, if the parties specifically agree that no rights were to accrue to her even though she remain the beneficiary at the time of his death she would not be entitled to such proceeds. Thus, the court says, the question to be determined is whether the parties agreed, "not only that the policy should become the separate property of the husband, but that no rights should accrue to plaintiff even though she remained the beneficiary at the time of the husband's death."

[2, 3] "The interest of a beneficiary designated by an insured who has the right to change the beneficiary is", the court there held in 26 Cal.2d at page 175, 157 P. 2d at page 842, "like that of a legatee under a will, a mere expectancy of a gift at the time of the insured's death", and when such expectancy has developed into a right it may be enforced in equity.

[4–7] And, continuing 26 Cal.2d on page 176, 157 P.2d on page 843 the court said that "In interpreting property settlement agreements courts weigh carefully the language of the agreements before concluding that they eliminate rights the disavowal of which is not necessarily connected with the purpose of such agreements." In other words, general expressions or clauses in such agreements "are not to be construed as including an assignment or renunciation of expectancies and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other." And where, as in the present case, "the husband has the power to revoke his will or to change the beneficiary named in an insurance policy his failure to do so ordinarily indicated that he did not wish to effect a change so that in effect his failure to act amounts to a confirmation of the will

or the designation of the wife in the insurance policy."

Frequently, the court noted, a husband is willing to grant more to her as a matter of bounty, than the agreement provides he is willing to give as a matter of right, since the affection of the spouses for each other may well survive separation agreements and divorce proceedings.

[8] In the present case, as in Grimm v. Grimm, supra, under the particular provision of the property settlement agreement the insurance policy was like any other community property that was to become the separate property of the husband. Although she did execute a change of beneficiary form it was for him to decide whether to use it or not. Again, here, as in both the Crane and Grimm cases, it is significant that the husband lived for several years after making the agreement—in fact the deceased here lived longer thereafter than either of the decedents in those cases. It is of further significance in the present case that he did remove her as the beneficiary in the New York Life policy but that he did not do so in the policy here in question even though his counsel repeatedly requested him to do so.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



STEWART v. STEWART. *

Civ. 4498.

District Court of Appeal, Fourth District, California.

Jan. 27, 1953.

Rehearing Denied Feb. 20, 1953.

Hearing Granted March 26, 1953.

Application by divorced mother for custody of two children. The mother appealed from order of the Superior Court, Orange County, Raymond Thompson, J., denying custody. The District Court of Appeal, Barnard, P. J., held that where custody provision of divorce decree did not determine fitness, but, pursuant to stipulation, provided that if question of custody should arise, evidence of fitness could be introduced, burden rested on divorced mother seeking change of custody to show change of circumstances and her fitness.

Order affirmed.

1. Parent and Child ⇐2(4)

Before custody can be taken from parent and placed in a stranger there must be a finding that the parent seeking custody is unfit.

2. Divorce ⇐303(3), 312.6(3)

Application for modification of an award of custody is addressed to the sound legal discretion of the court and every presumption supports the reasonableness of the order fixing the custody of children.

3. Divorce ⇐303(3)

To warrant a modification of the order for custody a sufficient change of circumstances must be shown and the burden is on the moving party to satisfy the court that conditions have sufficiently changed to justify the modification.

4. Divorce ⇐303(3)

Where custody provision of divorce decree did not determine fitness, but, pursuant to stipulation, provided that if question of custody should arise, evidence of fitness could be introduced, divorced mother seeking change of custody had burden of showing change of circumstances and her fitness.

5. Divorce ⇐303(3)

In proceeding by divorced mother for change of custody, evidence was insufficient to establish her fitness.

Will H. Winston, Long Beach, for appellant.

Leonard Di Miceli, San Pedro, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying an application for the modification of previous orders concerning the custody of two

* Subsequent opinion 260 P.2d 44.

children, a boy 11 years old and a girl 9 years old.

On February 3, 1949, the defendant and cross-complainant was given an interlocutory decree of divorce. This decree approved a property settlement agreement entered into by the parties, which contained a provision that the custody of these children should be given to the sister of the defendant and her husband, and pursuant to that provision the decree gave such custody to those parties. The decree also contained a statement that nothing was determined by the court as to the fitness of either party to have the custody of the children, by reason of the fact that the parties had stipulated that no order should then be made with reference to that matter, but that at any time in the future when the question of custody should arise "evidence can be introduced by any interested party at the time of the hearing as to any acts or things, past or future, which might bear upon the question of the fitness of the party desiring such custody."

On June 24, 1950, the plaintiff married another man. On November 15, 1950, the court modified its previous custody order by giving the plaintiff the right to visit the children every other Sunday from 1:00 P.M. to 7:00 P.M. On January 21, 1952, the plaintiff filed an application for a modification of the previous custody orders alleging that conditions had materially changed since those orders were made in that she had remarried, that she and her husband were happily married and had purchased a home, and she now had the ability to provide a suitable home for the children. It was also alleged that she and her husband are both fit and proper persons to have custody of the children. An affidavit in opposition was filed by the aunt and uncle, who had custody of the children under the previous order. At the hearing, oral evidence was received which makes a transcript of 50 pages, and the court talked to the children in the presence of counsel for both sides but what was there said does not appear in the record. The court entered an order denying any modification of the previous custody orders, and decreeing that the existing orders concerning custody of the minor children should remain unchanged.

The plaintiff has appealed from this order, the sole contentions being that she made a sufficient showing of changed circumstances, and that "the mother has the absolute right to the custody of the children as against strangers."

[1] In Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, the father was given the divorce by default but no provision for custody of the 5-year old child was made. The child remained with the mother, and four years later she sought an order for custody in connection with a demand for support money. No reporter was present at the hearing, and the court gave custody to the paternal grandparents without any finding as to the fitness of either parent. The order was reversed, it being held that a finding as to the fitness of the mother should be made. A similar holding appears in Newby v. Newby, 55 Cal.App. 114, 202 P. 891. In Eddlemon v. Eddlemon, 27 Cal. App.2d 343, 80 P.2d 1009, custody was given to the grandmother by stipulation of the parties at the time of the divorce. At a hearing two years later, custody was denied to the mother and continued in the grandmother. No finding was made that the mother was unfit, and the undisputed evidence shows that both she and the grandmother were fit persons to have such custody. It was held that before custody can be taken from the parent and placed in a stranger there must be a finding that the parent seeking custody is unfit.

[2, 3] It has also been held that an application for modification of an award of custody is addressed to the sound legal discretion of the trial court, Fay v. Fay, 12 Cal.2d 279, 83 P.2d 716; that every presumption supports the reasonableness of the order fixing the custody of children, Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; that to warrant a modification of an order for custody a sufficient change of circumstances must be shown, Smith v. Smith, 85 Cal.App.2d 428, 193 P.2d 56; and that the burden is on the moving party to satis-

fy the court that conditions have sufficiently changed to justify the modification. Johnson v. Johnson, 72 Cal.App.2d 721, 165 P.2d 552.

[4, 5] In the instant case custody was not taken from the appellant without her consent. The original order of custody was made in accordance with a written agreement of the parties, approved by the court and made a part of the decree. It was further stipulated in the divorce hearing that no order need then be made concerning the fitness of the parties and that if any question as to custody of the children should be later raised, evidence might be presented as to both past and future acts of the parties having a bearing on the question of the fitness of the party desiring to obtain such custody. Under these circumstances, and especially in view of the unusual stipulation, as contained in the decree, with respect to the evidence that might be received concerning fitness in the event of a later proceeding to change the award of custody, we think the burden rested on the party seeking to obtain such a change in the existing order, not only to show a change of circumstances but to affirmatively show that the applicant was a fit and proper person to have such custody.

The appellant's petition alleged changed conditions in that she had remarried and had purchased a home, and alleged that she and her husband were fit persons to have such custody. She introduced evidence that she had remarried; that she and her husband had purchased a home about a month before the hearing, which home was partially unfinished but suitable for two adults and two children; and that, while she was presently working, she would resign from her job, if given the custody of the children. She offered no direct evidence on the issue of fitness. On cross-examination she admitted that prior to the modification order of November 15, 1950, she had given birth to a child born out of wedlock, stating that she had placed that child "out for custody", signing some papers which the authorities informed her she could not revoke. The record does contain a report of the probation officer dated prior to the hearing, but filed after the hearing and after a minute order denying the application for a change in custody. In this report the probation officer stated that his investigation indicated that the appellant and her husband "appeared to have conducted themselves in a proper manner" from November 1, 1950, until the present time. This hearsay evidence was not very satisfactory and it does not even appear that that alleged fact was called to the attention of the court at the hearing.

At best, the appellant made an unsatisfactory showing with respect to the matter of her fitness. A large part of such meager evidence as there was on this matter seems favorable to the respondent. The evidence seems to have been presented, by the appellant, on the assumption that no showing in that regard was needed, which probably accounts for the court's failure to make a finding on this matter. The failure to make such a finding must also be viewed in light of the fact that the original custody order was made in accordance with the written agreement of the parties, and in accordance with a further stipulation which, in effect, called for a very special showing of fitness in the event it was later sought to change the order of custody agreed upon. No such showing was made, and no good reason was presented for relieving appellant from her written agreement. Under the circumstances here appearing, and in the absence of any further showing, we think no abuse of discretion appears and that the record does not justify a reversal.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

115 Cal.App.2d 769

HOWARTH v. HOWARTH.

Civ. 19122.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1953.

Hearing Denied April 2, 1953.

Action by divorced wife to recover subsequently accrued installments under the same property settlement agreement under which the wife had previously successfully brought a similar action. The Superior Court, Los Angeles County, Kenneth C. Newell, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Patrosso, J. pro tem., held that since the parties had litigated in the prior proceeding the questions of whether the agreement had been incorporated and merged in the Utah divorce decree so that the payments under the agreement were in the nature of alimony and therefore subject to modification by the Utah court, and whether any attempt by California court to enforce payment thereof constituted a violation of the full faith and credit clause of the Federal Constitution, defendant was estopped from re-litigating the same questions in the instant proceeding.

Affirmed.

1. Judgment ⇐603

Judgment for plaintiff on one installment due under property settlement and separation agreement is not a bar to an action for a subsequently accruing installment, but it is a conclusive adjudication as against defendant of everything determined therein, including plaintiff's rights under the contract and right to maintain an action thereon.

2. Judgment ⇐720

Where divorced husband and wife had litigated in action by wife to recover accrued installments under property settlement agreement the questions whether the agreement had been incorporated and merged in the Utah divorce decree so as to be subject to modification and whether any attempt by California court to enforce payment under agreement constituted violation of full faith and credit clause of Federal Constitution, husband was estopped from re-litigating the same questions in subsequent action instituted by wife to recover subsequently accrued installments under the same property settlement agreement. U.S.C.A.Const. art 4, § 1.

L. M. Cahill, Los Angeles, for appellant.

William J. Donahue and Riccardi & Webster, Pasadena, for respondent.

PATROSSO, Justice pro tem.

This action was instituted by plaintiff to recover subsequently accrued installments under the same property settlement agreement executed between herself and her former husband, the defendant herein, which was the subject of a previous action between the same parties. The judgment rendered therein, in favor of plaintiff, was affirmed upon appeal by this court. Howarth v. Howarth, 81 Cal.App. 2d 266, 183 P.2d 670. The opinion in that case sets forth at length the terms of the agreement and they need not be restated here.

An examination of the previous opinion of this court and appellant's brief herein, discloses that appellant's attack upon the judgment appealed from is based upon the identical grounds assigned upon his appeal from the judgment in the previous action, and all of which were decided adversely to him by the court. Under the circumstances no detailed consideration thereof is required.

[1, 2] Briefly stated, appellant's primary contention is that the agreement sued upon was incorporated and merged in the decree granted by the District Court in and for Tooele County, Utah, in the divorce action between the parties, and as corollary thereto (a) that the payments under said agreement were in the nature of alimony and hence subject to modification by the Utah Court, and (b) any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the Federal Constitution. In the previous action between the parties heretofore adverted to, the Superior Court in and for the County of Los Angeles decided each of these contentions adversely to appellant, and, as stated, upon appeal this judgment was affirmed. Hence appellant is

estopped from re-litigating the same questions in the instant proceeding. "A judgment for the plaintiff on one installment is not a bar to an action for a subsequently accruing installment; it is, however, a conclusive adjudication as against the defendant of everything determined therein, including the plaintiff's rights under the contract and his right to maintain an action thereon." (15 Cal.Jur., p. 156, sec. 202, and cases there cited.) Moreover, were we at liberty to re-examine the question sought to be presented, we see no reason to depart from the views expressed with reference thereto upon the prior appeal.

The judgment is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.



115 Cal.App.2d 544

LERNER et al. v. RIVERSIDE CITRUS ASS'N et al.

TAVAGLIONE et ux. v. RIVERSIDE CITRUS ASS'N et al.

Civ. 4474, 4475.

District Court of Appeal, Fourth District, California.

Jan. 27, 1953.

Hearing Denied March 26, 1953.

Two actions, consolidated for trial and on appeal, for alleged fraud of marketing association and its agent in securing contracts for handling and sale of plaintiffs' orange crops through facilities of marketing association. The Superior Court, Riverside County, O. K. Morton, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to support finding that agent made alleged fraudulent representations, that plaintiffs relied on representations and were induced to enter into contracts, and that representations were proximate cause of plaintiffs' damages.

Affirmed.

1. Fraud ⇐13(3)

The person who makes a statement implying knowledge, when in fact he has no knowledge whether the statement is true or false, is equally guilty of fraud, if the statement proves to be false, as if he had wilfully asserted that to be true which he knew to be false. Civ.Code, § 1710, subd. 2.

2. Fraud ⇐58(1, 4)

In actions against marketing association and its agent for fraud in securing contracts for handling and sale of plaintiffs' orange crops by representing that net proceeds to owners of oranges marketed by association during current season were greater than they in truth were, evidence was sufficient to support findings that agent made alleged fraudulent representations, that plaintiffs relied on representations and that representations were proximate cause of plaintiffs' damages.

3. Agriculture ⇐6

Where plaintiffs were induced to enter into contracts with marketing association for handling and sale of their orange crops and to sign membership cards in association by fraudulent representations of association's agent as to price being obtained for crops by other orange growers, who were members of association, no legal membership in association was effected, and plaintiffs were not bound by association's by-laws.

4. Fraud ⇐64(5)

Where association's agent made fraudulent representations as to the price being paid for crops by association to orange growers, who were members of association, and plaintiffs relied upon representations and were induced thereby to dispose of their crops through association, whether plaintiffs were entitled to rely upon false representations was factual question to be determined by trial court, in actions for fraud.

5. Fraud ⇐58(1)

In actions for alleged fraud of marketing association and its agent in securing contracts for handling and sale of plaintiffs' orange crops through facilities of marketing association, evidence was suffi-

cient to support findings as to value of plaintiffs' orange crops.

6. Fraud ⇐59(3)

Damage for fraud of marketing association and its agent in securing contracts for handling and sale of plaintiffs' orange crops was the difference between value of plaintiffs' crops and amount actually received from association by plaintiffs. Civ. Code, § 3343.

Wood, Crump, Rogers, Arndt & Evans, Guy Richards Crump, Los Angeles, Walter Clayson and Donald Stark, Corona, for appellants.

Thompson & Colegate, H. L. Thompson, Riverside, for respondents Lerner and Spiegel.

Best, Best & Krieger, Gerald Brown, Riverside, for respondents Tavaglione.

GRIFFIN, Justice.

These two actions are for alleged damages due plaintiffs from defendants for claimed fraud practiced in securing contracts for the handling and sale of plaintiffs' orange crops through the facilities of defendant Riverside Citrus Association. The complaints in both cases are similar in nature. By stipulation they were consolidated for trial and on appeal. The briefs of appellants raise the same points.

The Tavaglione complaint alleges generally that during March, 1948, defendants solicited and obtained from plaintiffs an agreement for the picking, packing, handling and marketing of the citrus fruit then growing on plaintiffs' property; that with intent to deceive and defraud plaintiffs and to induce them to contract with defendants, they falsely and fraudulently represented to plaintiffs that the net proceeds to the owners for navel oranges picked, packed, hauled and sold by defendant association for the then current season, had averaged approximately three and one-tenth cents per pound net to the grower; that in fact the net proceeds to the owners for such oranges had averaged only one and sixty-two hundredths cents.

The damage claimed was $3996.18, based on 214,489 pounds, which it is alleged returned to plaintiffs the sum of $2,652.98.

Defendants answered and denied generally the allegations of the complaint, admitted the net returns to growers for the season involved did not amount to 3.10 cents per pound or any sum in excess of 2.01 cents; that of the 214,489 pounds of navel oranges picked, defendant association packed and sold 128,988 pounds; that 14,680 pounds were sold in loose form; and that 64,101 pounds were sent to by-product plants, leaving 6,720 pounds of culls which were unfit for use; that defendants paid plaintiffs the net return of $3,121.56.

Defendants counterclaimed for a mistaken overpayment of $115.24, and cross-complained for liquidated damages in the amount of $4,050, for alleged violation by plaintiffs of the by-laws of the association while plaintiffs were members of it.

As to the Lerner complaint, it is alleged that on March 28, 1948, defendant association, through its agent, defendant Heinze, solicited plaintiffs to handle their crop of oranges; that plaintiffs advised defendant Heinze that plaintiffs had been offered $3.10 per cwt. for the fruit on the trees, and all expense of picking, packing, and selling was to be borne by the purchaser; that defendants fraudulently represented to plaintiffs that the net receipts for navel oranges picked, packed and hauled by defendant association up to March 28, 1948, for the then present season, had averaged $3.31 per packed box, when in truth it averaged only $1.62. Plaintiffs' complaint was amended to allege that the market value on March 28, was $3.10 per cwt. or $4,665.53, on the Esther Lerner property, and $7,713.63 on the remaining property. As to the Esther Lerner property $2,240.54 damages were claimed. As to the other property, it is alleged that 150,501 pounds or 1374 packed boxes were taken from that property, and that the net return of $1.86 per packed box was paid to plaintiffs. The prayer for damages was $3,659.45.

The answer denies the material allegations of the complaint and avers that defendant association picked 2842 field boxes

weighing 150,501 pounds and packed and sold 1608 packed boxes and 122 packed boxes in loose form or the equivalent of 370 packed boxes of 22,206 pounds and picked 4,788 field boxes weighing 248,827 pounds from the remaining property equivalent to 2,575 packed boxes; that it sold in loose form the equivalent of 428 packed boxes and delivered for processing the equivalent of 442 packed boxes or 26,509 pounds; that from the Esther Lerner property there were 55 boxes of culls not saleable and the other property 129 such boxes; that defendant association paid plaintiff Esther Lerner $2,640.71 and the other plaintiffs $4,485.67. Judgment was in favor of Esther Lerner for $2,024.82 and the other plaintiffs, Sidney Lerner and Bernice Spiegel for $3,227.96. The court found against defendants on their counterclaim and cross-complaint.

The main contention on appeal is that the evidence is insufficient to support the court's findings, which findings generally are in accord with the allegations of plaintiffs' complaints. The court specifically found that the statement made by the association's agent, that the net receipts to growers dealing through the association up to March 29, 1948, averaged $3.31 per packed box, was false and untrue and made without regard to its truth or falsity because the association was not able to ascertain the net return for such crops until the close of that final year; that defendants picked and marketed from the grove belonging to Esther Lerner and other plaintiffs the amounts set forth in defendants' answer, and found that the net return from the Esther Lerner grove was $2640.71, and the others $4485.67; that the reasonable market value of oranges growing on the trees of Esther Lerner was $3.10 per cwt. or $4,665.53, and the sum of $3.10 per cwt. on the trees of the other plaintiffs, valued at $7,713.63. Judgment was for the difference.

As to the Tavagliones, there was a similar finding that the amount defendants picked, packed and marketed, sold in loose form and delivered to by-products, as well as culls, amounted to the total indicated in defendants' answer; that the net returns were $3,168.64, and that the market value of the fruit growing on the trees was $6,649.16. Damages were for the difference or $3,480.52.

[1] It has been held that the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, is declared by the code to amount to actual fraud. If, therefore, one asserts that a thing is true within his personal knowledge, or makes a statement as of his own knowledge, or makes such an absolute, unqualified and positive statement as implies knowledge on his part, when in fact he has no knowledge whether his assertion is true or false, and his statement proves to be false, he is as culpable as if he had willfully asserted that to be true which he knew to be false, and is equally guilty of fraud. Civ.Code, § 1710, subd. 2; Daley v. Quick, 99 Cal. 179, 33 P. 859; 12 Cal.Jur. p. 747, sec. 27.

Defendants, in their briefs, concede that the evidence shows that Heinze, the agent of defendant association, made the representations claimed (although Heinze denies making them) to M. H. Lerner, an experienced grower who was well versed in the method of growing and handling fruit through associations, and who was, at all times, acting as agent for his wife and children in handling the groves involved.

It appears from the evidence that plaintiffs did sign membership cards in defendant association, agreeing to allow the association to pick, pack, and handle their fruit through regular channels of the association, and that M. H. Lerner had previously been a member of another cooperative association and that Tavaglione had previously been a member of defendant association but had withdrawn therefrom. Tavaglione claimed that he did not know what he was signing at the time he signed the membership card due to the fact that he did not have his glasses, as well as other claimed reasons, and the court so found. It also found that he was not a member of the association by reason of the fraud. It is plaintiffs' position, and

the court so found, that by reason of the false and fraudulent statements of the agent of the defendant association, they were induced to sign the membership cards and enter into the contract with the association, and had it not been for such false representations they would not have done so. Although the finding that Tavaglione did not know what he was signing may be questioned, we conclude that such finding is immaterial in view of the general finding that plaintiffs were induced to sign by reason of the false representations of defendant association's agent, which finding is amply supported by the evidence.

The main argument is that there is no causal connection between the representation that the members of the association for the then current season, "had averaged approximately $3.10 per cwt. net to the grower", and what plaintiffs' fruit thereafter sold for, i. e., no matter what representations defendants made or might have made to plaintiffs as to past returns to growers, the truth or falsity thereof would not or could not affect subsequent returns; that plaintiffs received for their oranges precisely what they were worth in the market when sold, and since the returns were in fact proportionately the same as those paid to all other members of defendant association, plaintiffs cannot be heard to complain, citing such authority as 37 C.J.S., Fraud, § 42, p. 296; and 23 Am.Jur. 995, sec. 176. We see no merit to this claim.

[2] The court found, and the evidence supports the finding, that defendants made a false and fraudulent representation as to an existing fact; that plaintiffs relied upon this representation and were induced by it to contract with defendants. The circumstances are such that the court was justified in holding that this representation was the proximate cause of the damage suffered by plaintiffs.

The next argument is that plaintiffs had no right to rely on the representation made by defendant association's agent because of the fact that plaintiffs or their agent had been a member of an association and had agreed to become members in defendant association; that they were familiar with the manner in which fruit is picked, packed, and marketed by such association, and accordingly, they were not justified in relying upon any representations of defendant association's agent which would in any wise conflict with this arrangement or the by-laws of the association; that every member of the association must be held to have knowledge of all the elements which enter into cooperative marketing agreements, citing such cases as California Canning Peach Growers v. Downey, 76 Cal.App. 1, 15, 243 P. 679; and Marshall-McCartney Co. v. Halloran, 15 N.D. 71, 106 N.W. 293.

[3] The argument is premised mainly on the claimed membership of plaintiffs in defendant association by reason of the signed membership cards executed after the making of the false representations alleged. If the signing of such membership cards was obtained by reason of the false representations made and relied upon by plaintiffs, as found by the court, no legal membership in defendant association was effected, and accordingly, plaintiffs were not bound by its by-laws or the by-laws of any other association of which they were not members. Accordingly, there is no merit to the claim of defendants that "neither Heinze nor anyone else could guarantee or assure any member of the association that he would receive any larger or different sum for his oranges than other members whose oranges were being handled in the same pool would receive".

[4] The trial court found, upon sufficient evidence, that the false and fraudulent representations were made, that plaintiffs relied upon them, and were deceived and induced thereby to dispose of their fruit through defendant association, rather than accept a previous offer from another source of $3.10 per cwt. on the trees. Whether plaintiffs were entitled to rely upon said false representations was a factual question to be determined by the trial court. Troy Laundry Machinery Co. v. Drivers', etc. Co., 14 Cal.App. 152, 155, 111 P. 121; Neher v. Hansen, 12 Cal.App. 370, 107 P. 565; 12 Cal.Jur. 751, sec. 30.

[5] The final argument is that there is no evidence that plaintiffs' oranges at the

time they were sold by defendant association for plaintiffs, were worth any more than was received by the association; that section 3343 of the Civil Code is the exclusive measure of damages in actions for fraud in the sale of property, and plaintiffs were accordingly only entitled to recover the difference between the actual value of that with which they parted and the actual value of that which they received, citing Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935; and Oliver v. Benton, 92 Cal.App.2d 853, 208 P.2d 375. This court considered this section in Lobdell v. Miller, 114 Cal.App.2d 328, 250 P.2d 357, where the Bagdasarian case and other cases therein cited were discussed.

It should be remembered that M. H. Lerner testified that the reasonable market value of the fruit on the trees on March 28, 1948, was $3.10 per cwt. He offered in evidence an agreement signed by the agent of another association, subject to approval of the "main office", dated March 12, 1948, wherein that association agreed to buy plaintiffs' crop of navel oranges growing on the trees at that price. The picking and hauling was to be done at the expense of the association. Lerner's testimony is that he showed this agreement to defendant Heinze at the time and that Heinze told him "he didn't make a good sale; that his house was paying much more"; that he later phoned to Heinze that the other association did not want to pick the fruit when they agreed to pick it, and that he was going to take it away from them, and he wanted to know what the actual returns of defendant association to plaintiffs would be and that Heinze said: "How fortunate" plaintiff was because he had the returns in his pocket, and that "up to this time the house has paid the growers $3.31 a packed box"; that he asked him "how come" your house is paying a little more than competitors, and Heinze said they were anxious to obtain plaintiffs' fruit because of its high quality, and that they had an "in" on "some loose-fruit deal where they make a terrific profit"; that he then told Heinze if that is what his returns were he would be willing to ship his fruit through his association.

Tavaglione testified to a similar approach by Heinze; that he told Heinze he was offered 3¢ per pound for his fruit cash on the trees; that Heinze praised the quality of plaintiffs' fruit, brought out a few record sheets and displayed them and said: "We are averaging 3.10 cents by this; you will get 3.10 cents * * * on the trees". He then testified that the reasonable market value of his fruit on the trees as of March 23, 1948, was $3.10 per cwt. or more.

[6] It is apparent that this price included all grades of oranges and that the reasonable or actual value of the property with which plaintiffs parted was 3.10 cents per pound on the trees, and this was the basis used by the court in its determination, and not the basis suggested by defendant association. The evidence supports the court's conclusion in this respect. The damage, therefore, would be the difference between that amount and the amount actually received by plaintiffs from defendant association.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.



115 Cal.App.2d 678

PEOPLE v. ROYALE et al.
Cr. 4787.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1953.

Rehearing Denied Feb. 13, 1953.

Hearing Denied Feb. 26, 1953.

Defendants were convicted in the Superior Court, Los Angeles County, William B. Neeley, J., of grand theft, and from orders denying their motions for new trial, they appealed. The District Court of Appeal, Fox, J., held, inter alia, that the evidence sustained the convictions.

Affirmed.

1. Larceny ⇐65

Convictions for grand theft were sustained by evidence.

2. Criminal Law ⇐1144(13), 1159(2)

Before judgment of conviction may be reversed on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below, and appellate court must assume, in support of judgment, existence of every fact which trial court could have reasonably deduced from evidence and then determine whether facts justify inference of guilt, and if circumstances reasonably justify determination of trier of facts, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendants will not warrant a reversal.

Patricia Ann Royale and Henry Bellows, pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

The defendants were convicted on three counts of grand theft. Following the denial of their respective motions for a new trial, proceedings were suspended and defendants were granted probation. They appeal from the orders denying their motions for a new trial.

The complaining witness, Mrs. Marie Blackwell, had known Miss Royale since 1942 when they were neighbors, and had met defendant Bellows in 1945, when her husband was living. In May, 1949, defendant Royale called twice on Mrs. Blackwell telling her that she had married Mr. Bellows who was a millionaire, and that they lived on a very lovely boat in Newport Bay. On the second visit Miss Royale told Mrs. Blackwell that Mr. Bellows had sent $5,000 to her (Mrs. Blackwell) in case she needed it because of Mr. Blackwell's recent death. Mrs. Blackwell said she did not need it. Miss Royale then invited Mrs. Blackwell to visit them on the boat, which she did a short time later. While on the boat defendant Royale stated that whatever Bellows touched turned to gold. He then told her "about the ten millionaires" who "had come to the table and each put in a million dollars * * * put it in investments." Defendants named the ten millionaires who made up the group; they included Harold Lloyd, Mary Pickford, Howard Hughes, the Goulds, the Vanderbilts, the DuPonts, and M.G.M.; they would come together once a week to make investments. Bellows mentioned an island they were going to buy with war surplus on it which the United States Government had left there; they would make a huge profit in selling the goods. He also said they planned to purchase buildings that were unfinished because of lack of finances and complete them and sell them at a big profit. They would, of course, invest in a variety of other things.

Bellows told Mrs. Blackwell that he was a Russian nobleman; had a lot of money; had invested several million dollars in England and Palestine; and was a troubleshooter at M.G.M., getting $150,000 a year. He also explained that he had invented a cure for cancer (which had been the cause of Mr. Blackwell's death) and that she would play a definite part in its development.

Defendants offered to cut her in on the pool. They urged that she liquidate all she could—even suggesting that she sell her home and put it into this venture. They also stated that they would make up any loss she might sustain. On June 12, 1949, Mrs. Blackwell gave Miss Royale her check for $5,000 to put into this investment pool. It was deposited in Miss Royale's bank account.

The next day defendants came to Mrs. Blackwell's home in Los Angeles. Bellows took the women, including Mrs. Blackwell's daughter and her friend, to lunch at a Hollywood hotel. After lunch Miss Royale accompanied Mrs. Blackwell on a shopping tour in Hollywood buying her three dresses and a pair of shoes. Miss Royale explained that her husband, Mr. Bellows, gave her some money to spend and these

purchases were going to be a belated Mother's Day present for her. Bellows took the group to dinner. When Mrs. Blackwell thanked him for the presents he replied, "Oh, that is nothing. Your money made over a thousand dollars overnight."

While at the Blackwell home on that occasion Miss Royale gave Mrs. Blackwell a promissory note, signed by her, for $5,000. She explained that the purpose for giving this note was that in case anything should happen to her Mrs. Blackwell could collect from her estate.

Some two weeks later defendants told Mrs. Blackwell that the millionaires "were coming to the table again," and that she should put in all the money she possibly could. On that occasion she gave Miss Royale another check for $2,000. A few days later Miss Royale asked the complaining witness to put $5,000 more into the pool. Miss Royale explained to her that the pool was "making good money." Mrs. Blackwell gave her a check for $3,500. Soon thereafter Miss Royale asked her for an additional $1,500, saying that the "millionaires were coming together." Mrs. Blackwell gave her a check in that amount. All of these checks were deposited in Miss Royale's bank account.

As in the first instance, promissory notes were given by Miss Royale to Mrs. Blackwell covering these later transactions. The complaining witness testified that she believed the representations that were made to her by the defendants; that she had confidence in them, and advanced these various amounts in reliance upon their statements and representations. She further testified that these transactions were not loans.

The testimony discloses that funds had been procured by the defendants from a number of other people by means of similar representations. It further appears that the demands of some of these people were paid from the funds realized from Mrs. Blackwell. A representative of Metro-Goldwyn-Mayer's studios testified that they had a contract with defendant Bellows in October, 1945, for the finished treatment of one of their scenarios for a total consideration of $4,500, and that defendant Bellows had no other contract or employment with their studios. A representative of the Mary Pickford Enterprises, and the general manager of the Harold Lloyd Corporation testified that their organizations were not acquainted with defendant Bellows and had not advanced any money for any investment pools. A search by the assessor's office of Orange County revealed that there was no property assessed in the names of the defendants, and that the boat on which they were living was assessed to a third party.

[1, 2] The defendants argue that the evidence is insufficient to sustain the judgment of conviction. This contention is not well founded. Before a judgment of conviction may be reversed on the ground of the insufficiency of the evidence it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. An appellate court must assume, in support of the judgment, the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts "justify the inference of guilt." People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259, 263. If the circumstances reasonably justify the determination of the trier of the facts, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendants will not warrant a reversal. People v. Newland, supra; People v. Gould, 111 Cal.App.2d 1, 243 P.2d 809.

From the recited evidence the trial court could reasonably conclude that the defendants' story about the meetings of a group of millionaires for the purpose of establishing an investment pool was untrue; that defendant Bellows was not a member of any such group; that no investment pool was ever established; that the existence of such a group of financially successful people and the establishment of such an investment pool were material considerations in causing Mrs. Blackwell to part with her $12,000. The intent to de-

fraud may be inferred from the fact that similar fraudulent representations were made to other people; that no investment pool was ever established; that a portion of Mrs. Blackwell's funds was used to pay the demands of others who had been fraudulently drawn into defendants' operations and the balance used for their ordinary living expenses; and from the conduct and false statements of the defendants. That an actual fraud was committed is established by the fact that although Mrs. Blackwell demanded the return of her money she only received $100. She testified that she had confidence in the defendants and relied on their statements. This supports the implied finding that she parted with her money in reliance upon the false representations of the defendants. Thus all the elements of grand theft based on the theory of obtaining money by false pretenses are established. People v. Frankfort, 114 Cal.App.2d 680, 251 P.2d 401.

Defendants contend that the court erred in refusing to allow a substitution of attorneys for the purpose of making a motion for a new trial. There is no merit in this point. At the time set for the hearing on the motion for a new trial one of the trial attorneys for the defendants advised the court that the defendants no longer had confidence in him and his associate and that defendants requested that counsel make a motion that they be substituted out of the case. No other counsel had been employed, and no arrangements appear to have been made for such employment. There was no transcript of the evidence. After explaining to the defendants that they had been well represented and that another attorney could not well argue a motion for a new trial in the absence of a transcript of the record, the trial court continued the matter until the middle of that afternoon. Upon the resumption of the hearing the court was advised by counsel that "Mr. Bellows has no objection to me arguing the motion for a new trial, and Miss Royale neither; and I am prepared to do it." This indicates that the defendants were agreeable to having their motion for a new trial presented and argued by the attorneys who had tried the case. The trial court thereupon directed counsel to proceed. It is clear that there was no abuse of discretion in this matter.

The orders denying the respective motions of the defendants for new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.



115 Cal.App.2d 735

SWEET v. MARKWART et al.

SWEET v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Civ. 8353, 8372.

District Court of Appeal, Third District, California.

Feb. 2, 1953.

Rehearing Denied March 4, 1953.

Action to recover the share of profits which the parties had allegedly agreed that the plaintiff should receive for executive, field, and engineering services rendered by plaintiff. The Superior Court, Sacramento County, Malcolm C. Glenn, J., rendered judgments of nonsuit and judgments upon direct verdicts and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that where the difficulties encountered in perfecting record on appeal were due to both parties, appeal would not be dismissed for want of prosecution.

Decision in accordance with opinion.

1. Appeal and Error ⇐347(1)

Where no new trial proceedings were begun, date of entry in permanent minutes of minute order granting nonsuits mark the beginning of time within which an appeal could be taken from nonsuits.

2. Appeal and Error ⇐428(2), 430(1)

Where order granting motions for nonsuits was entered in permanent minutes on February 23, 1951, notice of appeals from orders of nonsuit filed June 1, 1951 was not timely and appeals would be dismissed.

3. Appeal and Error ⇐624

The rule granting to Superior Court the power to grant ex parte an initial extension of time for appellant to file proposed statement of appeal does not put it beyond power of Superior Court in a proper case to grant ex parte extensions after an initial extension granted ex parte. Rules on Appeal, rules 7, 45 (b).

4. Appeal and Error ⇐619

It is the duty of an appellant to proceed diligently to procure and file his record on appeal.

5. Appeal and Error ⇐566

Where appellant files proposed statement on appeal, respondent has no right to propose amendments which he knows ought not to be allowed and he must engage in no dilatory tactics not justified by the condition or content of the proposed statement. Rules on Appeal, rule 7.

6. Appeal and Error ⇐655(3)

A motion to strike proposed statement on appeal filed by appellant is not a means of testing the propriety or sufficiency of the proposed statement except in extreme cases where it can be said that the statement is fraudulent or sham. Rules on Appeal, rule 7.

7. Appeal and Error ⇐989

The test on plaintiff's appeal of propriety of judgments of nonsuits and judgments on direct verdicts is whether, taking as true all evidence tending to prove plaintiff's causes of action, drawing all permissible favorable inferences therefrom, and disregarding all evidence that does no more than raise a conflict with the evidence favorable to plaintiff, it can be said that upon no legal theory has the plaintiff made a prima facie showing of his right to recover. Code Civ.Proc. § 630.

8. Appeal and Error ⇐695(2)

The record on appeal from judgments of nonsuits and judgments on direct verdicts need not include all the evidence and ought to exclude in the interest of brevity all evidence that is merely contradictory of the evidence favorable to plaintiff.

9. Appeal and Error ⇐627(2)

Where the difficulties encountered in perfecting record on appeal were due to both parties, appeal would not be dismissed for want of prosecution. Rules on Appeal, rules 4, 7.

Earl D. Desmond and E. Vayne Miller, Sacramento, for appellant.

Russell A. Harris and Devlin, Diepenbrock & Wulff, Sacramento, Brobeck, Phleger & Harrison, San Francisco, Lewis, Lewis & Lewis, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

Three matters having to do with the appeals herein have been presented to this Court for decision. Appellant has petitioned this Court that it issue its writ of mandate directed to the trial court ordering it to settle appellant's proposed statement on appeal under Rule 7 of the Rules on Appeal in order that he may engross the same and file it with this Court. Concurrently, respondents have moved to dismiss the appeals on various grounds. Appellant has petitioned this Court for relief from default in that he has not as yet filed his record. All three matters were heard together and we shall take them up and dispose of them in a single decision.

By his second amended complaint appellant sued respondents Earl H. Markwart, C. W. Howard and American Trust Company, a corporation. The complaint contained five counts, four of them in common count form. The fifth, undoubtedly treating of the same subject matter covered by the common counts, ran as follows: During the years 1946 and 1947 Earl H. Markwart, under the business name of Markwart Industrial Equipment Company, entered into six separate contracts to construct and install certain industrial machinery and aircraft cleaning equipment at prices aggregating $385,860.71. Before Markwart entered into these contracts he made an agreement with plaintiff whereby plaintiff was to aid in obtaining these contracts and to perform executive, field, and engineering

services, necessary in the performance thereof. On completion he was to receive 40% of the net profits. While these contracts were still executory, Markwart by written agreement assigned all his assets, including his interest in these contracts, to defendant Howard for the benefit of his creditors, including American Trust Company, which company was party to the assignment. Both Howard and American Trust Co. shortly thereafter agreed with plaintiff that he was to continue to furnish executive, field, and engineering services as agreed with Markwart until the contracts were completed and was to receive from Howard and the American Trust Company the same share of profits which Markwart had agreed he should have. Plaintiff performed all of his obligations under these agreements. Defendants Howard and American Trust Company received payment of the contract prices but failed and refused to pay plaintiff his 40% of the profits which plaintiff alleged to amount to the sum of $24,980.05. During the pendency of the action defendant Howard died and Helen Howard was substituted as executrix of his will. The answers of the various defendants, speaking generally, denied essential allegations of all five counts and the cause proceeded to trial before a jury. During the trial various motions of various defendants for nonsuits as to various counts were made and granted and various defendants were granted motions for directed verdicts as to counts not nonsuited. The cause was finally submitted to the jury for decision only as to the fifth count against the American Trust Company. After deliberating for some time, all twelve jurors voted for a verdict in favor of plaintiff in the sum of $24,980.05. The verdict was filled out on the form supplied and signed by the foreman, but before returning it to court the jury were taken to dinner by the officer in charge and while they were so engaged one of the members of the jury suffered a heart attack and died. The remaining eleven members returned to court. The verdict form was handed to the clerk of the court but the court refused to enter the verdict as being that of the jury and discharged the jury from further attendance. Thereafter, acting under the provisions of section 630 of the Code of Civil Procedure, the court granted the motions of American Trust Company, of Helen Howard as executrix, etc., and Markwart for judgments in their favor on the counts not nonsuited, upon the theory they had made motions for directed verdicts before the cause was submitted to the jury, that their motions should have been granted and that the jury had been discharged without having rendered a verdict. Thereafter and on June 1, 1951 appellant filed his notice of appeal to this Court, wherein he stated that he was appealing from the judgments of nonsuit and from the judgments upon directed verdicts.

In due time appellant gave notice that he would present his appeals by a settled statement pursuant to Rule 7 of the Rules on Appeal in lieu of both reporter's and clerk's transcripts. Thereafter and on October 3, 1951 appellant filed in the trial court his proposed statement. Respondents moved the court for an order striking the proposed statement from its files. The grounds were these: That it had not been prepared in accordance with Rule 7; that it was not a narrative statement of the oral proceedings occurring at the trial; that it did not contain a condensed statement of any material part of the oral proceedings; that it could not be told whether it contained such portions of the oral proceedings as might be material to determination of the points on appeal for the reason that appellant had not filed or served any points on appeal (the statement of points was filed after the lack had been so pointed out); and that it would be impossible for appellant or any one to prepare an accurate narrative statement of the oral proceedings without the aid of a reporter's transcript thereof. Respondents prayed that the motion be granted; that the court then direct that the record on appeal be prepared by the filing of a reporter's transcript pursuant to Rule 4 of the Rules on Appeal; that if the motion and the requested order be refused then respondents be granted an additional 30 days' period in which to prepare amendments to the proposed narrative statement and judgment roll.

The trial court made the following orders when these matters had been presented and submitted: "It is Ordered that the motion to strike be and the same is hereby denied; however, the Court finds that the transcript as presented is defective and insufficient to present a complete record on appeal, and it is ordered that an amended narrative statement be filed within the next sixty days, *covering all of the evidence,* and proper reference be made therein to the exhibits received in evidence. The transcript presented, commencing with Page 2 of the Reporter's transcript will be treated as sufficient in its present form, provided it is made complete and accurate in all respects." (Emphasis added.)

The above order was made on April 10, 1952. Since that time no further orders appear in the record of the cause, save that from time to time orders have been made extending appellant's time to supplement his statement as ordered. The statement has not been settled, nor have respondents filed in the trial court any proposed amendments thereto.

[1] We will consider first the motions to dismiss the appeals from the nonsuits. With respect to such appeals the Rules provide that the notice of appeal therefrom shall be filed within 60 days from the date of entry in the permanent minutes unless such minute order as entered expressly directs that a written order be prepared, signed and filed, in which event the date of entry shall be the date of filing of the signed order. This last condition did not obtain in the present cause. No new trial proceedings were begun. Costa v. Regents of University of Calif., 103 Cal.App.2d 491, 229 P.2d 867. Therefore, the date of entry of the minute order in the permanent minutes of the court marks the beginning of the time within which an appeal could be taken therefrom.

[2] On February 32, 1951, the trial court made and entered in its permanent minutes an order granting the motions of Helen H. Howard, executrix, and American Trust Company for nonsuits in their favor as to the first, second and fourth causes of action. The notice of appeal was filed June 1st following. Therefore the appeals from the orders of nonsuit in favor of said respondents as to said first, second and fourth causes of action must be dismissed. Costa v. Regents of University of Calif., supra. Respondent Markwart has made no motion to dismiss and no record now before us tells us whether or not the appeals from nonsuits in his favor are likewise without jurisdiction. All other appeals were timely.

[3] Respondents American Trust Company and Helen H. Howard have moved for an order dismissing the appeals taken against them upon the ground that appellant has so failed to diligently prosecute his appeals as to entitle them to a dismissal thereof. On June 8, 1951 appellant filed his written notice of election to present his appeal by settled statement under said Rule 7. He became obligated to comply with the time limitations contained in the Rules. He had 30 days to file his proposed statement. He obtained various orders of extension from the trial court. Assuming these orders to have been properly made, the trial court under Rule 45 (b) could have extended his time 90 days in the aggregate, which would carry him to October 6, 1951, three days beyond the date he filed his statement. But movants say that the last two orders made by the trial court granting extensions of time to file the proposed statement were void because made on ex parte application. Upon this subject the Rules state merely this: "Anything in these rules to the contrary notwithstanding, the initial extension granted to any party by the superior court may be granted ex parte." The Rules do not expressly declare that if, after the first, an extension be granted ex parte the order granting it is void. While of course trial courts should not grant ex parte extensions after an initial extension so granted, yet we do not think the trial court lacks power to make such an order. We do not think that, by implication, the rule granting the power to make the initial extension ex parte should be held to put it beyond the power of the trial court in a proper case to act ex parte beyond the initial extension. Each extension was made prior to the expiration

of a preceding extension and therefore the proposed statement filed on October 3, 1951 was filed within the time as extended.

[4] Notwithstanding the timely filing of the proposed statement the record discloses that more than 13 months had elapsed thereafter when on November 24, 1952 movants filed their notice of motion to dismiss for want of prosecution. It is the duty of an appellant to proceed diligently to procure and file his record on appeal. Flint v. Board of Medical Examiners, 72 Cal. App.2d 844–846, 165 P.2d 694.

[5, 6] There is a correlative duty imposed upon counsel for respondent when the proposed statement has been filed. He has no right to propose amendments which he knows ought not to be allowed and he must engage in no dilatory tactics not justified by the condition or content of the proposed statement. Walkerley v. Greene, 104 Cal. 208, 212, 37 P. 890. Respondents did not propose any amendments nor did they obtain any order of the trial court extending their time to do so. What respondents did was to give notice of a motion to strike the proposed statement from the files. Although the Rules on Appeal do not expressly recognize the propriety of such a motion, nevertheless there are a number of decisions which discuss such motions, apparently recognizing that in a proper case such a motion will lie. But a motion to strike is not a means of testing the propriety or sufficiency of the proposed statement except in extreme cases where it can be said that the statement is fraudulent or sham. Providing a record under Rule 7 is closely akin to the old proceeding for the settlement of a bill of exceptions, and so far as motions to strike be concerned we think the same rules apply. In Walkerley v. Greene, supra, it was held that a party desiring a bill of exceptions was not compelled to propose a perfect bill in the first draft on pain of forfeiting his right to review of the decision from which he had appealed; that it was the undoubted duty of the appellant to proceed in good faith and do his proper share of the work involved in the settlement of the bill; that he could not put off upon the opposite party or the judge the labor of reducing to writing and incorporating by amendment statements of amendments and other matters which he knew a proper bill of exceptions ought to contain; and that he had no right to include statements or matters that were untrue or irrelevant. It was further held that a corresponding duty rested upon the opposite party who had no right to propose amendments which he knew ought not to be allowed and that these reciprocal duties of the parties were undoubted. The court said that while it was not easy in a particular case to decide whether or not these duties had been consciously and deliberately violated yet it was only in a gross case of palpable and deliberate fraud that the severe penalty of striking out the bill and thus denying the party a hearing upon the merits of his case could be properly imposed; that the right of a judge to strike out or refuse to settle a bill of exceptions was limited to a case of gross and manifest fraud on the part of the one proposing it.

For our consideration in determining the instant proceedings there has been lodged with this Court the appellant's proposed statement. It contained the judgment roll. As to the oral proceedings, a document was filed entitled "Appellant's Proposed Narrative Statement of the Oral Proceedings Pursuant to Rule 7 of Rules on Appeal and Partial Transcript by Question and Answer". It was not narrative at all. It was mainly the chronological recitation of occurrences during the trial. For example, that on a certain day the court convened and a certain witness was sworn and testified as set forth in that part of the statement called "Partial Transcript by Question and Answer". Of course this is not a proper way to prepare a narrative statement. Rule 7 is clear that an appellant, having elected to proceed under it, shall serve and file a *condensed* statement in *narrative* form of all *or such portions of the oral proceedings as he deems material* to the determination of the points on appeal. He is permitted, when necessary, for purposes of accuracy to set forth portions of the evidence by question and answer, but only subject to approval of the court in settling the statement. While appellant here ought

to have obeyed these rules, nevertheless, if his statement as proposed actually contained those portions of the oral proceedings which he deemed material to the determination of his points on appeal, the court could not strike it out, but must proceed to settle it. It could not be said that such a proposed statement, even though defective in form as indicated, was sham, pretense or fraudulent.

[7–9] Appellant appeals from orders of nonsuit entered during the course of the trial and from judgments taken against him under Section 630 of the Code of Civil Procedure. The test of the propriety therof on appeal is this: Taking as true all evidence tending to prove plaintiff's causes of action, drawing of all permissible favorable inferences therefrom, and disregarding all evidence that does no more than raise a conflict with the evidence favorable to plaintiff, can it be said that upon no legal theory had he made a prima facie showing of his right to recover. 40 West's Cal. Digest, Trial, ⚷ 139, pp. 337–351. The record on such appeals need not include all the evidence, and ought to exclude in the interest of brevity all evidence that is merely contradictory of the evidence favorable to plaintiff, for such evidence, if included, would have to be disregarded. It is quite apparent that a consistent and insistent effort was made by counsel for the respondents to compel appellant to include in his record on appeal all of the evidence taken. For instance, counsel for respondent American Trust Company files herein an affidavit wherein he says that at all hearings of the motion to strike he urged that the statement was incomplete and did not present a full or correct statement of the evidence of the proceedings had at the trial with particular emphasis on the following: 1. That the same did not contain any evidence adduced in the defendants' case which consumed approximately five days of trial, and, 2. That the same did not include any of the rulings of the court upon objections made by defendants to evidence sought to be adduced by plaintiff. As we have said, the evidence, including that adduced by defendants, which was merely contradictory of the plaintiff's evidence, would not be material in determining whether or not the trial court was justified in nonsuiting the plaintiff and in directing verdicts against him. It is clear, however, that respondents measurably succeeded in persuading the trial court that such matters ought to be included, for the trial court ordered the appellant to add to his statement all of the evidence. The same counsel affirmed that some of the evidence included in the statement as filed had been limited in its application to respondent Markwart. If so, that was no ground for striking the statement, but should have been covered in the performance of counsel's plain duties in the matter by proposed amendments which would show that such orders had been made. Without laboring the point further, we conclude that in substantial part the difficulties which the parties have encountered in perfecting the record on appeal in this cause are chargeable to the respondents themselves. We have no doubt that had the reciprocal duties of all counsel been performed the perfection of the record on appeal herein would have consumed little of their time, little of the trial court's time and none of this Court's time in passing on matters which never ought to have become the subject of decision. We are somewhat persuaded to this conclusion by the matters appearing in the affidavits on behalf of appellant to the effect that he was financially unable to bring up a record under Rule 4 and that a statement under Rule 7 was the only avenue open to him through which to test the propriety of the orders and judgments from which he appealed. In saying all of the foregoing, however, we do not in any wise commend the failure of appellant's counsel to exercise proper diligence in pressing for the completion of the record. It is only because the fault is not wholly his and because we are reluctant to deny to an appellant the right to have his appeal heard on the merits where counsel on both sides have been derelict in the performance of their duties, that we deny the motion to dismiss.

The Rules on Appeal do not, and for obvious reasons should not, set specific limitations upon the time which the trial court may use in settling a statement. In

this cause the trial court has not refused to settle the statement and we feel that if all parties concerned approach the solution of any problem presented in the preparation of the record herein in the spirit in which it ought to be approached no difficulty will be experienced in perfecting the statement.

The motions to dismiss the appeals are denied, save, as hereinbefore stated, with respect to the orders of nonsuit in favor of respondents American Trust Company and Helen H. Howard as executrix, on the first, second and fourth counts, which appeals are dismissed.

The petition of appellant for mandate is denied. Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119.

SCHOTTKY and PEEK, JJ., concur.



115 Cal.App.2d 563

MICHAELS v. MULHOLLAND et al.

Civ. 19228.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1953.

Action for value of personalty allegedly wrongfully held by defendants. The Superior Court, Los Angeles County, Ellsworth Meyer, J., rendered judgment of dismissal after a demurrer to plaintiff's second amended complaint without leave to amend was sustained. The District Court of Appeal, Fox, J., held that complaint alleging that plaintiff was deceased's house guest before she died, that plaintiff owned certain personalty which was stored in deceased's house, that when plaintiff entered deceased's house after her death to retrieve his property one of the defendants ordered plaintiff to leave and "declared 'held' the plaintiff's property" was insufficient to state a cause of action where complaint failed to show relationship between deceased and defendants and contained no allegation that defendants had possession of the property.

Affirmed.

1. Trover and Conversion ⇐32(1, 3)

In action for value of personalty allegedly wrongfully held by defendants, complaint alleging that plaintiff was deceased's house guest before she died, that plaintiff owned certain personalty which was stored in deceased's house, that when plaintiff entered deceased's house after her death to retrieve his property one of the defendants ordered plaintiff to leave and "declared 'held' the plaintiff's property" was insufficient to state a cause of action where complaint failed to show relationship between deceased and defendants and contained no allegation that defendants had possession of the property.

2. Pleading ⇐223

After a demurrer is sustained without leave to amend, no formal motion to dismiss the action is necessary.

3. Appeal and Error ⇐102, 870(5)

There is no appeal from a ruling on a demurrer, but only from an ensuing judgment, and, hence, it is only by the entry of judgment that an appellant is in a position to test the correctness of the court's ruling upon a demurrer. Code Civ.Proc. § 963.

4. Pleading ⇐218(2)

Where notice of hearing on defendants' demurrer was placed on calendar in accordance with court rules, plaintiff, acting as his own attorney, was presumed to have knowledge of the rules and no further notice of the hearing was required.

5. Appeal and Error ⇐873(2)

Where no appeal was taken from court's denial of plaintiff's motion to vacate judgment of dismissal and from denial of certain other motions, there was nothing for court to pass upon relative thereto.

Walter E. Michaels, in pro. per.

No appearance for respondents.

FOX, Justice.

Appellant appeals from a judgment of dismissal after a demurrer to his second amended complaint had been sustained without leave to amend.

The most that can be gleaned from appellant's final pleading is that on January 11, 1950, he was a "house guest" of one Betsy Mulholland; that she passed away in April, 1950, and no personal representative has been appointed; that he owned certain personal property consisting of several gallons of paint, paint brushes, tools, a life insurance policy, clothing and personal effects; that some of these items were stored in a room he occupied in the Mulholland house and others were at the rear of the house; that when he entered the Mulholland home on January 11, 1950, respondent Ross ordered him to leave immediately and "declared 'held' the plaintiff's property." Appellant then states that respondents have not made any arrangements with him for the storage and safety of this property and that they have denied all knowledge of it. He further alleges that respondent Karges had made "a fraud-like claim" against him in the sum of $64 which he denies owing. Based on these allegations appellant seeks to recover from respondents the value of the personal property and also damages for, among other things, his "unreasonable eviction," which has caused him to lose business contacts in his painting and decorating business.

[1] Appellant does not show the relationship between respondents and decedent, Betsy Mulholland, nor does he allege that the respondents now have or ever had possession of the personal property. It is clear that no cause of action is stated.

[2, 3] In his brief appellant argues that the judgment of dismissal was in excess of the court's jurisdiction because no motion was made for a dismissal. After a demurrer is sustained without leave to amend, as here, no formal motion to dismiss the action is necessary. The entry of a judgment of dismissal follows as a matter of course. It is only by the entry of the judgment that appellant is in a position to test the correctness of the court's ruling since there is no appeal from a ruling on a demurrer but only from the ensuing judgment. Code Civ.Proc. § 963.

[4] Appellant states that he was not given notice of the hearing on respondents' demurrer. It was placed on the calendar in accordance with the rules of the court. Plaintiff, acting as his own attorney, is presumed to have knowledge of these rules, and no further notice of the hearing on the demurrer was required.

[5] Appellant complains of the court's denial of his motion to vacate the judgment of dismissal, and the denial of certain other motions. No appeal is taken from any of these orders, consequently there is nothing for this court to pass upon relative thereto.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



115 Cal.App.2d 795

GREEN et al. v. SEARS, ROEBUCK & CO. et al.

Civ. 19252.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1953.

Rehearing Denied March 3, 1953.

Action to recover damages for entering plaintiffs' residence, allegedly without their consent, and removing personal property therefrom. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Patrosso, J. pro tem., held that findings that entry was with plaintiffs' consent and that defendants did not take any property of plaintiffs were conclusive on appeal.

Motion to dismiss appeal denied and judgment affirmed.

1. Appeal and Error ⇐1011(1)

In action for damages for entering plaintiffs' residence, allegedly without their consent, and removing personal property therefrom, finding that defendants did not take any property of plaintiffs was conclusive on appeal in view of conflicting evidence.

2. Appeal and Error ⇐1011(1)

In action for damages for entering plaintiffs' residence, allegedly without their consent, and removing personal property therefrom, finding that entry into plaintiffs' residence was with their consent was conclusive on appeal in view of conflicting evidence.

3. Appeal and Error ⇐801(1)

Motion to dismiss appeal as frivolous need not be considered, where appellate court found that appeal was devoid of merit.

David Silverton, Los Angeles, for appellants.

John L. Wheeler, John J. McCue, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

In this action for damages against the respondents and others, the amended complaint alleges that the defendants without the consent of the plaintiffs and in their absence entered the residence of the plaintiffs and conducted a search of plaintiffs' household goods, clothing and personal effects without a search warrant and removed certain personal property therefrom, a portion of which was never returned to the plaintiffs and a portion of which were returned in a damaged condition, for which plaintiffs pray general damages in the sum of $25,000, special damages in the sum of $1,000, and punitive damages in the sum of $50,000. All of the defendants other than Sears, Roebuck & Co. and John Marine, were dismissed from the case and hence we are not concerned with them here. The respondents answered, denying all of the material allegations of the complaint, and following a trial by the court without a jury judgment was entered in their favor, from which plaintiffs appeal.

The trial court found that the plaintiffs took a number of articles of merchandise from the Olympic Boulevard store of respondent Sears, Roebuck & Co. without paying therefor and that they were thereupon apprehended by the respondent Marine who was an employee of Sears, Roebuck & Co. as a security supervisor at this store and at the time was also a special police officer of the City of Los Angeles; that the respondent Marine, in company with two police officers of the City of Los Angeles, at the express invitation and with the consent of the appellants, entered the premises of the latter for the purpose of reclaiming a black felt hat that had been taken by the appellants from Sears, Roebuck & Co.'s Vermont Street store and for the purpose of identifying other merchandise of Sears, Roebuck & Co. which appellants stated that they had taken from various stores of Sears, Roebuck & Co. without paying therefor; that the act of the respondent Marine and the said police officers in entering the residence of appellants was lawful and the search conducted therein was reasonable and proper; that the police officers mentioned, at the invitation and with the consent of the appellants, removed from the latter's residence the said black felt hat and certain other merchandise that bore identifying marks indicating that Sears, Roebuck & Co. was the retail source of such merchandise and the same was delivered into the custody of and held by the police department of the City of Los Angeles as evidence in connection with criminal proceedings then pending against the appellants, upon the conclusion of which the said merchandise was returned by the Los Angeles police department to the appellants with the exception of the black felt hat which was the property of the respondent Sears, Roebuck & Co. It was further found that the respondents did not take or injure any property of the appellants.

[1] While appellants complain of the judgment, the scanty briefs filed in their behalf in this court leave us in the dark as to the basis of their claim in this regard. It is said that it is "undisputed that defendants took from the plaintiff certain merchandise, to-wit, 4 hats of the value of Seventy-five ($75.00) Dollars, and if there were no other reason for a judgment in favor of the plaintiffs there should certainly be judgment for plaintiff's for this conversion". The complete answer to this is that not only was there no direct evidence

that these items were taken by the respondents or either of them but the evidence introduced upon behalf of the respondents was that they took no property of any kind from the residence of the appellants. Even if it were to be conceded, however, that there was some evidence which might have justified a contrary inference, we are concluded by the trial court's finding in view of the conflicting evidence.

[2] The same may be said of appellants' complaint of the trial court's finding that the entry of the respondent Marine and the police officers into appellants' residence was with their consent. While this was denied by the appellants, it is conceded there was ample testimony to the contrary. The appeal is devoid of merit.

[3] In view of the foregoing we find it unnecessary to consider respondents' motion to dismiss the appeal upon the ground that it is frivolous.

Motion to dismiss is denied and the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



115 Cal.App.2d 639

BLACK et al. v. PARTRIDGE.

Civ. 15286.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1953.

Widow and son of deceased tenant brought action against landlord to recover for death of tenant as result of carbon monoxide poisoning in rented room having an unvented gas heater. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment adverse to landlord, and landlord appealed. The District Court of Appeal, Peters, P. J., held that res ipsa loquitur instructions given were reversibly erroneous.

Judgment reversed.

1. Landlord and Tenant ⇐162

A landlord may be liable to his tenant for misfeasance in negligently performing a task that landlord has assumed.

2. Landlord and Tenant ⇐162

If landlord assumes performance of a task for tenant, landlord owes duty to tenant to perform such task with reasonable care.

3. Landlord and Tenant ⇐164(3)

Where landlord undertook to maintain, adjust, and service gas heater in tenant's room, landlord owed duty to tenant to use reasonable care in maintaining the heater.

4. Negligence ⇐121(2)

Res ipsa loquitur doctrine is not inapplicable merely because defendant did not have exclusive control of instrumentality causing accident.

5. Landlord and Tenant ⇐169(10)

In action against landlord for death of tenant as result of carbon monoxide poisoning in rented room having an unvented gas heater, evidence entitled plaintiffs to res ipsa loquitur instructions.

6. Negligence ⇐121(2)

Though plaintiff introduces some circumstantial evidence as to cause of accident, he is still entitled to inference under res ipsa loquitur doctrine, as long as the inference may still be drawn in support of the specific proof.

7. Appeal and Error ⇐1064(1)
Landlord and Tenant ⇐169(10)

In action against landlord for death of tenant as result of carbon monoxide poisoning in rented room having unvented gas heater, wherein there was evidence sufficient to justify submission of res ipsa loquitur doctrine, but wherein there was also substantial uncontradicted evidence that tenant had tampered with adjustments on stove, contrary to instructions of landlord, giving of res ipsa loquitur instruction which made indulging in inference of negligency mandatory and not permissive, and which provided that inference of negligence arose from mere happening of accident, was reversible error.

Charles A. Christin and Wallace W. Scales, San Francisco, for appellant.

Sturgis, DenDulk, Douglass & Henes and E. Hugh Henes, Oakland, Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondents.

PETERS, Presiding Justice.

Plaintiffs are the wife and adult son of Bruce Black. Defendant owns and operates a rooming house, in which Black was a lodger. Black was asphyxiated while operating an unvented gas heater located in his room. In this action for his wrongful death the jury brought in a verdict for plaintiffs. Defendant appeals, contending that serious and prejudicial error occurred in the giving of certain instructions.

In November, 1949, appellant rented a room in her lodging house to Black for $6 per week. No maid or janitor service was furnished, but appellant had access to the room at all times. The rooming house was heated with 12 Rado gas heaters, which had been installed prior to 1939. In decedent's room his heater was the sole source of heat. This type of heater is no longer manufactured. It had been originally designed for manufactured gas rather than natural gas, with which it was being operated at all times here relevant. More air is needed to secure a proper combustion of natural gas than is required with manufactured gas. In decedent's room there was a double window above the heater and another single window on the opposite side of the room.

These heaters are constructed without an attachment for an outside vent. The burner is at the bottom of the heater. The heat and flames are supposed to pass through a combustion chamber in the back of the heater. In the course of their journey the gas passes through a retort in which there is supposed to be several sticks of a chemical compound called "Fumo," designed to absorb carbon monoxide and sulphur fumes. The chemical is supposed to be placed in a wire basket placed in the retort. Unless the chemical is placed in the basket, when it starts to disintegrate with use it will clog the outlets and adversely affect combustion. This chemical comes in small cylinders. If the heater is properly adjusted, a basket full of these pellets will absorb the carbon monoxide, but the chemical has to be watched because with use the cylinders tend to disintegrate or become dirty, and thus become less efficient.

When there is proper combustion the gas flame burns in a distinct violet blue cone. As combustion becomes less efficient, with a consequent increase in carbon monoxide, the cone becomes longer and indistinct and the flame turns yellow.

Appellant testified that about four years before the trial she had 24 to 36 boxes of "Fumo" on hand, and at that time had been able to purchase a dozen more boxes. At the time of trial she still had three or four boxes on hand. Apparently, the chemical is difficult to secure.

The appellant assumed the responsibility of servicing these heaters. Each basket requires about one box of the chemical, and appellant testified that she would fill each basket about once a year. She denied that the chemical would disintegrate with use, but admitted that it would get covered with soot. She testified that a P. G. & E. mechanic first showed her how to operate these heaters, and, later, that a plumber, who died before the date of the accident here involved, frequently assisted her in making adjustments to the needle value and air control. Thereafter, she made the adjustments. She also testified that whenever a new tenant moved in she checked the adjustments on his heater, watched him operate it, and instructed him as to its operation. She would occasionally check the controls, and always checked them when a heater was moved for painting. These adjustments, intended to regulate properly the flow and proportions of gas and air, were made with a screwdriver.

Appellant testified that when decedent first rented his room she showed him how to light the heater, explained to him the location and purpose of the chemical, and warned him not to water it. She testified that she lit the heater for him and warned him that if the chemical became dirty the carbon monoxide might "jump" the chem-

ical. Another tenant, Miners by name, who occasionally assisted appellant, and who was present when the room was rented to decedent, testified that he also told decedent how to operate the heater. He also testified that sometime before Christmas of 1949 he was in decedent's room and saw him stuff paper in the holes in the bottom of the heater apparently in an attempt to increase the heat, but that decedent immediately removed the papers when advised to do so by the witness.

In the first week of January of 1950 decedent took a short vacation to visit his family in San Jose. During his absence the room was painted. Before decedent left he told the painter that the heater did not throw out enough heat and that he was continually cold. The painter promised that he would see to it that the heater was checked and adjusted. The painter also testified that during decedent's absence he painted the room and disconnected and painted the heater, and then connected the heater up again. Appellant, in his presence, checked the heater and found that the flame was much too high. Appellant called the painter's attention to the high flame, reset the adjustments, and complained that gas bills were too high, stating: "Boy, a six dollar room, and a $20 gas bill." The painter also testified that after he had connected the heater he saw appellant dump out the chemical and refill the retort in the back of the heater. Appellant testified that she emptied the basket before the heater was disconnected and filled the basket with "Fumo" after it was painted and connected.

When the decedent returned from his vacation the painting equipment was still in his room. The painter testified that decedent told him that the heater was still not throwing out enough heat, and stated that he had adjusted it himself. The painter warned decedent that appellant wanted no one but herself to adjust the heaters.

Appellant testified that the painter told her of this conversation, and that, about a week after decedent returned, she told decedent not to tamper with the heater, and that if he continued to do so she would remove the heater or decedent would have to leave the house. She further testified that after that conversation she again reset the adjustments on the heater so that it burned with a proper blue flame instead of a yellow flame. This was the second week of January.

January 26, 1950, was a cold day. On the morning of January 27th a tenant reported to appellant that the light had been on in decedent's room all night. Appellant found that the door to the room was bolted from the inside. Tenant Miners, at her request, then forced open a window and crawled into the room, and opened the door to admit appellant. Decedent, half undressed, was lying face down on the floor near the heater, dead. Miners testified that when he entered the room the heater was going wide open, with flames shooting out of its top, and that he shut it off, but made no other examination of it. The room smelled far from fresh. An autopsy fixed the cause of death as carbon monoxide poisoning. The autopsy surgeon testified that except for such poisoning, the autopsy disclosed decedent had been in normal health.

Dr. Lewis, an industrial medicine and toxicology expert, testified that carbon monoxide causes death because it combines with the hemoglobin of the blood many times more effectively than oxygen, that the victim is not aware of what is happening to him, and prior to death has no unpleasant symptoms. He further testified that every gas burner produces some carbon monoxide, and should not be kept burning for any substantial period unless vented, or unless it is functioning properly, because otherwise it will pile up a deadly amount of carbon monoxide in a short period. He pointed out that the carbon monoxide is not in the gas, but is caused by improper combustion, and once formed will circulate about a heated room. Open windows would, of course, mean more ventilation, but would not necessarily prevent asphyxiation. If a gas heater is properly vented, or has a good absorbent, carbon monoxide poisoning is not probable, but an improper adjustment that merely results in a larger

flame increases the danger. The absorbent container method is less efficient than outside venting.

Both Miners and appellant testified that all of the windows in the room were closed on the fatal night, except the window by which Miners gained admission, that window being open a crack. Miners was impeached in this respect by respondents to both of whom Miners stated that after the tragedy, two windows were open when he entered the room.

Respondents produced evidence to the effect that immediately after the accident the heater was in a defective condition. The daughter-in-law of decedent testified that she visited the room in question on the day of the inquest and then examined the heater. She found that the basket was not then in the retort and that the chemical was so disintegrated that she could see the bottom of the retort. A friend who accompanied this witness on this visit testified that he examined the heater, that there was no basket, and that the chemical in the retort was crumbled and very dirty. Appellant testified that she had not removed the basket.

This is a fair summary of the relevant evidence. On this evidence the trial court instructed, at the request of respondents, on the doctrine of *res ipsa loquitur*. Appellant contends that this was error, urging that as landlord she owed no duty to decedent, and that under the evidence she did not have exclusive control of the heater.

Appellant urges that, under the standard rules applicable to the landlord-tenant relationship, she can be held liable to her tenant only for a failure to disclose defects of which she had actual knowledge, and that concealment of defects not readily discoverable by the tenant's inspection is an essential element of responsibility. Therefore, so she contends, there being no evidence of these facts, she owed no duty to decedent.

[1–3] The extent of a landlord's duty, in some circumstances, is as stated by appellant, at least as to nonfeasance. Daulton v. Williams, 81 Cal.App.2d 70, 183 P.2d 325; Dorswitt v. Wilson, 51 Cal.App.2d 623, 125 P.2d 626; Sherrard v. Lidyoff, 108 Cal.App.2d 325, 239 P.2d 28; Powell v. Stivers, 108 Cal.App.2d 72, 238 P.2d 34. It could be argued that the evidence, although conflicting, does show "concealment" of a hazardous condition in that the appellant knew or should have known of the condition of the chemical, and concealed the fact that the basket in the retort had been removed, and that the chemical was disintegrated. Regardless of this theory, however, it is also the law that a landlord may be liable to his tenant for misfeasance in negligently performing a task that he has assumed. In such case he owes a duty to the tenant to perform such task with reasonable care. Janofsky v. Garland, 42 Cal.App.2d 655, 109 P.2d 750; Callahan v. Loughran, 102 Cal. 476, 36 P. 835; Nelson v. Myers, 94 Cal.App. 66, 270 P. 719; Singer v. Eastern Columbia, Inc., 72 Cal.App.2d 402, 164 P. 2d 531. See annotation in 18 A.L.R.2d 973, particularly at pp. 980–981, for cases dealing with duty of due care in connection with heating fixtures. Here the evidence produced by respondents shows that as part of the contract of letting, the landlord undertook to maintain, adjust and service the heater, and that one of the defects—improper maintenance of the retort box in the back of the heater—was not an obvious one. Appellant owed a duty to decedent to use reasonable care in maintaining the heater.

In this state there also is a statutory duty of due care imposed upon landlords to maintain such heaters in a reasonably safe condition. Section 16905 of the Health and Safety Code, which is part of the State Housing Act, imposes on landlords the following duty: "Every gas vent, gas water heater, or other gas appliance shall be maintained in good repair."[1] Decedent was ob-

1. It should be noted that today this duty is much more stringent. In 1951, which was after the date of the accident here involved so that the amendment is not applicable, § 16900 of the Health and Safety Code was amended to require all gas burning appliances, with certain exceptions not here applicable, to be vented to the outside.

viously a member of one of the classes for whose benefit this statute was passed. Thus the requirement that the defendant, before the doctrine of *res ipsa loquitur* is applicable, must owe a duty to the plaintiff, was fully met in the instant case.

[4] But, says appellant, another factor that must exist before the doctrine is applicable is control in the defendant over the instrumentality. This is a most confusing concept. As Dean Prosser has so clearly pointed out in his article on Res Ipsa Loquitur in California (37 Cal.L.Rev. 183, at p. 199 et seq.), the courts have held that all that is required is that the defendant exercise some control over the article involved in the accident or exercise a right of control. Once it is shown that defendant had some degree of control over such agency, then it is for the jury to say whether it is more probable that defendant's negligence caused the accident or not.

It is appellant's theory that the evidence shows that decedent exercised some control over the adjustments on the heater and that he controlled the ventilation of the room. The heater was in his possession, and appellant points out that there is no evidence that he did not tamper with the adjustments prior to death, and that there is some evidence that he did so. Those are factors that have been declared to be important in some factual situations. Meyers v. G. W. Thomas Drayage, etc. Co., 108 Cal.App.2d 529, 239 P.2d 118; Honea v. City Dairy, Inc., 22 Cal.2d 614, 140 P.2d 369; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522. But the more recent cases on this subject recognize the principle that the existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact, and carefully preserve the right of the jury to find those facts. See Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Knell v. Morris, 39 Cal.2d 450, 247 P.2d 352; Milias v. Wheeler Hospital, 109 Cal.App.2d 759, 241 P.2d 684. These principles apply to the question of the degree of control that must be exercised before the doctrine is applicable. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344; Rose v. Melody Lane, 39 Cal. 2d 481, 247 P.2d 335; see, also Hinds v. Wheadon, 19 Cal.2d 458, 121 P.2d 724; Rafter v. Dubrock's Riding Academy, 75 Cal.App.2d 621, 171 P.2d 459; Metz v. Southern Pacific Co., 51 Cal.App.2d 260, 124 P.2d 670.

[5] How do these principles apply to the instant case? There is some evidence that without proper venting the heater would be dangerous, and that absorbtion by the chemical method was less satisfactory than outside venting. There is also evidence that, even with the windows partially open, if the chemical was insufficient or dirty or disintegrated, enough carbon monoxide could be created to be deadly. There is evidence to the effect that defendant had control of the chemical, that the chemical basket had been removed, and that the chemical in the retort was disintegrated. It is, of course, true that all we positively know is that death was caused by carbon monoxide poisoning, and that such resulted from the burning of the heater. There are three reasonable probabilities which alone or in combination could have caused the accident. The heater could have been improperly adjusted, or the room could have been inadequately ventilated, or the chemical was insufficient. It was for the jury to say which of these three probabilities, or any combination of them, under the evidence, was the most reasonable. While decedent had the opportunity to tamper with the adjustments on the heater, and there is evidence that he did so, and while he, of course, controlled the room's ventilation, the accident could have been caused by defective chemical replacement. Under such circumstances, the respondents were entitled to *res ipsa loquitur* instructions. Under the evidence the jury could find, aided by the inference permitted by the *res ipsa* instruction, that the reasonable probability was that appellant was negligent in replenishing the chemical, that the chemical was placed in the retort instead of the basket, that the chemical was disintegrated and insufficient, and that death was caused by these acts.

[6] It cannot be successsfully urged that, because respondents introduced some

evidence as to the probable cause of the accident and as to appellant's negligence, they are deprived, as a matter of law, of the benefit of the inference permitted under the *res ipsa loquitur* doctrine. That evidence supports the inference, and vice versa. It is common sense, and well supported by authority, that, where the plaintiff introduces some circumstantial evidence as to the cause of an accident, he is still entitled to the inference as long as the inference may still be drawn in support of the specific proof. Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008; Doke v. Pacific Crane & Rigging, Inc., 80 Cal.App.2d 601, 182 P.2d 284; Brunig v. Pacific Gas & Elec. Co., 140 Cal.App. 254, 35 P.2d 226; Kilgore v. Brown, 90 Cal.App. 555, 266 P. 297; Mansfield v. Pickwick Stages, N.D., 68 Cal.App. 507, 229 P. 890; Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, at p. 212.

[7] Appellant next objects to the form of the instructions given on *res ipsa loquitur*. There is merit to this contention. The instructions given were taken from B. A.J.I., and have been the subject of frequent discussion and criticism. They are as follows:

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that she did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on her part, or by contributory negligence of decedent himself.

"The instruction just given may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiff or decedent in this case was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the decedent or his heirs are not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiffs, in the absence of a showing by defendant that offsets the inference."

There can be no doubt that the first paragraph of this instruction is ambiguous, confusing and somewhat contradict the last part of the quoted instructions. We recently had occasion to review this instruction in Hardin v. San Jose City Lines, Inc.,* Cal.App., 252 P.2d 46. It was there held that the giving of the first instruction above quoted, under the facts there involved, in a carrier case, was not prejudicial error, but the several reasons why the instruction is unsound are discussed at length in that opinion. What was there said on that subject need not be re-

*A hearing was granted by the Supreme Court on March 12, 1953.

peated here. We also there stated at page 357 of that opinion 50 of 252 P.2d: "While here, for the reasons aforesaid, we find no prejudice in the giving of this instruction, it nevertheless is a dangerous one to give, particularly in a case where, different than here, a common carrier is not involved. It does leave open the possibility that it might be construed to mean that the court is stating that an accident happened and that the inference is compulsory. * * * The instruction should not be used."

The vice of the instruction is, of course, as pointed out in the Hardin case, supra, that apparently it makes the indulging in the inference mandatory and not permissive. That is not prejudicial in a carrier case where the best reasoned cases hold that the effect of *res ipsa* is to shift the burden of proof to defendant. But that is not true in a case between private individuals. In such case the inference is permissive and not mandatory. The instruction, however, states that from the happening of the accident "there arises an inference", that the jury should weigh any evidence "tending to overcome that inference," and that it is incumbent on the defendant "to rebut the inference". That language is mandatory language, and to a layman might very well indicate that upon proof of the accident the inference arises and the burden of proof shifts to defendant. That is, of course, not the law. There are several cases where the instruction has been criticized but held not to be prejudicial. Thus in Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522, the error was held to be non-prejudicial, but in that case an additional instruction was given requiring the plaintiff to prove that the instrumentality had not been tampered with after it had come into plaintiff's possession. No such instruction was here given. See, also, Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 239 P.2d 671; Hinds v. Wheadon, 19 Cal.2d 458, 121 P.2d 724; Meyers v. G. W. Thomas Drayage, etc. Co., 108 Cal.App.2d 529, 239 P.2d 118; Radisich v. Franco-Italian Packing Co., 68 Cal.App.2d 825, 158 P.2d 435; Welch v. Sears, Roebuck & Co., 96 Cal.App.2d 553, 215 P.2d 796. In Milias v. Wheeler Hospital, 109 Cal.App.2d 759, 241 P.2d 684, it was held that the court properly refused to give the challenged instruction, and on the first appeal in the Zentz case—Zentz v. Coca Cola Bottling Co., 92 Cal.App.2d 130, 206 P.2d 653—the giving of the challenged instruction was held to be reversible error.

The instruction was also erroneous in the instant case for another important reason. Under the evidence the heater was in the physical possession of the decedent. He had the opportunity to tamper with the adjustments, and there is substantial uncontradicted evidence that he did so. Thus, an essential element of *res ipsa loquitur* was not present if the jury should find that the carbon monoxide was created by faulty adjustment. See the second Zentz case—Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344. The only condition under which *res ipsa* was applicable in the present case was if the jury should first find that the death was caused by a failure to maintain properly the chemical. But the instruction given was not so limited. It provided that the inference of negligence arose from the mere happening of the accident. If the jury should find that the accident happened from an improper adjustment, then no inference of negligence arose, because of the absence of the vital element of control in appellant. This error was obviously prejudicial and requires a reversal.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

BRITSCHGI v. McCALL et al.

THOMAS et al. v. McCALL et al.

LIEBMAN et al. v. McCALL et al.*

Nos. 15325–15327.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1953.

Rehearings Denied Feb. 26, 1953.

Hearing Granted March 26, 1953.

Three actions, consolidated for trial, for damages, specific performance of agreement for sale of realty, breach of exclusive real estate broker's contract, etc. The Superior Court, Santa Clara County, John D. Foley, J., entered judgments for defendants, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that purchaser, a plaintiff, effectively waived condition in agreement of sale that sale was subject to vendors' ability to eliminate claimed outstanding interest in realty for a specified sum by evidencing his willingness to take realty subject to that outstanding interest.

Affirmed in part, reversed in part.

1. Appeal and Error ⇐931(1)

On appeal from judgments of superior court in favor of defendants, District Court of Appeal was required to consider evidence and reasonable inferences therefrom most strongly in favor of defendants.

2. Specific Performance ⇐59

Where vendors' acceptance of receipt and option was contingent upon vendors' being able to eliminate interest of third party in realty for sum not to exceed $5,000.00, but vendors did not eliminate such interest, and purchaser before expiration of receipt and option signified willingness to take realty subject to interest of third party, purchaser effectively waived condition in agreement and was entitled to specific performance.

3. Specific Performance ⇐121(11)

In actions against vendors for damages, specific performance of agreement for sale of realty, etc., wherein vendors alleged that agreement was conditional on their being able to eliminate interest of third party in realty, evidence was insufficient to support findings that purchaser was not willing to purchase realty, and that purchaser's offer to take realty was contingent upon vendors' paying commission of realty brokers and placing revenue stamps on deed.

4. Tender ⇐16(2)

Technical defects in the matter of tender are unimportant where it appears that tender would not have been accepted. Civ. Code, § 1440.

5. Specific Performance ⇐97(1)

Where purchaser attempted tender to vendors' attorneys but was told that vendors could not sell, formal tender of purchase price to vendors was not necessary, and lack of such tender would not defeat purchaser's right to damages and specific performance. Civ.Code, § 1440.

6. Brokers ⇐11

Where vendors authorized realty broker to sell realty for $200,000, realty broker's remuneration, if any, was to come from excess over $200,000 obtained for realty, and vendors thereafter accepted receipt and option for sale of realty for $205,000 subject to their being able to eliminate interest of third party for $5,000, and purchaser thereafter offered to purchase realty for agreed price subject to interest of third party, broker was not damaged by vendors' refusal to sell.

7. Brokers ⇐63(5)

Where vendors authorized realty broker to sell realty and agreement did not provide for commission, but thereafter vendors accepted receipt and option which provided for payment of commission to realty brokers and vendors thereafter evidenced unwillingness to sell and purchaser's attempted tender of purchase price to vendors' attorney was refused, brokers were entitled to commission.

Cosgrove, Molinari & Tinney, San Francisco, Campbell, Hayes & Custer, San Jose, for appellants.

Crist, Stafford & Peters, Elton F. Martin, Palo Alto, for respondents.

BRAY, Justice.

In three actions in which the defendants are the same, and which were consolidated

* Subsequent opinion 257 P.2d 977.

for trial, plaintiffs appeal from the judgments in favor of defendants.

Question Presented.

The principal question is whether a buyer may waive a condition in the agreement of sale to the effect that the sale is subject to the seller's ability to eliminate a claimed outstanding interest in the property for a specified sum.

Record.

Action No. 15325 is by plaintiff Britschgi, a licensed real estate broker, to recover $10,000 damages for alleged breach by defendants of a written contract giving him the exclusive authorization to sell certain Santa Clara County real property. Action No. 15326 is by plaintiffs Britschgi and Thomas to recover $10,250, the alleged reasonable value of services rendered to defendants by them as real estate brokers. Action No. 15327 is by plaintiff Liebman and others as copartners doing business as Brentwood Company,[1] a copartnership, for specific performance of a written agreement by which defendants agreed to sell and Brentwood agreed to buy defendants' property for $205,000, and for $50,000 damages for wilful withholding. In a second cause of action Brentwood sought $30,000 damages allegedly incurred because relying on said agreement of sale, Brentwood purchased adjoining lands in order to bring to defendants' land utilities from the city of Palo Alto. Defendants filed a general answer in all three cases. In the third action they also set up as a defense the fact that the agreement provided that it was contingent upon their being able within 120 days to eliminate the interest of one Santana in the property, and that they were unable so to do.

Evidence.

[1] Most of the evidence is uncontradicted. Taking, as we are required to do, the evidence and the reasonable inferences therefrom most strongly in favor of defendants, the facts follow.

After a discussion in which McCall[2] stated that he wanted $200,000 net, defendants executed a written exclusive authorization to Britschgi for a period of 90 days to sell their property, referred to as 175 acres, more or less, for that sum "Net to seller." Britschgi submitted the property to several brokers including plaintiff Thomas, asking $225,000. Thomas brought Brentwood to the property, who objected to buying as it was not adjacent to public utilities of the city of Palo Alto. Property owned by one Eells intervened. Britschgi informed McCall of this difficulty. McCall told him that at one time he had dug a well on the property for its sale as a golf course. Britschgi discussed with the Palo Alto authorities the possibility of bringing utilities to the property. Thereafter Thomas told Britschgi that Brentwood was now willing to negotiate. Britschgi, in turn, so informed McCall. The next day Thomas brought to Britschgi a deposit receipt form signed by Brentwood in which they agreed to purchase the property for $205,000, accompanying it with Brentwood's check for $5000. As it was necessary to use the Eells property to get utilities to the McCall property, Brentwood had signed a deposit receipt to purchase it from Eells. This receipt plus a down payment check Thomas also gave to Britschgi. In checking the McCall property Brentwood's engineers discovered that it contained 168 acres rather than 175. The receipt recited that the property contained 160 acres more or less, and that if it turned out that it contained less than 160 acres the purchase price would be reduced pro tanto. It provided that the balance of the price should be paid within 120 days. Britschgi took the receipt and check to McCall. McCall then told him that he had found an option for a golf course which he had given to one Santana sometime before, and asked Britschgi what he thought of it. Britschgi told him he had better see his attorney. McCall testified that on discovery of this option he called Britschgi to his home and told him to do nothing further about selling the property unless some ar-

1. Herein referred to as "Brentwood."

2. As most of the discussions were with William McCall, generally he alone will be referred to.

rangement could be made with Santana. After that Thomas and Britschgi again discussed the matter with McCall and then with Brentwood. They suggested that McCall see Santana. McCall saw Santana and reported that the latter was going ahead with the golf course. Britschgi and Thomas told McCall to get legal advice. McCall then told them that he had gone to see his lawyer, Crist, who told him he could not advise him as he, Crist, had an interest in the property. Britschgi recommended that McCall see Attorney Curry. This McCall did and employed him to represent him in the Santana matter. Britschgi met McCall at Curry's office. McCall stated he wanted to go through with the sale to Brentwood and McCall was to contact Santana to see if he would settle for a price. McCall had no success with Santana, and another meeting was held at Curry's office. Curry asked McCall what he would pay Santana for a release. McCall said he would pay $5000. Curry then contacted Brentwood and the latter agreed that if Santana would not settle for that sum Brentwood would pay additionally for a settlement. Curry advised McCall that if Santana would not settle for $5000 a quiet title action should be brought by McCall against Santana. Previously the receipt and check had been left with Curry. There was then added to the receipt "This acceptance is contingent upon the seller being able to eliminate the interest of George E. Santana, if any, in the above described property, for a sum of not to exceed $5000." It was then signed by the McCalls. The check remained with Curry. McCall testified he signed the receipt because of Curry's advice that $5000 would be all he would have to pay for a settlement. In the acceptance portion of the document the McCalls agreed to pay Thomas and Britschgi a 5 per cent commission on the selling price. The agreement also provided that Thomas and Britschgi might without notice extend the time of performance for an additional 30 days. Apparently the signed receipt was delivered to Brentwood. Curry filed a quiet title action for the McCalls against Santana. Next, in June, a meeting was held at Santana's attorney's office, at which Curry, Brentwood, the McCalls and Santana were present. A settlement was discussed. On July 15, another meeting with substantially the same persons present was held. Santana was willing to settle for $40,000. McCall said he would put up $5000. Brentwood offered an additional $17,500. No settlement was made. The $40,000 figure was left open, although there was nothing binding, for four or five days and the parties adjourned. No offer has been made to Santana since. McCall made no other effort to eliminate Santana. Santana filed a cross-complaint in the quiet title action apparently seeking specific perfomance of his option or in the alternative for $40,000 damages. From the time of the meeting in Curry's office Brentwood kept pressing Curry to prosecute the action. Brentwood asked Curry to get a 90 day extension of their agreement with McCall. Curry stated he was having difficulty getting McCall to come to his office. He would not answer his letters or seem to cooperate. About June, a large tract south of the McCall property was sold. A large development to take place on it was advertised. From then on, Britschgi testified, McCall's attitude towards desiring the Brentwood sale consummated changed. Sometime in August the Brentwood agreement was extended 30 days by Britschgi and Thomas under the power given them therein. The extension was made in Curry's office and McCall then said he was still willing to go through with the Brentwood sale if they eliminated Santana. About August 13 or 14 Brentwood went to Curry and offered to take the property and would pay Santana $40,000, of which McCall was to pay $5000. August 16, Cosgrove, one of the Brentwood partners, had the three actions now on appeal prepared, and went to Curry's office. Cosgrove told Curry of the actions they were going to file. Cosgrove stated they would pay $240,000 less the $5000 promised by McCall. Cosgrove had with him a blank check signed by Brentwood and a savings bank book showing a credit to Brentwood's account of $325,339.94. Cosgrove offered to pay the $235,000 and demanded a deed. Curry stated that he did not know if he still represented McCall, that he was unable to get McCall in and that he thought Attorney

Crist represented him. Cosgrove first filed the suits and then went to Crist's office. On being informed by Crist that he represented the McCalls, Cosgrove offered to pay McCall the $235,000 and demanded a deed. Crist then told him "McCall cannot sell that property because I have an interest in it." Cosgrove then requested Crist to have McCall place a deed in a certain title company and Brentwood would pay the $235,000. No objection was made to the form of the tender by check. Crist stated he would let Brentwood know in a few days whether McCall would go through with the sale, but Brentwood did not hear from Crist. In the meantime Brentwood purchased the Eells property.

Findings.

The court found in effect that the agreement between Brentwood and defendants provided that defendants agreed to sell for $205,000 "upon defendants being able to eliminate the interest" of Santana for not to exceed $5000, the sale and purchase to be consummated within 120 days after April 19, 1950; that the consideration set forth in the agreement is the fair and reasonable value of the property; that within the 90 days provided by the authorization Brentwood was able but not willing or ready to purchase the property for $200,000 net to sellers (in the Brentwood action the court found that Brentwood was ready, able and willing); that Brentwood paid a $5000 deposit to Britschgi on the purchase price of $205,000 with the provision, however, that defendants should pay to Thomas and Britschgi a commission of $10,250 and revenue stamps on the proposed deed amounting to $2,255, leaving net to sellers only $192,495.

Specific Performance.

[2] Defendants' main defense to this action is that the provision that defendants' acceptance of Brentwood's offer to purchase was contingent upon the seller being able to eliminate the Santana interest for not to exceed $5000, was one for defendants' benefit, and the Santana interest not having been eliminated within the time limit of the agreement, Brentwood cannot enforce the agreement. While this provision was a shield to protect defendants against being required to convey the property if the elimination of the Santana interest should cost them more than $5000, it nevertheless does not protect them when the purchaser was willing to accept the property subject to the Santana interest. The effect of the provision is that defendants were to get $200,000 net, they undertaking to eliminate Santana if it did not cost them more than $5000. Brentwood offered to pay the $200,000 and take the property subject to the outstanding Santana interest. While the provision was for defendants' benefit, it was also for Brentwood's benefit, in that it meant that they were to get the property free of the Santana interest if it did not cost the sellers more than $5000. Now, they were willing to take the property subject to the Santana interest. Defendants got the $200,000 that they originally contemplated getting.

The trial court erroneously adopted defendants' theory that this provision constituted a condition precedent to Brentwood's right to the property and one which they could not waive. Cases like Schwab v. Bridge, 27 Cal.App. 204, 149 P. 603, where a party guaranteed a debtor's account provided the account was presented by a certain date, Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 202 P.2d 365, where the contract provided that a real estate commission was payable when a certain contract was executed, and other cases cited by defendants, are not in point. The situation here is rather peculiar. McCall testified that subsequent to the meeting with Santana above mentioned he did not try to eliminate the Santana interest, in spite of the fact that he entered into an agreement to sell if the Santana interest could be eliminated. Moreover, he employed as his attorney to resist the efforts of Brentwood to consummate the transaction the very attorney who had an interest under the Santana option. It is apparent from the record that defendants were willing, if not anxious, to sell for $200,000 at the time they entered into the agreement. Then, for some reason, possibly the prospective development of another tract nearby and the probability of being able to obtain a higher price, they evidenced an intention of doing nothing towards the consummation of the sale. Long before the

time limit of the agreement had expired they employed an attorney adverse to Brentwood's interests. During the trial both McCalls as well as Santana testified that no agreement other than the original option agreement had been entered into between the McCalls and Santana. Yet Crist, defendants' attorney, stated to the court that on February 12, 1951, a written agreement between them had been entered into although he objected to its terms being disclosed. As before stated, Curry had filed a quiet title suit on behalf of McCalls against Santana. Attorney Crist had filed in it a cross-complaint on behalf of Santana, asking specific performance of the Santana option or for $40,000. At the opening of the trial here, Crist testified that he was now defendants' attorney in that action. Crist on behalf of McCalls as plaintiffs and Santana as cross-complainant moved for a dismissal of that action, stating that an agreement of settlement of the case had been executed. Apparently Crist also was a party to the agreement. Defendants contend that they should be permitted to stand on a clause of the agreement which, while in their favor in one sense, is primarily to the detriment of Brentwood, although Brentwood is willing to take the property subject to that detriment. The absurdity of defendants' contention is shown by the following illustration: In an agreement of sale of real property the seller inserts a clause that the sale is subject to his being able to eliminate a right of way in a third person. Could it reasonably be contended that if the buyer was willing to accept the property subject to that right of way, the seller could not be compelled to perform? Although the facts of Twisselmann v. Cohn, 57 Cal.App.2d 987, 136 P.2d 33, are different, its rule is applicable here. "It is no answer for a vendor to say, when specific performance is sought under his contract, that the interest or title which the decree seeks to affect, is not as complete as he agreed to convey." 57 Cal.App.2d at page 990, 136 P.2d at page 34. See also Miller v. Dyer, 20 Cal.2d 526, 126 P.2d 901, 141 A.L.R. 1428.

Isaacson v. G. D. Robertson & Co., 85 Cal.App.2d 71, 192 P.2d 486, is not in point here. There the seller owned certain lots in a block in Los Angeles which was zoned for residence only. He agreed to sell one of them but in the sales agreement, the seller inserted a clause to the effect that proceedings for the rezoning of the block to business were now proceeding and that if the lot was not rezoned to business within six months, the agreement would ipso facto terminate. Prior to the expiration of the six months the buyer offered to take the property without it being rezoned. The court held that rezoning was a condition for the benefit of the seller which the buyer could not waive, pointing out that "the sellers contemplated a uniform development of the block in which this lot was situated, and that such development could proceed only if the area was rezoned." 85 Cal.App. 2d at page 76, 192 P.2d at page 489. The court drew a distinction between the situation there and in "those cases in which the vendee under a contract of sale can compel the vendor to convey such title as he has, even though that title be defective" 85 Cal. App.2d at page 76, 192 P.2d at page 489, holding that there was no question of defective title. In our case the whole question is one of defective title, against which the seller provided that the clearing of it could not cost him more than $5000. The buyer is willing to accept the defective title, bringing itself under the rule of the defective title cases. McCall testified when asked if he felt that the price, $200,000 net, was a fair one, "I was willing to take the price and they were to eliminate all the interest of Mr. Santana, to go ahead." To refuse to require defendants to convey to Brentwood the property subject to the Santana interest for that price would be a travesty on justice. It would put the courts in a position of placing a premium on the actions of defendants who, after agreeing to sell their property to Brentwood for $200,000, causing Brentwood to purchase adjoining property in order to bring in utilities, suddenly sense a chance of getting a better price from someone else, and employ the very attorney who is standing in the way of their fulfilling their agreement to help them break their agreement.

[3] The court's finding that Brentwood was not ready or willing to purchase the

property for $200,000 is not supported by the evidence. As pointed out before, the court also found that Brentwood was able, ready and willing. We find nothing in the evidence to support the finding that Brentwood's offer to take the property was contingent upon defendants' paying Thomas and Britschgi a $10,250 commission and placing $2,255 revenue stamps on the deed. Defendants did agree in writing to pay Thomas and Britschgi a 5 per cent commission on the selling price. Undoubtedly the sellers would have to provide the stamps on the deed by which they would convey, but the evidence is silent upon either of these matters being a condition to Brentwood's demand to go through with the sale.

Tender.

[4, 5] The trial court found that Brentwood did not tender defendants any portion of the purchase price. It is doubtful if the tender to either Curry or Crist would constitute a tender to defendants. However, the evidence demonstrates and the court should have found that defendants were avoiding all the plaintiffs, were repudiating their agreement and would not have accepted any tender. They had employed Crist to represent them as against Brentwood even before the time limit had expired and before these suits were filed. "* * * the positive repudiation of a contract of sale by the vendor excuses the vendee from a formal tender of the price as a condition precedent to an action for specific performance * * *." Buckmaster v. Bertram, 186 Cal. 673, 676, 678, 200 P. 610, 612. Technical defects in the matter of tender become unimportant where it appears that the tender would not have been accepted. Boro v. Ruzich, 58 Cal.App.2d 535, 541, 137 P.2d 51; Civ.Code, § 1440.

The condition requiring elimination of the Santana interest is one which Brentwood could and did waive and hence specific performance should have been granted.

Britschgi Action.

[6] This action is to recover $10,000 damages for defendants' violation of the written authorization given Britschgi by defendants to sell their property for $200,000 net. The agreement did not provide for any commission. Britschgi's remuneration, if any, was to come from the excess over $200,000 for which he might sell the property. There was no such excess. Hence he was not damaged either by the failure of defendants to go through with the Brentwood contract, or by the consummation of that contract as here required by specific performance. Britschgi alleged in his complaint that he had been damaged in the sum of $10,000. Defendants' answer denied generally all of the allegations of the complaint. Britschgi urges that such a denial constituted a negative pregnant admitting that Britschgi was damaged in any sum less than $10,000, such as $9999.99, and that Britschgi is entitled to judgment in such amount. As the case was tried on the theory that Britschgi was not entitled to any damages at all, we see no necessity of going into technical questions of niceties of pleading.

The Thomas and Britschgi Action.

[7] This action is based upon the agreement at the bottom of the deposit receipt. This agreement, signed by defendants, provided for payment to Thomas and Britschgi of a real estate commission of 5 per cent of the selling price. While the original authorization to Britschgi to sell the McCall property was on the basis of no commission being paid other than the excess over the $200,000, this was a new agreement made between defendants and both Thomas and Britschgi, and definitely provided for a commission. As we have held that the Brentwood sale was repudiated without cause by defendants, Thomas and Britschgi earned their commission in bringing Brentwood and defendants together.

The judgment in action No. 15325 (Britschgi) is affirmed; those in actions No. 15326 (Thomas and Britschgi) and No. 15327 (Brentwood) are reversed, appellants to recover costs in the latter two actions.

PETERS, P. J., and FRED B. WOOD, J., concur.

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RICCIARDI v. LOS ANGELES COUNTY et al.

Civ. 18998.

District Court of Appeal, Second District, Division 3, California.

Jan. 28, 1953.

Proceeding by operator of slaughterhouse and packing plant against county and certain county officers to restrain them from interfering with operation of his plant, which had been built prior to enactment of the county zoning ordinance. The Superior Court of Los Angeles County, Dudley C. McGregor, J., entered judgment for operator, and county and county officers appealed. The District Court of Appeal, Shinn, P. J., held that trial court's findings that the operation was not a nuisance and that the Regional Planning Commission had found the operation was not a nuisance or detrimental to public health or safety was error.

Judgment affirmed with directions to strike the erroneous findings.

1. Counties ⇐55

It would be assumed that framers of the county building ordinance knew that every business was subject to control in interest of health and safety and anticipated that, when some alteration in a structure should be demanded, the ordinance would be interpreted and administered in a fair and reasonable manner.

2. Counties ⇐21½

Even if alterations demanded by State Department of Agriculture, which would not enlarge rights of operator of slaughterhouse and packing plant under the original exception, were such that the building would be "structurally altered" within meaning of county zoning ordinance provision that no building existing at effective date of ordinance which is devoted to use not permitted shall be enlarged, extended, reconstructed, built upon, or structurally altered unless use is changed to a permitted use, County Regional Planning Commission's approval of the alterations did not constitute a granting of a new exception.

3. Counties ⇐21½

A request for permission to make an alteration which is necessary in order to preserve owner's original right under an automatic exception to a county zoning ordinance cannot be subject to limitations under which the Board of Supervisors may grant an exception, allow a structure to be altered so as to enlarge the original use, or directly or indirectly extend life of structure.

4. Counties ⇐21½

It is not the purpose of the county zoning ordinance to disallow repairs or minor alterations in a building merely to hasten obsolescence or render it impossible to continue a permitted use, but ordinance does have general purpose to eventually end all nonconforming uses and to permit no improvements or rebuilding which would extend normal life of nonconforming use.

5. Counties ⇐21½

Although existing uses are protected by granting of automatic exceptions for purpose of preserving to owner property he had at time it became zoned, owner may not enlarge his right except in manner prescribed by county zoning ordinance.

6. Counties ⇐21½

The county zoning ordinances should not be interpreted or applied to deprive owner of his original right, but such right may be determined if it is determined that its continued exercise would be detrimental to public health or safety or would constitute a nuisance.

7. Counties ⇐21½

Where owner seeks permission to make a change in the existing structure which is subject to a county zoning ordinance, question is whether the change is reasonably required in order to preserve the original right or would create some new or additional right, exercise of which would be detrimental to the public or property owners, and it is for the county regional planning commission and the board of supervisors to decide what effect alterations would have upon rights of applicant and the public.

8. Counties ⇐21½

If alteration sought by owner in existing structure which is subject to county zoning ordinance is a minor one and is necessary to preserve owner's property right, which existed at time of zoning, denial of application would be contrary to fundamental principles of zoning law, but, if it should be determined that denial would not impair right to continue an existing use as preserved originally, owner would not be entitled to make the alterations as a matter of right.

9. Counties ⇐21½

Every application for permission to make alterations to property subject to county zoning ordinance does not constitute a surrender of the existing exception to the ordinance or a petition for a new one.

10. Counties ⇐21½

Where operator of slaughterhouse and packing plant petitioned county regional planning commission for permission to make alterations which were ordered by State Department of Agriculture and were necessary to enable operator to continue in business, allowance of the petition did not constitute the granting of a new exception but constituted a recognition and protection of operator's original right.

11. Counties ⇐21½

Even if application of operator of slaughterhouse and packing plant for permission to make alterations ordered by the State Department of Agriculture was one for an exception from the county zoning ordinance, although not for enlargement of an existing right, granting of the application constituted a determination by the county regional planning commission that the alterations were necessary for the preservation of the substantial property right of the operator and would not be materially detrimental to the public welfare or property of others in the vicinity.

12. Counties ⇐21½

Where condition that operator's right to use his premises as a slaughterhouse and packing plant, which had existed prior to county zoning ordinance, should cease November 1, 1950, was inserted in order approving application of operator for permission to make alterations which were ordered by State Department of Agriculture to be made before operator could continue his business, such condition constituted an illegal attempt to conditionally revoke operator's existing exception, and, therefore, was not binding on operator.

13. Estoppel ⇐90(1)

Where operator of slaughterhouse and packing plant had to make alterations ordered by State Department of Agriculture or quit business and would have been subject to punitive action if he had made the alterations without obtaining approval under the county zoning ordinance, fact that operator continued to so make use of the property from 1945 to 1950, following permission to make the alterations upon condition that use of the premises as slaughterhouse and packing plant should cease November 1, 1950, did not estop operator from questioning validity of such condition.

14. Estoppel ⇐52

Estoppel is an equitable doctrine which will not be applied against one who is blameless.

15. Counties ⇐21½

Any one who relied upon order of county regional planning commission which approved application of operator of slaughterhouse and packing plant for permission to make alterations ordered by the State Department of Agriculture upon condition that operator's use of the premises for such purposes should cease November 1, 1950, would be chargeable with knowledge of invalidity of order.

16. Estoppel ⇐93(2)

In proceeding by operator of slaughterhouse and packing plant against county and certain county officers to restrain them from interfering with operation of his plant which had been built prior to enactment of the county zoning ordinance, fact, if true, that six or seven residences in vicinity were erected in reliance upon report that the slaughterhouse would be closed down on November 1, 1950, in accordance with county regional planning commission's in-

effective attempt to so revoke operator's existing exception to the ordinance, would not estop operator from questioning validity of the commission's order.

17. Injunction ⇐108

Failure of operator of slaughterhouse and packing plant to appeal to the board of supervisors to question validity of five year limitation on future operation of the plant, which limitation was imposed by county regional planning commission in its approval of operator's application for permission to make alterations ordered by the State Department of Agriculture, did not constitute a failure by operator to exhaust his administrative remedies in view of facts that operator did go to board of supervisors when five year limitation became operative, and that ultimate action on part of board was merely delayed by order for five years, and, therefore, operator was not precluded from seeking to enjoin enforcement of the limitation.

18. Injunction ⇐130

In proceeding by operator of slaughterhouse and packing plant against county and certain county officers to restrain them from interfering with operation of his plant, which had been built prior to enactment of the county zoning ordinance, it was error for the Superior Court to find that the regional planning commission had found that the operation was not a nuisance or detrimental to public health or safety since such determinations were for the board of supervisors to determine and were not in issue before the Superior Court.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellants.

Holbrook, Tarr & O'Neill, Francis H. O'Neill, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff Ricciardi is and since 1922 has been the owner of property at the northeast corner of Rosemead and Ramona Boulevards in the county of Los Angeles. In 1924 he erected at a cost of about $80,000 buildings and structures especially designed and equipped as a slaughterhouse and meat processing, packing, and refrigeration plant. In conformity with county ordinances he used the plant as originally constructed until 1945 when the State Department of Agriculture ordered him to make certain alterations in it. For the reason that his property had in the meantime been zoned for agricultural and residential purposes only, he made application to the Los Angeles County Regional Planning Commission for a permit to make the alterations. On November 1, 1945, the commission, after a hearing, approved the application and issued a permit for the alterations, but, without the consent of Ricciardi, incorporated therein a provision that his right to use and operate the premises as a slaughterhouse and packing plant should cease November 1, 1950. Ricciardi made the alterations at a cost of $30,000. On October 1, 1950, the county ordered him to cease doing business at the location on November 1st. He made an application for extension of his 1945 permit, which application was denied by the commission, and upon appeal was denied by the Board of Supervisors. He complied by closing his plant as ordered and brought this proceeding against the county and certain officers thereof in which he obtained an injunction restraining them from interfering with his operation of the plant. The defendants have appealed.

Our discussion of the case of Ricciardi is predicated upon a unique state of facts and is limited to a consideration of the operation of the ordinance upon the following principal facts: Ricciardi was engaged in a permitted business; he did not wish to enlarge it; he desired to make alterations in his building solely for the purpose of complying with an order of the State Department of Agriculture; denial by the county of a right to make the alterations would have deprived him of his right to continue in business.

At the time plaintiff constructed his plant and entered business there was no county ordinance forbidding the operation of a slaughterhouse at said location. It was altogether a legal operation.

Section 15 of Ordinance 1494, which was the original County Zoning Ordinance, adopted in 1927, did not disturb existing uses.[1] Neither did the 1933 amendment which placed plaintiff's property in zone A-1 (agricultural and residential). They could be continued indefinitely. There have been many amendments of the zoning ordinance but none of them has departed in principle from the protection of existing uses recognized in the 1927 ordinance. They have granted automatic exceptions generally in the language of the latest enactment, § 531.[2]

While it is material only as an aid to a better understanding of the general zoning scheme it may be mentioned that by amendments culminating in present § 531 the life of automatic exceptions has been specified for different types of buildings, and for industrial buildings (including slaughterhouses) has been fixed at 40 years, subject to revocation under the general procedure provided by the ordinance and also subject to extension.

In addition to automatic exceptions for existing uses there are other types of exceptions which may be granted upon application. The conditions upon which they will be granted are the same under present § 531 as they were under § 156 which was in force in 1945, namely, if: "(a) The exception is necessary for the preservation of a substantial property right of the owner; (b) Such exception will not be materially detrimental to the public welfare nor to the property of other persons located in the vicinity thereof."

In the original zoning ordinance there was no provision for revocation of exceptions. In 1943 the ordinance was amended by the addition of § 75, reading: "In addition to the other grounds set forth in this article a permit granted pursuant to this article, whether automatically or upon application, may be revoked and cancelled by the Board of Supervisors if it finds that the use is detrimental to the public health or safety or is a nuisance." No other provisions related to exceptions granted automatically. These grounds for revocation were retained in later amendments. Sections 76 and 77 of the 1943 amendment provided that a permit (later referred to as an exception) could be revoked only after a public hearing before the commission.

In 1945 plaintiff held an automatic exception which would remain in effect unless and until it should be revoked by the Board of Supervisors. There was then in force § 123.[3] Plaintiff submitted with his application plans and specifications, which were approved by the commission and he was given a permit to make the alterations. However, without his consent the board incorporated the condition that he must discontinue his business by November 1, 1950.

The trial court found upon uncontroverted evidence that the alterations did not "increase, alter or change the extent, kind, type or amount of use of said property from the legally established and proper use there-

1. "Sec. 15. Existing Uses. Nothing contained in this ordinance shall be deemed or construed to prohibit a continuation of the particular existing use or uses of any building, structure, improvement or premises existing in the respective zones at the time this ordinance becomes effective in the event that such existing use is not in violation of any other ordinance or law; provided, that if such use is changed to a different use such different use shall conform to the provisions of this ordinance regulating the particular zone in which the premises are located."

2. "An exception is granted automatically, hereby, so as to permit the continuation of the particular existing uses of any building, structure, improvement or premises existing in the respective zones immediately prior to the time this ordinance or any amendment thereof becomes effective if such existing use was not in violation of this or any other ordinance or law."

3. "Buildings Converted or Altered. No building or structure existing at the time of the effective date of this ordinance which is designed, arranged, intended for or devoted to a use not permitted in the zone in which such building or structure is located, shall be enlarged, extended, reconstructed, built upon or structurally altered unless the use of such building or structure is changed to a use permitted in the zone in which such building or structure is located."

for" etc. This finding was of a fact to be considered in determining the nature of the consent that was given in 1945. Defendants say that when permission is requested to make an alteration in a building which is under an automatic exception it is to be treated as an application for an original exception and that it can be denied altogether or granted upon such terms as the Board of Supervisors see fit to impose. They cite § 155, which provides that *upon an application for an exception* "the Board of Supervisors may except such property from any particular restriction or restrictions and permit the erection, alteration, reconstruction or enlargement of any building or structure thereon upon such terms and conditions as it deems proper under the particular circumstances shown to exist, if it finds that the facts are such as to entitle the petitioner to such an exception." They contend that under the authority thus granted, the board, in approving an application for an exception, may limit its life to such term as it may deem reasonable. Granting, without deciding, that § 155 applies to automatic exceptions, the argument assumes that if approval is given for an alteration in a building that is under an automatic exception it amounts to the granting of a new exception. This may or may not be true. We shall see that it is not true in the present case.

[1] The question as to the validity of the limitation of plaintiff's right to remain in business to five years involves nothing more than an interpretation of the various provisions of the ordinance and their application to the established facts. The county ordinance does not in terms make an exception of alterations which may become necessary in order to conform to other laws or the lawful orders of county or state authority. However, in judging of the legality of the proceedings which purported to terminate plaintiff's right to continue in business, we must assume the framers of the zoning ordinance knew that every business is subject to control in the interest of health and safety and anticipated that when some alteration in a structure should be demanded the ordinance would be interpreted and administered in a fair and reasonable manner.

[2, 3] The point is not argued and we do not decide whether the alterations demanded by state authority, which would not enlarge plaintiff's rights under the original exception, were such that the building would be "structurally altered," thereby within the literal meaning of § 123. If so, it does not follow that giving approval to the alterations amounted to the granting of a new exception. Although "structurally altered" is an exceedingly broad term, it must be given a meaning which is consistent with the context in which it is used and the particular facts of the case. It must be recognized that there is a vast difference between alterations which would result in or facilitate enlargement of a use under an exception and those that would merely enable the owner to continue his business on the same scale but in a more efficient or more sanitary manner. A request for permission to make an alteration which is necessary in order to preserve the owner's original right under an automatic exception cannot in reason be subject to the limitations under which the Board of Supervisors may grant an exception, allow a structure to be altered so as to enlarge it or expand the original use, or directly or indirectly extend the life of the structure. It must be kept in mind that there is a fundamental difference between an exception that is granted as of right and one which may be granted conditionally.

[4–6] We have seen that the zoning ordinance recognizes that automatic exceptions of substantial structures shall enjoy long life and that even a recognized life of 40 or 50 years may be extended. It is not the purpose of the law to disallow repairs or minor alterations in a building merely to hasten obsolescence or to render it impossible to continue a permitted use. Upon the other hand it is the general purpose to eventually end all nonconforming uses and to permit no improvements or rebuilding which would extend the normal life of nonconforming structures. County of San Diego v. McClurken, 37 Cal.2d 683, 689, 234 P.2d 972. Every application for

permission to make an alteration is not an application for a new exception. Having in mind that existing uses are protected by the granting of automatic exceptions for the purpose of preserving to the owner what he had at the time his property was zoned, it is clear that he may not enlarge his right except in the manner prescribed by ordinance. It is equally clear from the care that has been taken to refrain from interference with constitutional rights that the zoning ordinances should not be so interpreted or applied as to deprive the owner of his original right. That right, however, has its limitations. It may be terminated if it is determined that its longer exercise would be detrimental to public health or safety or a nuisance.

[7, 8] Upon application for an exception the questions are whether there are substantial property rights of the owner to be protected, and whether the desired operation would be detrimental to public welfare or to the property of others in the vicinity. Where a change in an existing structure is sought the question is whether the *change* is reasonably required in order to preserve the *original right* or would create *some new or additional right,* exercise of which would be detrimental to the public or other property owners. These are the matters to be determined. In a technical view they arise whenever it is desired to make alterations in a building. It is for the commission and the board to decide what effect the alterations would have upon the rights of the applicant and the public. If the alteration is a minor one and is necessary in order to preserve the owner's property right which existed at the time of the zoning, denial of the application would be contrary to fundamental principles of zoning law. Upon the other hand, if it should be determined that denial of the application would not impair the right to continue an existing use as it was preserved originally, the owner is not entitled to make the alterations as a matter of right.

[9] Although permission to make alterations should be applied for in order that the commission and the board may determine whether and to what extent the changes would affect existing rights it is readily seen that every such request is not the surrender of an existing exception or a petition for a new one.

[10, 11] In the present case allowance of the alterations was not the granting of a new exception. It was merely a recognition and protection of plaintiff's original right. If an existing use "is not in violation of any other ordinance or law" an exception is granted by the ordinance free from conditions or limitations, and it can be terminated or interfered with only in the manner provided by ordinance. Even if the 1945 application be regarded as one for an exception, although it was not for the enlargement of an existing right, the granting of it was a determination by the Commission that the alterations were necessary for the preservation of a substantial property right of the owner and would not be materially detrimental to the public welfare or the property of other persons in the vicinity.

[12] The condition inserted in the 1945 order was a conditional revocation of the automatic exception. The only explanation of it is that the commission was of the opinion that by November 1, 1950, conditions in the vicinity of plaintiff's property would have changed in such manner and to such extent as to furnish grounds for revocation of the original exception. It was an attempt to do indirectly what could not be done directly, namely, to conditionally revoke an existing valid exception without a hearing upon notice in which the Board of Supervisors would be required to determine whether there existed one or more of the conditions specified in the ordinance as grounds for revocation.

There has been no proceeding for revocation of plaintiff's original exception, nor any proceeding which brought in question the existence of grounds for revocation. The existing exception, which represented a valuable property right, could not be revoked except upon grounds and by means of procedure prescribed by the zoning ordinance. Johnston v. Board of Supervisors, 31 Cal.2d 66, 74, 187 P.2d 686; Simpson v. Hite, 36 Cal.2d 125, 135, 222 P.2d 225;

Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 795, 194 P.2d 148.

Since plaintiff was required by the State to improve his plant in order to remain in business, and sought only preservation of an existing right, the attempted limitation of his exception was unauthorized and of no effect. We conclude, therefore, that when plaintiff's application was approved he obtained the right to make the changes free from the condition that the use of the property as a slaughterhouse must cease November 1, 1950.

We attach no importance to the 1950 proceeding in which plaintiff applied for and the Board of Supervisors refused an extension of the limitation sought to be imposed by the 1945 permit. To sustain the 1950 order would amount to a final determination by this court that plaintiff's right to do business expired November 1, 1950, without any proceeding having been had to terminate the right.

[13, 14] Appellants contend that inasmuch as plaintiff continued to make use of the property from 1945 to 1950 he is estopped from questioning the validity of the conditions upon which approval of the alterations was granted. We find no merit in this contention. Plaintiff did not agree to the condition. He was between two fires. If he refused to obey the order of the State Department of Agriculture he would have to quit business. If he made the alterations and continued in business without having obtained approval of the alterations he would subject himself to punitive action by the county. Estoppel is an equitable doctrine. It will not be applied against one who is blameless. Williams v. Williams, 170 Cal. 625, 629, 151 P. 10. It should not be applied as a result of conditions which were forced upon plaintiff by state action and in favor of the county which had granted him nothing to which he was not entitled and had suffered no detriment. There would be no equity in giving effect, indirectly, to the invalid curtailment of plaintiff's property rights.

[15, 16] There was some testimony that six or seven residences had been erected in the vicinity of plaintiff's premises by persons who had read in a newspaper that the slaughterhouse would be closed down November 1, 1950. Defendants contend that plaintiff should be held estopped to continue his business. Plaintiff made no such representation, directly or indirectly. If houses were built in reliance upon an invalid order of the Planning Commission it was not through any fault of plaintiff. He had no knowledge of facts which would have called for public repudiation of the commission's action. Moreover, anyone who relied upon the order of the Commission as effective to close up plaintiff's business would be chargeable with knowledge of its invalidity. The finding was against the claimed estoppel. The testimony introduced and that mentioned in an offer of proof was extremely vague and would not have furnished a basis for an estoppel.

[17] Defendants urge the point that plaintiff could have appealed to the Board of Supervisors questioning the five-year limitation imposed by the Commission and that having failed to do so he has no standing in court. We do not believe the facts bring the case within the rule of exhaustion of administrative remedies. Plaintiff did go to the Board of Supervisors when the conditional provision of the Commission's order came into actual operation. One reason for the rule is that resort should not be had to the courts for redress that might have been obtained through the administrative procedure. This would not be a sound reason, in view of the Board's action in 1950. Since the ultimate action on the part of the Board lay ahead of plaintiff, and was merely delayed, it would be a harsh and unwarranted application of the rule to hold that plaintiff should have appealed from a portion of the order in 1945.

[18] Defendants pleaded as a defense that plaintiff was operating a nuisance. Over plaintiff's objection certain witnesses testified that there were obnoxious odors and noises emanating from plaintiff's premises. This evidence was stricken on plaintiff's motion. The ruling was assigned as error. It would have been error if it had been the duty of the court, rather than the Board of Supervisors, to determine whether

conditions were created by plaintiff's operation which should be abated. But we agree that the present action was not one for the decision of that question. Findings and judgment one way or the other on that issue would have usurped the functions of the Board of Supervisors and would have deprived both plaintiff and defendants of the right to have the issue tried in the manner provided by law. However, it was error for the court to find that plaintiff's operation was not a nuisance for the reason already stated, and for the additional reason that all the evidence of the defendants on that subject had been stricken on plaintiff's motion.

It was also error to find that the Regional Planning Commission had found that plaintiff's operation was not a nuisance or detrimental to public health or safety. The finding erroneously implies that those matters had been in issue and had been legally determined in a hearing conducted for that purpose. This finding, and the finding that plaintiff's business did not constitute a nuisance should be stricken.

We construe the judgment as a restraint of defendants from enforcing the provision of the order of November 1, 1945, which purports to revoke and terminate plaintiff's right to operate a slaughterhouse upon the described premises. It does not purport to restrain them from any proceedings hereafter which may be instituted pursuant to applicable ordinances.

The judgment is affirmed, with directions to the court to strike the findings above mentioned and to make no findings to replace them.

PARKER WOOD and VALLÉE, JJ., concur.

FLINT et al. v. RUTHERFORD et al.

Sac. 6183.

Supreme Court of California, in Bank.

Feb. 10, 1953.

Rehearing Denied March 9, 1953.

Action by home owners to enjoin sale of their property under deed of trust. The Superior Court, Stanislaus County, B. C. Hawkins, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that since plaintiffs and a third party had borrowed money from defendants and had executed the trust deed covering the property of the borrowers and had entered into a supplemental agreement providing that purchase price of any of the property should be credited on the debt, in absence of evidence showing that plaintiffs were liable for less than one-half of the debt, plaintiffs could not enjoin the sale because defendants had released the third party's property from the deed of trust after the proceeds from the sale of such property had reduced the debt by more than fifty per cent.

Affirmed.

Prior opinion 246 P.2d 57.

Mortgages ⇐338

Where home owners and landowners borrowed money and note given for such loan was secured by trust deed covering the property of the borrowers, and supplemental agreement provided that purchase price of any of the property should be credited on the debt, in absence of showing that home owners were liable for less than one-half of the debt, home owners could not enjoin sale of their property under the deed of trust because landowners' property was released from the deed of trust after proceeds from sale of land had reduced the debt by more than fifty per cent.

Taylor & Taylor, Modesto, Mazzera, Snyder & DeMartini, Stockton and Edward Taylor, Modesto, for appellants.

Frank B. Collier and Vernon F. Gant, Modesto, for respondents.

GIBSON, Chief Justice.

Plaintiffs, Mr. and Mrs. Earl Flint, seek to enjoin the sale under a deed of trust of certain real property belonging to them, and they have appealed from a judgment entered in favor of defendants.

The Flints and Mr. and Mrs. John Frazier borrowed $40,000 from Mrs. Iris Kewin in order to finance the acquisition of a sawmill. The indebtedness was evidenced by a promissory note which was executed by the Flints and the Fraziers as comakers. The note was secured by a chattel mortgage on personal property in the sawmill and by a trust deed covering a tract of land owned by the Fraziers and a house and lot owned by the Flints. As a part of the transaction, Mrs. Kewin, as first party, and the Fints and Fraziers, as second parties, entered into a supplemental agreement which provided that all contracts with respect to the sale of any real property described in the trust deed should be deposited in escrow, and that all payments on account of the purchase price of any of the property should be credited on the note and deed of trust.

The land owned by the Fraziers was being subdivided, and the proceeds from the sales of lots were applied in payment and reduction of the note until the balance due on account of the principal was approximately $8,400. Thereafter the Fraziers and Mrs. Kewin, without the knowledge or consent of the Flints, instructed the escrow company to accumulate and hold the proceeds from the sales of subdivision property and not to credit the note with any further payments from such proceeds. These instructions were followed by the escrow holder, and the sum of $5,085.99 was accumulated. In the meantime, installments on the note became overdue and were not paid.

At about this time the Fraziers, Mrs. Kewin and a Mr. Rutherford executed certain agreements between themselves and opened another escrow without the consent of the Flints. In these transactions Mrs. Kewin assigned the Flint-Frazier note, together with the trust deed and chattel mortgage, to Rutherford who took with knowledge of the facts stated above. Rutherford released the subdivision property from the trust deed, and it was reconveyed to the Fraziers. He also released the chattel mortgage on the personal property in the sawmill. The Fraziers executed a new note

to Mrs. Kewin for approximately $8,400, being the unpaid principal and interest due on the Flint-Frazier note, and as security therefor gave a new trust deed on the subdivision tract. The money which had accumulated in the first escrow was released by Rutherford and divided between Mrs. Kewin and the Fraziers. As a result of these transactions Rutherford held the Flint-Frazier note for $40,000, on which about $8,400 remained due, secured only by the lien of the trust deed on the Flint home.

The installments on the Flint-Frazier note being in default, Rutherford instituted proceedings under the trust deed for the sale of the Flints' home. This action to enjoin the sale was then brought against the Fraziers, Mrs. Kewin, Rutherford, the trustee and the escrow holder on the theory that the failure to apply all the proceeds from sales of subdivision lots toward payment of the Flint-Fraizer note constituted a breach of the supplemental agreement.

Evidence of the circumstances surrounding the transaction between the Flints, the Fraziers and Mrs. Kewin was received at the trial without objection. It appears that Flint introduced Frazier to Mrs. Kewin, with whom they discussed the possibility of a loan for the purpose of acquiring a lumber mill. Mrs. Kewin was unwilling to lend the money unless she was given a first lien upon the Frazier property which was being subdivided. There was then a lien of approximately $8,000 on this property, and in order to obtain enough money from Mrs. Kewin to free the property and purchase the sawmill, the Flints agreed to put up their home as additional security. As a part of the transaction Flint was to receive an interest in the sawmill, the extent of which is in dispute and the subject of other litigation. The bill of sale was made out in the names of Flint and Frazier, and Flint testified that he was to receive a half interest in the mill.

The trial court found and concluded that the supplemental agreement was for the benefit of Mrs. Kewin and her assigns and not for the benefit of the Flints or the Fraziers, that the proceeds from the sales of the subdivision lots were not the primary security for the loan, that the Flints were not damaged and that they were not entitled to enjoin the sale under the trust deed.

In our opinion, the judgment is supported by the evidence. The supplemental agreement was not, as claimed by the Flints, a tripartite contract; instead it was a bilateral agreement entered into by Mrs. Kewin as party of the first part, and by the Fraziers and Flints as parties of the second part. Mrs. Kewin demanded execution of the agreement as a condition to making the loan, and it was drawn by her attorney for the obvious purpose of protecting the security. It did not purport to make the proceeds from the Frazier tract the primary security or to provide for the order in which resort might be had to the different items of property. It applied to all contracts for the sale of any of the real property described in the deed of trust, and it specifically referred to both present and future contracts. While it provided that all agreements for the sale of any property described in the trust deed, and "particularly" all agreements with respect to the sale of any part of the Frazier tract, should be deposited with the escrow holder, the promises with respect to the application of the proceeds of such sales were, of course, made by all the parties of the second part and were applicable to all the realty secured by the deed of trust. Hence, if the Flints had contracted to sell their home, it would have been their duty, under the agreement, to deposit that contract with the escrow holder and have all payments applied on the note.

It was, of course, to the advantage of the Flints to have all proceeds from the subdivision sales applied in reduction of the debt on which they were liable, since resort would not be had to their home so long as such proceeds were sufficient to meet the installments. On the other hand, it is clear that the Flints, who were co-makers, were obligated to Mrs. Kewin to pay the entire amount of the note and that they were also obligated to reimburse the Fraziers for any payments which the Fraziers made covering the Flints' proportionate part of the indebtedness. It follows that if the Flints are not required

to bear more than their share of the debt, they are in no position to complain that they were injured by the failure to apply on the Flint-Frazier note the money which was accumulated in the escrow from the proceeds of sales of the Frazier tract.

There is no dispute that the Fraziers paid $33,600 on the note, while the Flints paid nothing, and that about $8,400 remained unpaid. As we have seen, the Flints and the Fraziers signed the note as comakers. The Flints claim that they have a half interest in the sawmill, and so far as the record shows they may be liable to the Fraziers for one-half of the amount of the debt. If the Flints were to be liable only for a lesser proportion of the indebtedness, the burden was on them to establish that fact as a predicate for any claim that the threatened sale of their home would cause them to bear more than their share of the debt. They did not sustain this burden and, therefore, are not entitled to enjoin the sale under the deed of trust.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



115 Cal.App.2d 811

PEOPLE v. PIAZZA.

Cr. 2382.

District Court of Appeal, Third District, California.

Feb. 6, 1953.

Defendant was convicted in the Superior Court, Solano County, Greenwood, J., of petty theft, and he appealed. The District Court of Appeal, Schottky, J., held that defendant, indicted for grand theft for the taking of a sheep, could not be convicted of the crime of petty theft under the same indictment.

Reversed.

1. Indictment and Information ⇐189(9)

A defendant indicted for grand theft for taking of a sheep could not be convicted of the crime of petty theft under the same indictment. Pen.Code, §§ 487, 488.

2. Criminal Law ⇐814(20), 1186(4)

Where state of record, in prosecution under indictment for grand theft for taking of sheep, was such that it was extremely doubtful that jurors would have found defendant guilty of grand theft if they had been correctly instructed that the only verdict they could render was one of grand theft or one of not guilty, trial court's error in instructing jurors on petty theft and submitting to them a verdict as to petty theft resulted in a miscarriage of justice requiring reversal of judgment of conviction for petty theft. Const. art. 6, § 4½.

A. F. Bray, Jr. and John F. Baldwin, Martinez, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Leo V. McInnis, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment of conviction of petty theft. The sole question presented by appellant is: "May a defendant indicted for grand theft under Penal Code Section 487(3) for the taking of a sheep be convicted of the crime of petty theft under the same indictment?"

Before discussing this question we shall summarize the evidence as shown by the record.

Joseph and Charles Piazza are brothers, Charles residing on a ranch owned by one Ross Noonan, by whom Charles was employed. The Noonan sheep ran loose on this property and in the yard surrounding the residence. Charles had several lambs belonging to him personally. Late Sunday afternoon, February 17, 1952, after having visited with his brother over the week-end, defendant Joseph Piazza was preparing to return to his home in Cupertino; Charles at this time offered defendant one of his sheep. Defendant was reluctant to take the time

necessary to slaughter the animal, but he finally consented. In response to defendant's question as to which lamb he should take, Charles told him to "take one that is cooped up." Defendant then went out into the yard, grabbed a lamb, struck it over the head, cut its throat, strung it up in the barn and started skinning it. When the animal was about half skinned, Charles came up to the door of the barn and told defendant he had killed the wrong lamb. Thereupon the brothers had a strong argument in the yard, appellant went back into the barn, finished the skinning, and left the premises with the animal. Defendant dropped the entrails and hide into a ditch alongside the Benicia road. These discarded items were investigated two days later, on February 19, 1952, by Stanley M. Emerson, Chief Criminal Deputy Sheriff of Solano County. Several days later, on February 21, 1952, Emerson went to Cupertino where the meat was found in defendant's deep freeze; defendant at that time contended that Charles had given him the sheep, that he had not killed it, and that it was hung up when he first saw it. Defendant's reason for telling this story was that he thought he was going to be thrown in jail. Both Charles and Joseph were indicted for grand theft, but Charles was acquitted and is not involved in this appeal. The defense presented by Joseph was that of mistake and ignorance in that he had simply slaughtered the wrong animal. The hide discharged on the Benicia road was identified by Ross Noonan as coming from one of his sheep because it was marked by a square red "N" and also had his earmarkings consisting of underbites on both ears and a notch cut out of the right ear. Defendant said he was unaware of the red "N" on the hide, although he did notice something resembling a grease spot on the belly of the lamb. No evidence as to value was presented to the jury.

At the conclusion of the arguments to the jury there was a discussion between court and counsel outside of the presence of the jury relative to the instructions to be given to the jury, and counsel for appellant objected to the giving of any instruction on petty theft or to the submitting of any such verdict to the jury upon the ground that petty theft was not an included offense under the crime of grand theft charged in the indictment. The court overruled these objections and instructed the jury that if they found the defendant guilty of theft, they must then determine whether such theft was grand theft or petty theft and must state the degree of the theft in their verdict. Included in the verdicts prepared by the court for the jury was the one which was used by the jury in finding appellant guilty of petty theft.

Section 487 of the Penal Code provides as follows:

> "Grand theft is theft committed in any of the following cases:
>
> "1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50) the same shall constitute grand theft.
>
> "2. When the property is taken from the person of another.
>
> "3. When the property taken is an automobile, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow or pig."

Section 488 provides: "Theft in other cases is petty theft."

Appellant contends that inasmuch as he was charged with grand theft, committed by stealing, taking and carrying a sheep, he could only be found guilty of grand theft or acquitted. He argues that since the jury found him guilty of petty theft, it in effect acquitted him of grand theft, the crime with which he was charged. Appellant then argues that while larceny or theft is divided into two degrees, grand and petty, grand theft itself is not divided into degrees, and that, therefore, when a defendant is charged with the taking of a sheep, which offense falls only within the category of grand theft, the jury is not concerned with the degree. 15 Cal.Jur. 889; People v. Price, 67 Cal. 350, 7 P. 745. Appellant cites People v. Prather, 120 Cal. 660, 53 P. 259, wherein the court approves instructions given by the

trial court to the effect that in a prosecution for the felonious taking of calves, cows, steers and bulls, the jury would not be at liberty to find the defendant guilty of petty larceny but must either find him guilty of grand larceny or not guilty. Appellant also attacks the giving of the instructions on petty theft as erroneous and inapplicable because the matter of value did not appear in the evidence, nor was it relevant under the offense as charged. Cited are People v. Kelley, 24 Cal.App. 54, 140 P. 302, and People v. Huntington, 138 Cal. 261, 70 P. 284, which, while dealing with a different kind of offense, are analogous in that they hold that it is error to give instructions having no application to the case at hand. Appellant then argues that the rule was early established that in charging the crime of grand theft of an animal, the value need not be stated, citing People v. Townsley, 39 Cal. 405. Other cases cited holding that instructions calling for a petty theft verdict are not required where the crime charged is a type of grand theft in which value is not concerned are People v. Kuhl, 28 Cal.App. 2d 471, 82 P.2d 715 (theft of calf); People v. Moon, 7 Cal.App.2d 96, 45 P.2d 384 (theft of money).

Respondent in reply first argues that the evidence of appellant's guilt of grand theft is clear, and that, therefore, he has not been prejudiced by his conviction of petty theft only, even though it may have been error to give the instruction as to petty theft. Respondent cites People v. Grafft, 61 Cal.App. 7, at page 13, 214 P. 273, at page 276, where the court said:

> "This assignment is unique, in that it really is an objection by defendant Grafft that he was convicted of murder in the second instead of the first degree, for, from the evidence adduced at the trial, the jury might very properly have found defendant Grafft guilty of murder in the first degree. The error of which he complains redounded to his advantage rather than to his prejudice. People v. Tugwell, 32 Cal. App. 520, 163 P. 508."

Respondent also quotes from People v. Jenkins, 118 Cal.App. 115, at page 118, 4 P. 2d 799, at page 800, as follows: "The fact that the jury found the defendant guilty in a lesser degree than the evidence may have warranted, being to his advantage, he is in no position to complain."

Respondent also cites People v. Blackwood, 35 Cal.App.2d 728, at page 733, 96 P. 2d 982, at page 985, where the court said:

> "These authorities are to the effect that where the evidence shows the defendant to be guilty of murder but the jury is instructed as to manslaughter and brings in a verdict of guilty of manslaughter, the judgment will stand."

[1] We are satisfied that it was error to instruct the jury on petty theft and to submit to them a verdict as to petty theft, because petty theft was not included within the charge for which appellant was indicted, and hence the authorities cited by respondent are not in point.

[2] We are unable to agree with respondent's contention that the error did not result in a miscarriage of justice and that the conviction of petty theft should be affirmed by reason of section 4½ of article VI of the California Constitution. Applicable to this contention is the language of our Supreme Court in Satterlee v. Orange Glenn School District, 29 Cal.2d 581, at page 593, 177 P.2d 279, at page 286:

> "For these reasons the adoption by the trial court of the standard of care imposed by a statute or ordinance becomes an important factor in imposing liability. The instruction given by the court on its own motion had the effect of minimizing, if not completely negativing the code provision. It was, therefore, erroneous and considering the direct conflict in the evidence, constituted 'a miscarriage of justice' within the meaning of article VI, section 4½ of the California Constitution."

Appellant was entitled to have the case against him submitted to the jury on the basis of whether or not he was guilty of the offense of grand theft. His counsel objected to the giving of instructions as to petty theft. The trial court overruled such objections and not only erroneously instructed the jury that petty theft was in-

cluded in the offense with which appellant was charged but submitted to the jury verdicts of guilty of grand theft, guilty of petty theft, and not guilty. The state of the record is such that it is extremely doubtful that the jury would have found appellant guilty of grand theft if they had been correctly instructed that the only verdict they could render was one of grand theft or one of not guilty. It is quite likely that the jury may have felt that the appellant was not guilty of grand theft but that he was somewhat careless and should therefore be found guilty of the milder offense of petty theft, which under the court's instructions they were justified in believing they had a right to do. We, therefore, conclude that the error in the instant case was such that section 4½ of article VI of the Constitution cannot save the judgment of conviction of petty theft from reversal.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.



115 Cal.App.2d 776

PEOPLE v. HARPER et al.

Cr. 4887.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1953.

Rehearing Denied Feb. 18, 1953.

Hearing Denied March 5, 1953.

Defendants were convicted in Superior Court, Los Angeles County, John J. Ford, J., of keeping and occupying a place with papers and paraphernalia for purpose of recording bets, and for recording bets, and they appealed. The District Court of Appeal, Fox, J., held that exemplars of defendants' handwriting were admissible to show that pencil writings on betting markers found in defendants' residence were in defendants' handwriting, as against objection that the exemplars were obtained from them only because of an alleged promise of police officers that defendants would not be prosecuted, and thus constituted self-incriminating testimony.

Affirmed.

1. Criminal Law ⇐395

In prosecution for keeping a place with papers and paraphernalia for purpose of recording bets, and for recording bets, betting markers and scratch sheet obtained from defendants' residence were not rendered inadmissible by fact that police entered defendants' residence without a search warrant. Pen.Code, § 337a, subds. 2, 4; U.S.C.A.Const. Amend. 4; Const. art. 1, § 19.

2. Criminal Law ⇐393(1)

Constitutional guarantees against self-incrimination only protect a person from any unwilling testimonial disclosures, and do not preclude the introduction of physical evidence, such as an exemplar of his handwriting, that a defendant is induced to provide. U.S.C.A.Const. Amend. 5; Const. art. 1, § 13.

3. Criminal Law ⇐393(1)

The protection of constitutional guarantees against self-incrimination extend only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. U.S.C.A.Const. Amend. 5; Const. art. 1, § 13.

4. Criminal Law ⇐393(1)

In prosecution for keeping and occupying place with papers and paraphernalia for recording bets, and for recording bets, exemplars of defendants' handwriting were admissible in evidence to show that defendants' handwriting appeared on betting markers found at their residence, as against objection that the exemplars were obtained from them only because of an alleged promise by police officers that they would not be prosecuted and thus constituted self-incriminating testimony. Pen.Code, § 337a, subds. 2, 4; U.S.C.A.Const. Amend. 5; Const. art. 1, § 13.

5. Gaming ⇐98(3, 5)

Evidence sustained conviction for keeping and occupying a place with papers

and paraphernalia for purpose of recording bets, and for recording bets. Pen.Code, § 337a, subds. 2, 4.

Russell E. Parsons, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Michael J. Clemens, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant Harvey W. Harper, formerly sergeant on the Los Angeles Police force, and his wife, Margaret, were convicted of violating Penal Code section 337a, subdivision 2 (keeping and occupying a place with papers and paraphernalia for the purpose of recording bets), and also subdivision 4 thereof (recording bets). They appeal from the ensuing judgments and the orders denying their motions for a new trial.

On January 4, 1952, at about 1:45 p. m., police officers entered the residence of defendants without a search warrant. Officer Mullins, who entered from the rear, observed Mrs. Harper rise from a chair which was next to a table upon which was a telephone, a scratch sheet, and numerous pieces of yellow, lined paper on which there were pencil notations. These were identified at the trial by an expert in bookmaking practices as betting markers. Approximately 168 bets were recorded on these markers on horses running at various tracks throughout the United States on that day. Other betting markers covering previous dates were found in a rear bedroom where there was another telephone.

Upon the arrest of Mrs. Harper by officer Mullins he took her into the front room where the other officers had already placed Harvey Harper under arrest. In response to a question as to the identity of the co-defendant who was sitting on the divan Margaret replied that she had never seen the man before. He informed the officers, however, that she was his wife. Officer Mullins had his hand on Margaret's arm but not in a holding or pulling manner. Mr. Harvey told him to take his hands off his wife, jumped up from the divan and came at him. When Mullins saw Harper coming toward him he turned to meet him. When the latter placed both hands on his shoulder, Mullins, who feared Harper was going to either strike him or shove him, hit Harper three or four times. Another officer also hit Harper, who was immediately handcuffed. He was not thereafter struck.

Mr. Harper testified that when he and his wife were at the police station on the evening of January 4th a Sergeant Brown told him that if he would resign from the police department there would be no prosecution. He admitted, however, on cross-examination, that he was told the matter would have to be submitted to the district attorney's office as to whether or not there would be any prosecution but that usually under such circumstances the district attorney does not prosecute. Thereupon Harper resigned from the police department. The Harpers were then released and returned to their home. They were, however, requested to, and did, furnish exemplars of their handwriting which were later introduced in evidence in this case. About noon the next day (Saturday) the defendants were rearrested and booked. On that occasion Mrs. Harper gave two additional exemplars of her handwriting.

A handwriting expert using these exemplars testified that portions of the pencil writing on People's Exhibits B, C and D—all being betting markers—were, in his opinion, that of Mr. Harper, and the remainder of the writing on these betting markers was that of Mrs. Harper.

Defendants contend that their constitutional rights as guaranteed by the Fourth and Fifth Amendments to the United States Constitution, and section 19 of Article I of the California Constitution were violated; that they were subjected to an unlawful search and seizure and compelled to be witnesses against themselves through the admission in evidence of the exemplars of their handwriting.

[1] The fact that the police entered defendants' residence without a search warrant did not render inadmissible in

evidence the betting markers and scratch sheet there recovered. People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Kendall, 111 Cal.App.2d 204, 244 P.2d 418; Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782.

In this connection defendants attempt to bring their case within the principle of Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, because of the physical encounter between the officers and Mr. Harper in his home. The Rochin case, however, is not applicable. It will be recalled that Rochin swallowed the narcotics that the officers found in his possession and that they forcibly pumped his stomach in order to retrieve the evidence. Here the blows that were struck by the policemen had no relation to the procurement of any incriminating evidence. It was an independent episode, apparently resulting from a misconception of Mr. Harper's acts and attitude, that had no bearing on the actual trial of the defendants.

[2–4] The major attack of the defendants is aimed at the admission in evidence of their handwriting exemplars. Their basic argument is that they gave these exemplars only because of the alleged promise of the police officers that they would not be prosecuted. Defendants rely upon the privilege against self-incrimination contained in the Constitution of California, art. I, sec. 13, and in the Fifth Amendment to the Constitution of the United States. Defendants, however, do not come within the protection of those constitutional guaranties since they only protect a person from any unwilling testimonial disclosures and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an exemplar of his handwriting. The protection extends only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. There was no "testimonial compulsion" here. Defendants were not required to verify the authenticity of their handwriting on the exemplars. This was provided by a witness who saw them fill out the exemplars. Defendants were not compelled to disclose that the writing on the betting markers was theirs. This was proved by a handwriting expert. There is here no reliance to be placed upon any statement made by either of the defendants. The evidence was their handwriting, a physical fact which was compared with the handwriting on the betting markers and found to be the same. The exemplars were therefore properly admitted in evidence. People v. Trujillo, 32 Cal.2d 105, 112–113, 194 P.2d 681; People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 204, 213, 168 P.2d 443; People v. Smith, 113 Cal.App.2d 416, 248 P.2d 444; 8 Wigmore, Evidence, sec. 2265, p. 375; 22 C.J.S., Criminal Law, §§ 649, 650.

[5] Mr. Harper argues that the evidence is insufficient to sustain his conviction. He is in error. The testimony shows that there were notations on some of the betting markers in his handwriting. This is sufficient to sustain the conviction of violating subdivision 4 of section 337a, Penal Code.

The circumstances were sufficient to support an inference of guilt as to subdivision 2 also. There can be no doubt that bookmaking was being conducted at their residence. He admitted, on the witness stand, knowing it was being carried on in his home. He sought to exculpate himself by testifying that he and his wife were having domestic difficulty, that he was not living there continuously, and had come there about 1:00 o'clock that morning when he got off duty in response to his wife's request for his advice regarding some insurance and other matters. He had spent the rest of the night there, and after he got up that morning he had gone to the store for his wife and had then gone out for a haircut. When the raid took place about 1:45 in the afternoon he was reading in the front room, waiting for the time to go to work as he was on the night watch. When the Harpers were released Friday night they went back to their residence. Mr. Harper was there at noon on Saturday when the officers rearrested him and his wife. When he was released the

second time he returned to this same house. He kept clothing at this place and referred to it in his testimony as "my home" and "our home." This evidence would support an inference that Mr. Harper was not just a mere visitor in the house. This, taken with the evidence that he had recorded bets on races that had been run that day reasonably justified the inference that he was occupying the premises with paraphernalia for the purpose of recording bets in violation of subdivision 2, section 337a, Penal Code. People v. Ross, 100 Cal.App. 2d 116, 121, 223 P.2d 85.

The judgments and orders denying defendants' motions for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



115 Cal.App.2d 622

FRUITVALE CANNING CO. v. COTTON et ux.

Civ. 15284.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1953.

Rehearing Denied Feb. 28, 1953.

Hearing Denied March 26, 1953.

Action against seller and buyers of box factory, by customer of seller, for balance due on loan. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment against the seller and in favor of the buyers, and the customer appealed. The District Court of Appeal, Patterson, J. pro tem., held that evidence was sufficient to support finding that buyers had agreed to assume seller's obligation to supply customer with its requirements of shook, but that it had not assumed the indebtedness.

Judgment affirmed.

1. Contracts ⇐187(1)

Before a third party who may derive a benefit from a promise is entitled to bring an action thereon, there must be an intent clearly manifested by the promisor to secure the benefit claimed to the third person.

2. Contracts ⇐187(2)

Where box factory owner, who had borrowed money from customer under contract to repay money and to supply customer with shook which could be credited against loan, sold factory to purchasers who agreed to assume the contract with understanding that owner would discharge the debt, customer was not entitled, as third-party beneficiary, to sue purchasers on the indebtedness. Civ.Code, § 1559.

3. Contracts ⇐187(1)

A third-party beneficiary cannot gain any greater rights under a promise than those of the promisee.

4. Contracts ⇐187(1)

Civil Code provision relating to the assumption of obligation by acceptance of benefits generally applies only where the person accepting the benefit was a party to the original transaction. Civ.Code, § 1589.

5. Contracts ⇐187(2)

Where owner of box factory borrowed money from customer, agreeing to repay it and to supply customer with its requirements for shook, which could be credited against the loan, box factory purchasers who, in buying the factory, agreed to assume contract between owner and customer only on condition that owner discharge debt, and did not receive any of the money borrowed, did not assume the debt and were not obligated to repay customer. Civ.Code, § 1589.

6. Contracts ⇐187(2)

Where box factory owner borrowed money from customer, agreeing to repay it and to supply customer with its requirements for shook, which could be credited against the loan, box factory purchasers who agreed to assume contract between customer and owner on condition that owner would discharge debt were not liable for the debt under Civil Code provision entitling creditors to the benefit of securities held by a surety. Civ.Code, § 2854.

7. Appeal and Error ⇐171(1)

Where complaint stated cause of action to recover a debt and pleadings were not

framed and case was not tried upon theory of breach of contract, plaintiff could not raise for first time on appeal claim that it was entitled to recover on theory of breach of contract.

Hadsell, Murman & Bishop, San Francisco, for appellant.

Clewe, Martin & Blade, Oroville, for respondent.

PATTERSON, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendants R. L. Cotton and Mamie M. Cotton, his wife, in an action to recover for money loaned to Charles E. Cotton.

Charles E. Cotton owned a box factory, and the Fruitvale Canning Company, the plaintiff, was one of his customers. He desired in connection with his box factory operations to acquire a timber supply and to construct a sawmill. To finance it he entered into an agreement with the Fruitvale Canning Company, the plaintiff, dated March 4, 1946, by which the company agreed to advance the sum of $25,000 to him. In return for this Cotton agreed to furnish for a period of five years such shook as the company needed in its cannery operations "when and as the plaintiff should order the same." Cotton agreed to repay the sum advanced at the rate of $5,000 annually. Five thousand dollars was to be credited each year against purchases, and in the event the purchases were less than $5,000 he was to pay the difference in cash. He furnished shook in accordance with the agreement to December, 1948. Charles E. Cotton became badly involved financially and by deed dated December 23, 1948, conveyed the box factory to his brother, R. L. Cotton, and his wife, Mamie M. Cotton. By agreement dated the same date, although the Court found it was not actually executed until February, 1949, R. L. Cotton and his wife purchased the box factory from Charles Cotton. There was adequate consideration and no claim of bad faith is made. Richard L. Cotton furnished shook under this agreement until 1950 when the box factory burned. At that time there was a balance due on the payments from Charles in the sum of $21,000. No further payments were made and plaintiff brought this action against Charles Cotton, Richard L. Cotton and Mamie M. Cotton, his wife. The Court gave judgment in the sum of $21,000 with interest against Charles E. Cotton and in favor of the other defendants. Defendant Charles E. Cotton did not appeal, and plaintiff takes this appeal from the judgment in favor of the other defendants. For convenience we shall refer to Charles E. Cotton as Cotton and R. L. Cotton and Mamie M. Cotton, his wife, as the defendants.

[1, 2] The plaintiff contends that it is entitled to recover first on the grounds that under the contract by which Cotton sold the box factory to defendants the latter assumed and agreed to pay the indebtedness of the former to the Fruitvale Canning Company. It is argued that the contract therefore falls within the provisions of Section 1559 of the Civil Code as a contract made expressly for the benefit of the Fruitvale Canning Company and may be enforced by it. The pertinent language in the agreement is as follows: "Buyers hereby agree to assume that certain contract dated March 4, 1946, and executed by the sellers, Charles E. Cotton, and the Fruitvale Canning Company. It is understood, however, that the sellers will pay and discharge the indebteness owing to the said Fruitvale Canning Company under and by virtue of the terms of said contract, whether the said indebtedness is now due and payable or not; provided, however, and in the event that the buyers are required to pay any of said indebtedness, that the amount so paid shall be charged against the sellers, and be deducted from the amounts here in this contract agreed to be paid by the buyers to the sellers, under the terms of this contract or any modification thereof." The argument is advanced that the defendants assumed all of Cotton's obligations to Fruitvale Canning Company, including the repayment of the indebtedness of $25,000. Although the agreement provides that the seller, Cotton, is to pay the indebtedness, it is claimed this was merely an arrangement between themselves, and so far as the plaintiff was concerned the

defendants herein became the principal obligors. We are unable to agree with the plaintiff's interpretation of this provision. Defendants by their agreement assumed and agreed to perform all the other burdens of the contract but it was expressly provided that the seller, Cotton, was to discharge the indebtedness to plaintiff. Before a third party who may derive a benefit of a promise is entitled to bring an action thereon there must be an intent clearly manifested by the promisor to secure the benefit claimed to the third person. Smith v. Anglo-California Trust Co., 205 Cal. 496, 502, 271 P. 898; Kohlberg v. Sherwin-Williams Co., 93 Cal.App. 609, 613, 269 P. 975. The agreement and testimony of the parties showed as between Cotton and the defendants that it was intended that Cotton should discharge this indebtedness.

[3] A third party beneficiary cannot gain any greater rights than those of the promisee. "The foundation of any right the third person may have, whether he is a donee beneficiary or a creditor of the promisee, is the promisor's contract. * * * Moreover, the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise." Williston on Contracts, Rev.Ed., Section 364–A; Slayden v. O'Dea, 182 Cal. 500, 510, 189 P. 1066.

The plaintiff regards as particularly significant the provision in the contract between Cotton and the defendants which provides that in the event that defendants should be required to pay any of Cotton's indebtedness to plaintiff that the amount should be charged to Cotton and deducted from any amount due him by defendants. Plaintiff under its agreement with Cotton was entitled to be credited each year with $5,000 upon the purchase of shook. Obviously this provision was intended to protect defendants in the event this right was exercised. It did not indicate any intention to assume the indebtedness.

Oral evidence was admitted regarding the circumstances under which the agreement was executed and the acts and declarations of the parties for the purpose of establishing their intention. The record discloses that defendants before entering into the contract for the purchase of the box factory informed the plaintiff that they would not assume this obligation. They also repeatedly informed Cotton they would not do so. The agreement itself was before the Court. The evidence was sufficient to support the finding that the defendants had not assumed the indebtedness. The contract was not made for the plaintiff's benefit. Any benefit received by it was purely incidental.

[4, 5] Plaintiff's next contention is that the defendants having voluntarily accepted the benefits of the contract between Cotton and Fruitvale Canning Company must likewise assume the burdens in accordance with the provisions of Civil Code, § 1589. This section, however, has generally been held to apply only where the person accepting the benefit was a party to the original transaction. Canale v. Copello, 137 Cal. 22, 25, 69 P. 698; Stone v. Owens, 105 Cal. 292, 296, 38 P. 726; Tarpey v. Curran, 67 Cal.App. 575, 587, 228 P. 62; Beazley v. Embree, 41 Cal.App. 706, 183 P. 298. Defendants were not parties to that agreement.

Plaintiff relies upon McCormick Saeltzer Company v. Grizzly Creek Lumber Co., 74 Cal.App. 278, 240 P. 32, Robinson v. Rispin, 33 Cal.App. 536, 165 P. 979, and Bergin v. Van Der Steen, 107 Cal.App.2d 8, 236 P.2d 613. In McCormick Saeltzer Company v. Grizzly, etc., Co., supra, there was an express assumption of the debt which is not true in the present case. As was pointed out in Tarpey v. Curran, supra, the case of Robinson v. Rispin, supra, represents an exception to the rule. This exception requires the assignee of an executory contract to accept the burdens when all the benefits of a full performance have inured to him. The exception to the rule is stated in Robinson v. Rispin, supra [33 Cal.App. 536, 165 P. 982], as follows: "But where, after the assignment is made, the executory provisions of the contract are fully performed, *the benefit inuring solely to the assignee,* and where by his actions he holds himself out as personally liable and recognizes the original con-

tract as binding upon him, he is liable to the other party equally with the assignor." (Emphasis added.) The general rule and the exception were also stated in Wilson v. Beazley, 186 Cal. 437, 444, 199 P. 772. Bergin v. Van Der Steen, supra, is one in which the full benefit inured to the assignee and falls under the exception. In the present case the principal benefit to be derived by Cotton under his agreement with plaintiff was an advance of $25,000. This was retained by him and did not inure to the benefit of the defendants. This case therefore does not fall within the exception and defendants not being parties to the contract, Civil Code, Section 1589 has no application.

[6] There is no merit to plaintiff's claim that it is entitled to recover under the provisions of Section 2854 of the Civil Code which reads: "A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." Plaintiff urges that defendants had agreed with Cotton to discharge his debt to plaintiff and that this was an obligation in Cotton's hands to which the plaintiff as a creditor could resort. Even assuming that this section might be made to apply to this situation the contention is based upon the premise that the defendants assumed the obligation. The premise being false, the conclusion falls.

[7] Another ground for recovery claimed is that defendants failed, as required by a provision in the agreement between Cotton and the plaintiff, to furnish and endorse over to plaintiff insurance policies covering the property which would protect this indebtedness. The complaint states a cause of action to recover a debt. No mention is made of any breach of obligation with reference to insurance. During the course of the trial, in answer to a suggestion by the Court that the gist of the plaintiff's action was a debt and not damage for breach of contract, plaintiff's counsel said, "We are not claiming the contracts were breached. We are claiming the contracts were performed in that the security problem was provided for by purchase of insurance. We want to show Mr. R. L. Cotton performed that agreement of March 4, 1946, in that he did have the insurance which was payable on the loss * * *. We are not claiming a breach of contract. We are claiming a performance of contract." Neither the pleadings were framed, nor was the case tried upon the theory of breach of contract to furnish insurance and plaintiff should not be permitted to raise it for the first time on appeal. Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 83 P.2d 942.

In view of our conclusion it is unnecessary to discuss the other points raised.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



115 Cal.App.2d 798

SUKIASIAN v. SHAKARIAN et al.

Civ. 19117.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1953.

Action to establish a constructive trust in a decedent's property for her children and their spouses. From a judgment of the Superior Court of Los Angeles County, Frederick F. Houser, J., for defendants, plaintiff appealed. The District Court of Appeal, Fox, J., held that the evidence supported the trial court's findings that no constructive trust including the children's spouses as beneficiaries was created and that there was no agreement between plaintiff and decedent's daughter, to whom plaintiff was married, that all property acquired by either of them, including property inherited by her from decedent, would be their common property.

Judgment affirmed.

1. Trusts ⇐110

In action to establish constructive trust in decedents' property for her children and their spouses, evidence supported trial court's finding that no such trust including spouses was created.

2. Appeal and Error ⇐994(3), 996, 1012(1)

The weight of particular testimony, inferences to be drawn therefrom, and witnesses' credibility are matters committed to trier of facts.

3. Appeal and Error ⇐1011(1)

The trial court's resolution of conflict in testimony is controlling on appeal.

4. Trusts ⇐110

In action to establish constructive trust in decedent's property for her children and their spouses, including plaintiff husband of one of decedent's daughters, evidence supported trial court's finding that there was no agreement between plaintiff and his wife that all property acquired by either of them, including property inherited by wife from decedent, would be their common property.

5. Appeal and Error ⇐994(3), 1011(1)

Resolution of inconsistencies and contradictions, even in particular witness' testimony, is for trial court in nonjury case.

6. Appeal and Error ⇐996, 1012(1)

On appeal, District Court of Appeal cannot reweigh evidence and draw inferences contrary to those drawn by trial court therefrom.

Gross & Svenson, Van Nuys, for appellant.

Harold Richardson, Whittier and Frank W. Doherty, Los Angeles, for respondents.

FOX, Justice.

Zaroohi Shakarian, the decedent, and her husband, Isaac, were married in 1912. They accumulated a substantial estate. Mrs. Shakarian became ill in 1946 and died intestate in November, 1947. There are five married children: a son, Demos, and four daughters, Ruth, Grace, Roxanne, and Florence. On several occasions during her illness Mrs. Shakarian stated that she wanted her children to have her share of the property that she and Isaac owned. It is asserted that these expressions on the part of Mrs. Shakarian were sufficient to create a trust in her property in favor of her children and that Isaac held it as a constructive trust for them and their respective spouses, who were claimed to be within the orbit of her intended bounty. Herein lies the foundation of this litigation.

In May, 1947, Florence married plaintiff, Albert, between whom a divorce action was pending at the time of this trial. Albert contends that upon his marriage to Florence it was orally agreed that all property acquired by either of them would be their common property.

The court found no trust was created which encompassed the spouses of decedent's children, and there was no agreement between plaintiff and Florence that all property acquired by either of them would be their common property. The ultimate question is: Does the evidence sustain these findings?

[1] While it is apparent that decedent had a great appreciation for and was fond of the spouses of her children, it is clear that her own children came first. Ruth testified that when she married, her father and mother gave her a home which was placed in her own name and that no interest therein was given to her husband; that her mother told her that any property she received should be kept in her own name so that she and her children would always be cared for. Florence testified that her mother repeatedly told her that if anything ever came to her from the family, "I want you to keep it in your own name. That way I will know that you will always be taken care of." Isaac testified that Zaroohi discussed with him her wishes with respect to the disposition of her property on only two occassions, both during her last illness. At their home, on one of these occasions, she said to Grace and her husband, "Well, I'm going to leave it to Papa." Later, at the hospital, she said to Isaac, "I know that you have been a good father and you will take care of your children." In an earlier

action Grace had verified a complaint in which she stated that her mother intended to will all her property to her five children, share and share alike. When Grace later received certain property from her father, including $40,000 in cash in a compromise of the family dispute, she received the real property and cash in her own name. The deed ran to her alone and nothing was given to her husband. This testimony, together with the inferences that may reasonably be drawn therefrom, support the court's finding that no constructive trust was created which included the respective spouses of the children as beneficiaries.

[2, 3] Plaintiff directs our attention to other testimony which is favorable to him and emphasises that some of the witnesses were "independent" and "unrelated to the family or to each other." He thus seeks to give added weight to the testimony favorable to his position. The weight to be given particular testimony, the inferences to be drawn therefrom, and the credibility of the witnesses are matters committed to the trier of the facts. Dillard v. McKnight, 34 Cal. 2d 209, 223, 209 P.2d 387, 11 A.L.R. 2d 835. But such evidence favorable to plaintiff's contention merely created a conflict with that opposed to his position which the trial court has resolved adversely to him and such resolution is controlling on appeal. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583.

[4] On the question of an agreement between Albert and Florence, that all property acquired by either of them would be their common property, the evidence supports the court's finding that there was no such agreement. Florence testified that she never told her husband she would give him any property she might inherit. When the parties married Florence had a checking account in excess of $1,400 which represented accumulated earnings as a school teacher. This account was not changed to a joint account but remained in her name alone. Albert stated "that was her own, separate account." It was not used for household expenses or for other family purposes. It was kept intact until plaintiff "got into some difficulty" gambling and this fund was required to extricate him. Prior to the separation of the parties certain property was deeded to Florence alone by her father. She received also rental checks of $150 per month made out to her personally. Plaintiff knew of these transactions but made no objection to the manner in which they were handled nor did he make any demand for any interest in the property. The ring which Albert gave Florence upon their engagement was a family heirloom. After their separation plaintiff demanded a return of the ring "two or three times" and upon receiving it back proceeded to pawn it. The foregoing testimony, the conduct and behavior of the parties, and the inferences reasonably to be drawn therefrom, furnish ample support for the trial court's determination that there was no agreement between plaintiff and Florence that she would share with him whatever property she might receive from her family.

[5] As a basis for discrediting Florence's testimony, plaintiff points to certain alleged inconsistencies therein. It is for the trial court to resolve inconsistencies and contradictions even in the testimony of a particular witness. Peterson v. Peterson, 74 Cal.App.2d 312, 319, 168 P.2d 474; Hansen v. Bear Film Co., 28 Cal.2d 154, 185, 168 P.2d 946.

[6] The basic difficulty with plaintiff's argument is that he would have this court reweigh the evidence and draw inferences contrary to those drawn by the trial court. Under firmly established legal principles we are not at liberty to do this. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Ex parte MASCHING.*

Cr. 4933.

District Court of Appeal, Second District, Division 3, California.

Feb. 6, 1953.

Hearing Granted March 6, 1953.

Petition for a writ of habeas corpus to secure petitioner's release from custody under a commitment by a municipal court to a city jail for service of a sentence on his conviction of driving a vehicle while under the influence of liquor. The District Court of Appeal, Wood, J., held that the municipal court did not abuse its discretion or deprive defendant of due process in denying his motion for continuance of his trial for such offense in order to give him an opportunity to obtain counsel and witnesses.

Writ discharged, and petitioner remanded to custody.

1. Criminal Law ⇐586

Granting of continuance normally rests in trial court's discretion.

2. Criminal Law ⇐1151

The trial court's granting of continuance, in exercise of reasonable, not arbitrary, discretion, will not be disturbed by appellate court.

3. Constitutional Law ⇐268
Criminal Law ⇐590(1)

A municipal court did not abuse its discretion or deprive defendant of due process in denying his motion for continuance of trial for misdemeanor in order to give him opportunity to obtain counsel and witnesses, where about a month elapsed from date of arraignment to date set for trial and defendant did not state reasons for his failure to obtain counsel and witnesses, but stated only that he had been confined to bed for three weeks and would like chance to get his witnesses and counsel.

4. Jury ⇐29(6)

In prosecution for misdemeanor, defendant was not required to obtain counsel in order to waive jury trial.

5. Habeas Corpus ⇐79

In habeas corpus proceeding for release from custody in city jail under commitment to serve sentence on conviction of misdemeanor, indefinite statement in petition that petitioner, to best of his knowledge or recollection, did not waive jury trial, and absence of reference to jury trial in reporter's transcript should not prevail against definite statement in docket, of which certified copy was attached to return, that defendant waived jury trial.

Morris Lavine, Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty. and Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

PARKER WOOD, Justice.

Petition for writ of habeas corpus. In a complaint filed in the municipal court on May 12, 1952, petitioner was charged with violation of section 502 of the Vehicle Code (driving a vehicle while under influence of liquor), a misdemeanor. On May 13, 1952, he was arraigned, pleaded not guilty, and asked for a jury trial. On said date, trial was set for June 12, 1952. At the arraignment, he was not represented by counsel. On the date set for trial, defendant appeared without counsel and, according to the petition herein, asked for a continuance in order to give him an opportunity to obtain counsel and witnesses. The request for a continuance was denied. An entry in the docket recites that: "Defendant waives jury trial." The case then was transferred to another division of the court for trial. Trial was by the court without a jury. Two witnesses called by the People testified, and the defendant and a witness called by defendant testified. Defendant was adjudged guilty. Defendant was sentenced to imprisonment in the city jail for 180 days; execution of sentence was suspended, and defendant placed on probation for three years on condition that he spend 170 days in the city jail.

On appeal to the superior court (appellate department), the judgment of conviction was affirmed. Petitioner was repre-

* Subsequent opinion 261 P.2d 251.

sented on the appeal by his present counsel. The contentions in the present proceedings were presented to the superior court on that appeal. A petition for rehearing on that appeal was denied. On October 20, 1952, after the appeal, defendant was committed by the municipal court to the city jail.

On October 22, 1952, the superior court denied an application for a writ of habeas corpus.

In the petition to this court for a writ of habeas corpus, it is alleged that: petitioner, by reason of injuries sustained in an automobile accident on the day of the alleged offense herein, was in bed approximately three weeks and was therefore unable to secure an attorney or arrange to subpoena witnesses; he was without funds to hire counsel; a few days before the trial, he contacted the public defender's office and was told that he would have to get private counsel; he was not guilty of the charge, but was suffering from a severe head injury; he could have produced several witnesses in his behalf; the trial judge did not question him about his illness or his inability to get witnesses; petitioner, to the best of his knowledge or recollection, did not waive trial by jury or right to have an attorney represent him.

Petitioner contends in effect that, by reason of the denial of his motion for a continuance, he was denied his right to be represented by counsel, and his right to obtain witnesses; and that he was denied due process of law, in that, a defendant and his counsel must join in a waiver of trial by jury.

[1–3] As above shown, it was approximately one month from the date of arraignment to the date of trial. It is alleged in the petition herein that, on the date set for trial, the petitioner asked the court for a continuance in order "to give him an opportunity to get an attorney and to bring his witnesses into court." It is not alleged in the petition that the petitioner, at the time he asked for a continuance, stated the reason he had not obtained counsel and witnesses. It does not appear from the petition that, at the time he asked for a continuance, he informed the court that he had a severe head injury, as stated in his petition; or that he was without funds to hire counsel, as stated in his petition; or that a month was not sufficient time in which to obtain counsel and witnesses. The reporter's transcript was not presented to this court, but an examination of it shows that at the time petitioner asked for a continuance he said, "I have been confined to bed for the last three weeks and I would like a chance to get my witnesses, and also counsel." The "granting of a continuance normally rests in the discretion of the trial court." People v. Buckowski, 37 Cal.2d 629, 631, 233 P.2d 912, 913. In People v. Gaines, 1 Cal.2d 110, at page 113, 34 P.2d 146, at page 147, it was said, "The trial court is apprised of all the circumstances of the case and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed." There was no abuse of discretion and certainly no deprivation of due process in denying the motion for a continuance.

[4] Petitioner contends that a trial by jury was not waived. He argues that a defendant and his counsel must join in a waiver of trial by jury and, since he did not have counsel, there was no waiver of a jury trial. It is true that when a defendant is represented by counsel, they must both join in the waiver. It was not necessary, however, that the defendant herein obtain counsel in order to waive trial by jury. In the case of People v. Thompson, 41 Cal.App.2d Supp. 965, 108 P.2d 105, wherein the defendant was charged with a misdemeanor and was not represented by counsel, a question was whether defendant could waive trial by jury. The court stated therein, 41 Cal.App. 2d Supp. at page 967, 108 P.2d at page 107, "In a waiver of a jury he and his counsel, if he have one, must concur. It seems to us, however, that his right to waive counsel carries with it the implication that if he chooses to have none, he alone may do for

himself that which he and his counsel together might do."

[5] Petitioner argues further that "to the best of his knowledge or recollection" he, alone, did not waive trial by jury. That statement is indefinite, and it is not a statement that he did not waive trial by jury. The certified copy of the docket, attached to the return herein, shows an entry as follows: "Defendant waives jury trial." As above stated, the reporter's transcript was not presented to this court. An examination of it, however, shows nothing with respect to waiving or not waiving a jury. Petitioner does not allege in the petition herein that he did not waive a trial by jury. His indefinite statement that "to the best of his knowledge or recollection" he did not waive trial by jury, and the absence of reference to trial by jury in the reporter's transcript, should not prevail, under the circumstances of this proceeding, against the definite statement in the docket that he did waive a jury.

The writ is discharged and the petitioner is remanded to custody.

SHINN, P. J., and VALLÉE, J., concur.



115 Cal.App.2d 809

WILLIAMS v. METZGER.

Civ. 19378.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1953.

Action by former wife to recover balance allegedly due under agreement between husband and wife for support of wife and minor child. From judgment of the Superior Court, Los Angeles County, Harold C. Shepherd, J., in favor of defendant and from order denying motion to vacate the judgment and enter a new and different judgment, plaintiff appealed. The District Court of Appeal, Fox, J., held that since provisions for support of wife and minor child contained in agreement had been incorporated in divorce decree, such provisions were merged into the decree and wife no longer had any right of action based on agreement.

Judgment and order affirmed.

1. Divorce ⇐243, 308

Comparison of provisions of agreement between husband and wife for support of wife and minor child with similar provisions of interlocutory decree of divorce sustained finding that agreement providing for payments to be made by defendant for support of former wife and minor child was incorporated in and made a part of interlocutory decree of divorce which had become final.

2. Divorce ⇐255, 308

Where agreement between husband and wife providing for settlement of their property rights and payments to be made by husband for support of wife and minor child is presented to court in divorce proceeding for adjudication and agreement or a part thereof is incorporated in decree and made a part thereof, the part so incorporated is merged in the decree, precluding any subsequent right of action on the agreement or portion thereof so incorporated in the decree.

3. Divorce ⇐255, 308

Where provisions for support of wife and minor child contained in agreement between husband and wife were incorporated in divorce decree, support provisions of agreement were merged in the decree and wife no longer had any right of action based on the agreement, and thereafter husband's only obligations for support were those imposed by the decree and were enforceable as such.

Lee Combs, Los Angeles, for appellant.

David G. Watts, Los Angeles, for respondent.

FOX, Justice.

On July 11, 1944, the parties, who were then husband and wife, entered into an agreement providing, inter alia, for the settlement of their property rights and that

the wife should have custody of her 11-year-old son by a previous marriage who, however, had been adopted by her husband. It further provided that, for alimony and support of the minor child, the husband agreed to pay the wife $50 a week for one year, and thereafter, during the minority of the child, the said payments were to continue at the rate of $25 a week. Thereafter the wife filed a suit for divorce, set up the agreement, and asked that it be approved and incorporated in the decree. On August 16, 1944, plaintiff was granted an interlocutory decree of divorce and the custody of the minor child was awarded to her; the agreement was approved, and the provision thereof for the support of plaintiff and the minor child was incorporated in the decree and defendant ordered to make the specific payments beginning as of the date of the agreement. These designated payments are "for alimony and for the support of the minor child."

After the remarriage of plaintiff, and upon application of defendant in February, 1946, the court modified the decree by striking out the provision for payment of alimony and ordering defendant to thereafter pay plaintiff $25 a week for the support of the minor child. A further modification of the decree was made in September, 1946, reducing the payments of $25 a week to $17.50 a week while the child remained in Southern California, and $12.50 a week if the child was removed therefrom by plaintiff. A final modification was made in January, 1951, terminating all support payments because the minor was in the United States Navy. No appeal has been taken from any of these orders and they are now final. Defendant has paid all, or substantially all, of the moneys required by the original decree and the several modifications thereof.

Plaintiff brought this action based on the aforesaid contract, claiming that there is a balance of more than $3,000 due thereon. She appeals from a judgment in favor of the defendant and from an order denying her motion to vacate the judgment and for entry of a new and different judgment.

[1] The trial court found that the agreement dated July 11, 1944, providing for the payments to be made by the defendant for the support of the plaintiff and the minor child, "was incorporated in and made a part of an interlocutory judgment of divorce" which had become final. A comparison of the support provisions of the agreement with those of the interlocutory decree amply sustain this finding.

[2, 3] Where such an "agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree," precluding any subsequent right of action on the agreement, or portion thereof so incorporated in the decree. Hough v. Hough, 26 Cal.2d 605, 609, 610, 160 P.2d 15. Here it is established by the foregoing finding that the provisions for support contained in the agreement between the parties dated July 11, 1944, were incorporated in the divorce decree. Under the rule of the Hough case, the support provisions of the agreement were merged into the decree and plaintiff no longer had any right of action based on the agreement. The obligations thereafter for support were not those imposed by the contract but were those imposed by the decree and were enforceable as such. Hough v. Hough, supra; Shogren v. Superior Court, 93 Cal. App.2d 356, 358, 209 P.2d 108; Verdier v. Verdier, 36 Cal.2d 241, 247, 223 P.2d 214; Dunning v. Dunning, 114 Cal.App.2d 110, 249 P.2d 609. See, also, 2 Stanford L.Rev. (1950) p. 736; 39 Cal.L.Rev. (1951) p. 252. It is therefore clear that plaintiff was not entitled to recover.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

PEOPLE v. CRAWFORD et al.

Cr. 2376.

District Court of Appeal, Third District, California.

Feb. 9, 1953.

Rehearing Denied Feb. 20, 1953.

Hearing Denied March 9, 1953.

Defendants were convicted in the Superior Court, Stanislaus County, Chamberlain, J., of grand theft, and they appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that the evidence supported the convictions.

Affirmed.

1. Larceny ⇐65

Evidence supported convictions for grand theft of automobile.

2. Criminal Law ⇐1141(2)

Error must be affirmatively shown by record, and cannot rest upon speculation, in order to warrant reversal of conviction.

3. Criminal Law ⇐889

Generally, it is the duty of the court to see that verdicts are returned in proper form. Pen.Code, § 1161.

4. Criminal Law ⇐889

Where considerable number of verdict forms had been given to jury, and after examining verdicts court announced that there were two verdicts in conflict and two other necessary verdicts were lacking, without further specification, and jury was directed to reconsider, and jury returned a second time and for the same reason was directed to reconsider, in absence of showing that a not guilty verdict had been changed to guilty, such procedure did not constitute error. Pen.Code, § 1161.

5. Criminal Law ⇐695(2)

Where defendant was without counsel, his general objection to proof of prior conviction of grand theft in stealing automobile, though offered on ground that proof was inadmissible because he had not taken the stand, would be treated as sufficient to raise question as to admissibility of authenticated copy of state prison record showing conviction for theft and unlawful driving or taking of a vehicle. Pen.Code, § 969b; Vehicle Code, § 503.

6. Criminal Law ⇐1186(4)

Although district attorney erroneously represented to jury that defendant had been convicted of the same type of crime with which he stood charged, where evidence clearly demonstrated defendant's guilt, the conviction would not be reversed because of such error. Const. art. 6, § 4½.

7. Witnesses ⇐8

Where it did not appear from record that witness who had not been subpoenaed woud have given evidence that would have been material to defendant's cause, failure to subpoena such witness was not error.

Louis A. Boli, III, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Dep. Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Clyde J. Crawford and Wilbur Dell Crawford each appeals from the judgment of conviction of grand theft and from the order denying motion for new trial. The evidence stated in the light favorable to the prosecution may be summarized as follows: On January 23, 1952 certain automobile dealers in Modesto had on their lot a new Oldsmobile coupe. It disappeared from the lot some time between 6:30 and 8 o'clock P.M., at which time the Modesto Police Department was notified that the car was missing. About one hour later two patrol officers who were cruising in the city observed an Oldsmobile answering the description of the missing car. Two men were in it. The officers followed the car some distance to a point where it stopped at a traffic-lighted intersection. The intersection light was red. The officers stopped behind the Oldsmobile, turned on their own colored lights and one of them approached the driver's side of the Oldsmobile, whereupon that car started quickly and went through the intersection at high speed and against the red light. The officer called for it to stop and when it did not he fired three shots at it as it sped away. The officers then pursued the fleeing vehicle at speeds up to 90 miles an hour until, in

attempting to make a turn, the car ran into a ditch, hit a tree and stopped. Thereupon the two occupants jumped out and ran and only stopped when the officers, with their guns out, commanded them to come back. These two men were the appellants herein. It was shown that no permission had been given them or anyone to take the automobile and that between 8:30 and 9 o'clock that same day the appellants had driven the car into a service station in Delhi where they purchased 16 gallons of gas for which appellant Clyde Crawford, giving his name as Jimmie Walker, left a wrist watch. At the trial Clyde Crawford did not take the stand, but his brother Wilbur did. Wilbur testified that while hitch-hiking from San Franciso to Fresno he had found the automobile unattended, and with the motor running, on the highway about six miles north of Modesto; that he had driven the car down to Keyes where he met his brother Clyde whom he told that a friend had let him have the car in order that he might break it in. He said he had no intent to steal the car.

[1] Appellants first urge that the evidence was insufficient to support verdicts of guilty of grand theft. They urge that mere possession of stolen property is not sufficient to show the necessary criminal intent for a conviction of theft and that the evidence of the People, taken at full value, only shows the car was missing from the owner's place of business, that it was not taken with the owner's consent, and that appellants were observed in possession of it. It is apparent that the foregoing is far from a complete statement of the evidence and the permissible inferences to be drawn therefrom. The jury did not have to believe Wilbur Crawford's story, but could have inferred that the car was taken from the owner's lot by the appellants, that the quantity of gasoline purchased indicated an intent not to return the car to its owner but to use it for a considerable time and perhaps to drive a great distance. The jury did not need to adopt the suggested explanation of the appellants' reluctance to be arrested as having been generated by their fear of being fired on and on the contrary could have well concluded that their acts in fleeing across the intersection against the red light when they were commanded by the officers to stop and their behavior thereafter were solely referable to guilt. There was evidence that both were acting in concert in that the driver of the car sped it away when he heard the command of the officers to stop; that before that, the one not driving had been watching the officers' car as it followed them; and that he joined the driver in flight when the car was disabled. From all the foregoing the jury permissibly inferred felonious taking with intent to steal. People v. Wissenfeld, 36 Cal.2d 758–763, 227 P.2d 833.

[2–4] Appellants claim the trial court committed error and invaded the province of the jury to the extent of a denial of a fair trial by virtue of certain incidents that occurred after the cause had been submitted to the jury. A considerable number of verdict forms had been given to the jury. The charge, being grand theft committed in the stealing of an automobile, included the offense of violation of Section 503 of the Vehicle Code. Recognizing that the conviction of one offense would amount to an acquittal of the other, People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321, guilty and nonguilty verdicts as to each were included in the forms. The jury returned after announcing that it had completed its work and a number of verdicts were handed to the court as having been used in arriving at the jury's verdict as to each defendant. After examining the verdicts the court announced that there were two verdicts in conflict and two other necessary verdicts were lacking. The record does not show what the actual facts were to which the court was referring, that is, which verdicts were conflicting and which were lacking. The court explained to the jury, however, that conviction of grand theft would be acquittal of violation of Section 503, and vice versa, and that the verdicts should conform to that rule of law. The jury were told to go back and consider their verdicts again. They came in a second time and the court again informed them that there were two conflicts in the verdicts and directed them to again return to

the jury room and agree upon the verdicts they were to return. Again the court did not particularize. Appellants indulge in a good deal of speculation concerning what the actual situation was each time the court sent the jury back to the jury room. They refer to Section 1161 of the Penal Code wherein the court is authorized, if there be a verdict of conviction and it appear that the jury have mistaken the law, to explain the mistake and direct a reconsideration. They point further to the provisions that if after reconsideration the jury returned the same verdict it must be entered and that in any event if there is a verdict of acquittal the court cannot require its reconsideration. Appellants attempt to analyze the many possible situations that might have existed, in some of which it would have been error for the court to have directed reconsideration; thus they say that if at either time the jury had included any verdict of not guilty in those returned to the court reconsideration could not have been ordered if other verdicts were faulty. We think it useless to follow appellants through their highly-ingenious analysis, for error must be affirmatively shown by the record and cannot rest upon speculation. 8 Cal. Jur., Sec. 568. We cannot say there were any not guilty verdicts returned to the jury nor any guilty verdicts as to which reconsideration was required a second time. Generally speaking, it is the duty of the court to see that verdicts are returned in proper form, and so far as form be concerned to aid the jury in returning correct verdicts. People v. Ah Gow, 53 Cal. 627; 8 Cal.Jur. 411–412. Of course if what the court did amounted in fact to telling the jury to reconsider a not guilty verdict it had returned, such direction would be improper, but even if such were the case it would have to appear further before prejudice could be claimed that on reconsideration a different verdict was returned. Nothing of the sort is shown by, or can be gleaned from, the record here and on the record as presented we must hold that error has not been shown.

[5, 6] Appellant Clyde Crawford had been charged with two prior convictions, one, robbery, and the other grand theft in the stealing of an automobile. When asked to plead to these priors he refused to do so and the court thereupon entered denials for him. In proof of the priors the People offered properly-authenticated copies of the records of State prisons pursuant to Section 969b of the Penal Code. Clyde Crawford objected generally and though he appears from the record to have been directing his objections to the offered proof solely upon the ground that the proof was inadmissible because he had not taken the stand, we think that in view of the fact that he was defending without the aid of counsel, which aid he had refused, that his objection should be treated as sufficient. These records had been obtained by the district attorney and must have been in his possession for some time and must have been examined by him before they were offered. At least if they were not so examined they should have been. They were competent to prove the charged prior of robbery. Not only were they incompetent to prove the charged prior of grand theft in the stealing of an automobile, but, much worse, the second felony referred to therein was that of violation of Section 503 of the Vehicle Code and in addition thereto the documents told the jury that the defendant had also been a parole violator. It appears that the introduction of this proof over Clyde Crawford's objection was due to inadvertence of the trial court which failed, upon looking at the offered proof, to detect the inadmissibility of all thereof save that portion which proved the charged prior of robbery; it appears further, giving him the benefit of any doubt, that the district attorney had likewise failed to note the defects in the offered proof. And it is clear that Clyde Crawford did not detect the same. Nevertheless, the proof was admitted over his objection. It appears further that the district attorney in his opening statement said he would prove that Clyde Crawford had suffered two prior convictions, one of robbery and the other of grand theft in the stealing of an automobile; and that in his argument the district attorney made considerable point of the same matter as

having been proved. It is to be noted further that this was a prosecution for grand theft in the stealing of an automobile and the jury were told that the People had proved that Clyde Crawford had been convicted of a similar crime before and had been imprisoned therefor, which was untrue. The seriousness and the prejudicial character of the error of the People in placing this inadmissible matter in the record is apparent. It was not, as urged by the People on appeal, a mere matter of failing to prove the prior charge. The vice lays in the proving of a different crime under the pretense of proving the charged prior and in arguing to the jury that the charged prior had been proven. It is rather well known that habitual criminal offenders tend to specialize upon a certain type of crime in the commission of which they become adept. And here was the district attorney representing to the jury that Clyde Crawford had been convicted of the same type of crime with which he there stood charged, when such was not the truth. The seriousness of the error complained of is such that if the proof of the crime charged here, that is, grand theft in the stealing of an automobile, was not extremely strong we would have no hesitancy in reversing the conviction of Clyde Crawford. But when the facts are considered we think the guilt of these two men was so clearly shown that it cannot be said a miscarriage of justice occurred. For that reason, and for that reason alone, we think the conviction of Clyde Crawford cannot be reversed upon the ground now being discussed. Art. VI, § 4½.

[7] Finally, complaint is made by Clyde Crawford that he was deprived of his right to subpoena witnesses on his behalf. We have carefully searched the record upon the matter and we think the charge cannot be sustained. It appears that a list of persons for whom subpoenas were desired was given by appellant and that they were either served with subpoenas or the subpoenas issued for them were returned because service could not be made for one reason or another. The appellant at the trial requested that one witness in particular who had not been served be then subpoenaed. It does not appear that this witness, or any other witness, failure to subpoena whom was complained of, was a witness who would have given evidence that would have been material to appellant's cause. Under such circumstances error is not shown.

The judgments and the orders are affirmed.

PEEK and SCHOTTKY, JJ., concur.



115 Cal.App.2d 395

METZENBAUM v. METZENBAUM et al. (two cases).

Civ. 19045.

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1953.

Petition was brought by liquidating partner to determine attorney's fees for services rendered in various proceedings and for leave to pay such fees. The Superior Court, Los Angeles County, Arnold Praeger, J., entered an order disallowing such fees, and petitioner appealed. The District Court of Appeal, Patrosso, J., pro tem., 252 P.2d 31, held that liquidating partner was entitled to reimbursement for such fees for services rendered in successful defense against adverse claims to partnership assets. A motion was made for rehearing. The District Court of Appeal held that in view of fact that title to royalties stood in name of liquidating partner alone and he was collecting revenues therefrom, he was the only necessary party defendant in action by another undertaking to establish an interest adverse to partnership.

Petition for rehearing denied.

1. Appeal and Error ⇐878(1)

Respondents cannot on appeal question trial court's findings.

2. Partnership ⇐296(1)

Where royalties stood in name of liquidating partner alone, and he was collecting revenues therefrom, he was the only necessary party defendant in action

whereby another undertook to establish an interest therein adverse to partnership, though liquidating partner was not described in complaint as a liquidating partner.

Milton A. Krug, Los Angeles, for appellant.

Newell & Chester, Los Angeles, for respondents.

PER CURIAM.

In their petition for rehearing respondents complain that in our opinion no mention is made of the fact that in the complaint filed in the instant action by respondent Walter Metzenbaum it was alleged that certain oil and gas leases referred to as the Culver City leases were the property of the partnership and that the allegation was controverted by appellant. The obvious reason for the absence of any reference to this in our opinion is that this fact is wholly immaterial to any question presented upon this appeal. Appellant did not contend and this court did not declare that he was entitled to be reimbursed for attorneys' fees incurred in litigating this issue or any other issue except that relating to the Oulton and Surfluh royalties.

It is also asserted that the allegations with respect to the partnership's ownership of the royalties last mentioned contained in the cross-complaint against Fanchon and Rose were identical to those contained in appellant's answer to the complaint of Walter herein. There is, however, no significance to this, for it is apparent that an adjudication of this issue as between appellant and Walter would not be binding upon the adverse claimants (Fanchon and Rose) unless they were brought in as parties.

[1] It is further said that our opinion omits mention of the fact "that all of the children, including Fanchon, filed a disclaimer to Murray's cross-complaint by which they disclaimed any interest in the partnership assets". This apparently refers to some equivocal language in the answer of the cross-defendant Fanchon, which did not escape our attention. The answer, however, denies that the royalties in question were partnership assets. Moreover, that Fanchon did not consider that she had, by her answer to appellant's cross-complaint, disclaimed any interest in the royalties in question is made evident by the fact (1) that, as evidenced by the findings, she participated throughout the trial and appealed from the judgment rendered against her upon appellant's cross-complaint; (2) that her appeal from the judgment rendered against her in the Fanchon suit was pending and undetermined during the trial of the instant case; and (3) that after the entry of the interlocutory judgment herein she filed still another action (584,906) wherein she asserted her ownership to one-half of the Surfluh royalty, by reason of which she was by the final decree herein restrained from further prosecution of said action. The facts just recited are made to appear by the trial court's findings in the proceeding which resulted in the order appealed from, and respondents are necessarily concluded thereby. Kern Oil Co v. Crawford, 143 Cal. 298, 302, 76 P. 1111, 3 L.R.A.,N.S., 993; Billings v. Farm Dev. Co., 74 Cal.App. 254, 263, 240 P. 298; 2 Cal.Jur., p. 839, sec. 492.

Respondents also assert that the trial court *could* have found that the services of appellant's attorneys were not increased by virtue of the cross-complaint. The answer is that the court did *not* so find.

[2] Nor is it of any moment, as respondents suggest, that the Fanchon suit was directed against appellant alone. Inasmuch as the title to the royalties stood in his name alone and, as liquidating partner, he was collecting the revenues therefrom, he was the only necessary party defendant in an action whereby Fanchon, as plaintiff, undertook to establish an interest therein adverse to the partnership. Appellant's duty to defend the title of the partnership thereto was no less because he was not described in the complaint as liquidating partner.

Finally, respondents say that "the trial court determined that there was no additional work" involved by reason of the trial of the issue raised by the cross-complaint as to the partnership's ownership of the royalties in question. This

is a palpable misstatement, for the trial court made no such finding. Equally erroneous is the statement in the petition to the effect that appellant's "attorneys made no contention nor did they prove that the filing of the cross-complaint involved any additional effort". The reporter's transcript reveals that Mr. Krug (one of appellant's attorneys) testified that approximately one-half of the time spent in the trial, which lasted thirteen or fourteen days, was devoted to the determination of the title to the two royalties in question and that one-third to one-half of the time involved in the appeal from the judgment therein was devoted to the same matter.

The petition for rehearing is denied.



115 Cal.App.2d 745

PEOPLE v. ALLEN.

Cr. 4861.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1953.

Hearing Denied March 5, 1953.

Defendant was convicted of occupying a room for purpose of recording bets and of recording or registering a bet. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment of guilty, and defendant appealed. The District Court of Appeal, McComb, J., held that where defendant occupied room containing racing paraphernalia for purpose of recording bets, and defendant took bets over telephone located in room, defendant was properly convicted of two separate offenses.

Affirmed.

1. Criminal Law ⇐29

Under statute making bookmaking, occupying room with bookmaking paraphernalia, receiving bets on races, recording bets, permitting use of room for such purpose, and making or accepting bets criminal offenses, violation of each subdivision of statute constitutes separate offense. Pen.Code, § 337a.

2. Criminal Law ⇐29

Occupying room for purpose of recording or registering bets is distinct offense from registering or recording bets or wagers, and conviction may be had for each offense. Pen.Code, § 337a, subds. 2, 4.

3. Criminal Law ⇐29

Where defendant occupied room containing racing paraphernalia for purpose of recording bets, and defendant took bets over telephone located in room, defendant was properly convicted of two separate offenses. Pen.Code, § 337a, subds. 2, 4.

4. Criminal Law ⇐395

Evidence obtained from defendant's apartment without search warrant in violation of constitutional provision against unreasonable searches and seizures was admissible in prosecution for occupying room for purpose of recording bets and for recording or registering bets. Const. art. 1, § 19; Pen.Code, § 337a, subds. 2, 4.

5. Criminal Law ⇐394

Evidence obtained by illegal search and seizure in violation of Constitution is admissible and will support judgment of guilty. Const. art. 1, § 19.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Michael J. Clemens, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant appeals from a judgment of guilty of violating (1) section 337a, subdivision 2 of the Penal Code (occupying a room for the purpose of recording bets), and (2) section 337a, subdivision 4, Penal Code (recording or registering a bet).

Defendant concedes the sufficiency of the evidence to sustain the finding of guilty as to each count but contends:

First: *The offense of recording or registering a bet is a necessarily included of-*

fense with that of occupying a room for the purpose of recording bets.

This contention is devoid of merit. Section 337a, subdivision 2 of the California Penal Code provides in part:

"Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; * * *."

Section 337a, subdivision 4 provides in part:

"Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; * * *."

[1] Section 337a of the Penal Code contains six subdivisions, and is so framed that one set or series of acts may constitute a violation of each or all of said subdivisions, and a violation of each subdivision constitutes a separate offense. (People v. Ghio, 82 Cal.App. 28, 32[2], 255 P. 205; People v. Jerman, 29 Cal.2d 189, 195[1], 173 P.2d 805.)

[2] Subdivision 4 of section 337a is not a necessarily included offense of the prohibited acts set forth in subdivision 2 of the same section of the Penal Code. The offense denounced by subdivision 2 is the *occupancy* of a place with the necessary equipment for recording or registering bets and *not* the actual making of bets. There is *no* requirement that there be a recordation of a bet in order to have a violation of subdivision 2. So long as a place is occupied for the purpose of recording or registering bets a violation of subdivision 2 is consummated. (People v. Warnick, 86 Cal.App.2d 900, 902, 195 P.2d 552.)

On the other hand subdivision 4 interdicts the recording or registering of bets or wagers. The judgment in the instant case of violating subdivisions 2 and 4 did not arise out of one act but two separate and distinct acts. The gist of the offense denounced in subdivision 2 is the *occupancy* of a room with racing paraphernalia for the purpose of recording bets, while the gist of the offense prohibited in subdivision 4 is the distinct act of *recording a bet* in violation of such provision.

[3] Defendant admitted to the police officer that he had occupied the room for two days before his arrest for the purpose of recording bets. The evidence disclosed, which defendant does not question, that he had taken bets over the telephone located in the room which he had occupied and that it contained racing paraphernalia.

People v. Knowles, 35 Cal.2d 175, 217 P.2d 1 and People v. Frank, 28 Cal. 507, relied on by defendant, are not here in point. In the Knowles case it was held that if one act is committed which results in two crimes, the perpetrator can be punished under only one statute. In the present case the evidence disclosed two different sets of facts which constituted two separate and distinct crimes.

In the Frank case it was held that the various acts charged in the indictment constituted but one offense, forgery. Such is not the situation in the instant case since, as indicated above, section 337a of the Penal Code enumerates not one offense but six separate and distinct offenses.

[4] Second: *His constitutional rights under Article I, section 19 of the California Constitution were violated when the trial court admitted evidence which had been illegally obtained.*

This contention is likewise devoid of merit. The trial court received evidence which had been obtained by police officers from defendant's apartment into which they had broken without a search warrant. The Constitution of the State of California, Article I, section 19 reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

[5] However, the Supreme Court of California, by whose decision we are bound, has held that evidence obtained by illegal search and seizure in violation of the quoted section is not inadmissible but may be received in evidence and will support a judgment of guilty. (People v. Gonzales, 20 Cal.2d 165, 169[1] ff, 124 P.2d 44.)

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



115 Cal.App.2d 753

Ex parte SHAW.

Cr. 4955.

District Court of Appeal, Second District, Division 3, California.

Feb. 3, 1953.

Hearing Denied March 5, 1953.

Habeas corpus proceeding seeking release from confinement in state hospital to which petitioner was committed as an insane person by a municipal court which determined the issue of her present sanity during pendency of prosecution in such court for disturbing the peace. The District Court of Appeal, Shinn, J., held that a municipal court has no jurisdiction to determine the issue of present sanity, and, therefore, the commitment was void.

Petitioner ordered released.

1. Courts ⇐118, 188(1)

The superior courts are courts of general jurisdiction, but the jurisdiction of municipal courts is limited to cases and proceedings in which jurisdiction is conferred by legislative action. Const. art. 6, §§ 5, 11.

2. Criminal Law ⇐625

A proceeding to determine the question of present sanity of accused is not a part of the criminal prosecution but is a special proceeding, civil in character. Pen.Code, § 1368.

3. Criminal Law ⇐625

The fact that the question of accused's sanity arose during pendency of criminal prosecution in municipal court did not give the municipal court jurisdiction to determine the issue of present sanity. Pen.Code, §§ 690, 1368, 1429.5, 1462; Const. art. 6, § 11.

4. Criminal Law ⇐625

When, during pendency of criminal action in a municipal court, a doubt arises as to sanity of defendant, it is the duty of the court to order a trial of the issue of sanity and to suspend all proceedings in criminal prosecution, and to certify the proceedings to the superior court for determination of such issue. Pen.Code, § 1367 et seq., 1429.5.

5. Criminal Law ⇐625

Where petitioner for writ of habeas corpus had been charged with disturbing peace and, during trial in municipal court on such charge, doubt arose as to petitioner's sanity, and court determined such issue and committed petitioner to state hospital, such commitment was void because of such court's lack of jurisdiction to determine such issue. Pen.Code, §§ 1367 et seq., 1429.5, 1462; Const. art. 6, § 11.

David C. Marcus, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., and Ariel C. Hilton, Deputy Atty. Gen., for respondents.

SHINN, Presiding Justice.

Della Shaw seeks release from confinement in Camarillo State Hospital to which she was committed as an insane person by the municipal court of Los Angeles County. She was charged with disturbing the peace, and when her case came to trial the court announced that it had a doubt as to her sanity, ordered the criminal proceedings suspended and a trial had as to petitioner's sanity. After a trial to the court defendant was found insane and was committed to the state hospital until she should regain her sanity. Petitioner assails the proceedings as an unwarranted assumption of jurisdiction by the court. She contends that the municipal court has no authority to determine the question of the present sanity of any person for the reason that the jurisdiction of the superior court is exclusive. The attorney general presents the views of the law which were entertained by the municipal court and has cited such law as may be found which tends to support those views. We find nothing in the law which purports to give the municipal court jurisdiction to conduct a proceeding to determine the present sanity of a person, whether the question arises in the course of a criminal cause or otherwise.

[1] The jurisdiction of the superior court is defined in Article VI, § 5 of the Constitution which, in material part, reads as set out below.[1] The legislature defines the jurisdiction of municipal courts and inferior courts pursuant to Article VI, § 11, of the Constitution. Thus, the superior courts are courts of general jurisdiction, while the jurisdiction of municipal courts is limited to cases and proceedings in which jurisdiction is conferred by legislative action.

The general civil jurisdiction of the municipal court is defined in § 89 of the Code of Civil Procedure, and its criminal jurisdiction in § 1462 of the Penal Code. A proceeding to try the question of sanity is not mentioned in either section.

In 1951 the legislature enacted § 1429.5 of the Penal Code to require that the question of sanity at the time of the commission of the act charged, when raised in a misdemeanor prosecution, be certified to the superior court for trial. The clear purpose of the enactment was to remove all uncertainty as to whether the lower courts had jurisdiction to determine the issue and to commit a defendant to a State hospital if found to be insane. It is suggested in a supplement to the brief of the attorney general that § 1429.5 is probably unconstitutional. That question does not call for decision in the present case.

[2] In the proceeding under review the court applied the procedure outlined in § 1367 et seq. of the Penal Code which requires a trial of the question of present sanity when a doubt arises in a criminal cause whether the defendant is sane, and also requires suspension of all proceedings in the criminal prosecution until the issue of sanity has been determined. The section which governs is 1368.[2] The attorney general points out that this section applies to all trial courts, and we agree that it does, with respect to matters of procedure. It is clearly the duty of every court to suspend

1. "(Superior Court Jurisdiction). The superior courts shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts); in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; and of all such special cases and proceedings as are not otherwise provided for; and said court shall have the power of naturalization and to issue papers therefor."

2. "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity."

criminal proceedings when the question of a defendant's sanity comes in doubt, but the section does not purport to confer jurisdiction. Although the municipal courts and inferior courts have exclusive jurisdiction of misdemeanors, a proceeding to determine the question of present sanity of a defendant is not a part of a criminal trial. It is a special proceeding, civil in character. Section 1368 recognizes the difference between the criminal trial and the civil proceeding. It reads, in part: "All proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined". It is thus recognized that the sanity proceeding is not a part of the criminal prosecution. This manifestly is the case, since the issue of present sanity is entirely foreign to the question of guilt.

[3] In People v. Lawson, 178 Cal. 722, at page 728, 174 P. 885, at page 888, the court spoke as follows: "The proceedings provided by the Penal Code for the determination of the question of present sanity in order to determine whether a defendant possesses sufficient mental capacity to be tried, or having been tried and convicted, to be adjudged to punishment (section 1367 et seq.), or, having been adjudged to suffer death, is sane within the meaning of our law precluding execution of such a judgment upon an insane person (section 1221 et seq., Pen.Code), are special proceedings of a civil nature. * * * Such an investigation has none of the elements of a criminal proceeding. * * * This investigation is entirely collateral to the criminal proceeding." And it was said again in People v. Loomis, 27 Cal.App.2d 236, 80 P.2d 1012, that a proceeding under § 1368 is not a criminal action but is a special proceeding of a civil nature. The fact that the question of sanity arose during the pendency of the prosecution of petitioner did not give the municipal court jurisdiction to determine the issue.

The attorney general calls attention to § 690 of the Penal Code, enacted in 1951.[3] The section provides for uniformity of procedure in the several courts, but it does not purport to confer jurisdiction upon any court nor authorize any court to conduct a proceeding not within its granted jurisdiction.

[4] When, during the pendency of a criminal action in a municipal court, a doubt arises as to the sanity of the defendant, it is not only the duty of the court to order a trial of the issue and to suspend all proceedings in the criminal prosecution, but it must also certify the proceedings to the superior court. The criminal prosecution is not ended, it is merely suspended, and in order for it to be concluded the question of sanity must be determined by the superior court. After the issue has been determined the municipal court must proceed in accordance with Chapter VI, Part 2, Title 10 of the Penal Code, §§ 1367–1375.

[5] The commitment of petitioner to the state hospital was void and she is entitled to be released from the custody of that institution.

It is alleged in the petition that the superintendent and medical director of the hospital has communicated to the municipal court his finding that petitioner is qualified to be released on parole in the custody of a friend, Mr. C. Lynch, and that the court refused to approve of the parole or the transfer of petitioner to a private institution. The present proceeding concerns only the question of legality of the action which resulted in petitioner's present confinement. All other matters are irrelevant.

It is ordered that the superintendent and medical director of Camarillo State Hospital release petitioner from confinement therein.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

3. "The provisions of Part 2 of this code shall apply to all criminal actions and proceedings in all courts, except where jurisdictional limitations or the nature of specific provisions prevent, or special provision is made for particular courts or proceedings."

115 Cal.App.2d 853

PROVIDENCE BAPTIST CHURCH OF SAN FRANCISCO et al. v. SUPERIOR COURT, etc., CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15702.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1953.

Petition for a writ of review to review and annul an interlocutory judgment of the Superior Court of the City and County of San Francisco. The District Court of Appeal, Per Curiam, held that the writ would not lie because the Supreme Court had determined that the Superior Court had jurisdiction to enter the judgment and the judgment could be reviewed on appeal from the final judgment.

Petition denied.

1. Certiorari ⇐28(2)

Where Supreme Court has determined that Superior Court had jurisdiction to enter interlocutory judgment, writ of review will not lie to review and annul such judgment. Code Civ.Proc. § 1068.

2. Certiorari ⇐16

A writ of review will not lie to review and annul an interlocutory judgment, as it can be reviewed on appeal from final judgment.

Edward D. Mabson, San Francisco, for petitioners.

Joseph E. Isaacs and Allan H. Critcher, San Francisco, for respondents.

PER CURIAM.

[1, 2] By this petition for a writ of review petitioner seeks to review and annul an interlocutory judgment entered on July 10, 1951. The Supreme Court has determined that the Superior Court had jurisdiction to enter that order. Providence Baptist Church v. Superior Court, 40 Cal. 2d 55, 251 P.2d 10. That being so, the writ of review will not lie. Sec. 1068, Code of Civ.Proc. Moreover, the interlocutory judgment can be reviewed on the appeal from the final judgment. That too precludes the issuance of the writ. 4 Cal.Jur. at p. 1053.

The petition for a writ of review is denied.

115 Cal.App.2d 854

GOTTESFELD v. RICHMAID ICE CREAM CO. et al.

Civ. 15177.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1953.

Action by stockholder against corporation and its directors for allegedly wrongful disposition of corporate assets. The Superior Court for the City and County of San Francisco, Edward Molkenbuhr, J., entered an order granting a motion for change of venue to county of residence of all but one defendant, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that venue was properly changed on ground that plaintiff did not in good faith believe that a cause of action existed against defendant director who resided in San Francisco but joined him as a defendant for the sole purpose of retaining jurisdiction there.

Order affirmed.

1. Venue ⇐41

Whether only defendant residing in county in which action was brought was improperly joined for purpose of maintaining venue in such county must be determined from an examination of the pleadings before the court, and allegations which merely shadow forth the semblance of a cause of action against resident defendant are sufficient as against motion for change of venue, provided such cause of action was apparently pleaded in good faith and is not prima facie so glaringly and vitally defective as to be beyond correction by amendment. Code Civ.Proc. § 395.

2. Venue ⇐72

On hearing of motion by defendants residing outside county in which action is

pending for change of venue on ground of improper joinder of resident defendant, real issue is whether plaintiff in joining resident defendant had reasonable grounds for belief in good faith that plaintiff had cause of action against such defendant. Code Civ. Proc. § 395.

3. Venue ⇐72

On hearing of motion for change of venue by defendants residing outside county in which action is pending, court should not try, on conflicting affidavits, fact issues going to merits of cause of action stated against defendant residing in such county. Code Civ.Proc. § 395.

4. Pleading ⇐192(3)

In action by stockholder against corporation and its directors for allegedly wrongful disposition of corporate assets, complaint was insufficient, as against demurrer, to state a cause of action against individual director, in absence of allegation of facts to support the conclusions of law pleaded against him.

5. Venue ⇐41

In action by stockholder against corporation and its directors for allegedly wrongful disposition of corporate assets for the purpose of making plaintiff's stock worthless, complaint, though based largely on conclusions of law, was sufficient, as against motion of defendants residing outside the county for change of venue, to shadow forth the semblance of a cause of action against defendant director residing in the county, and such cause of action was not prima facie so vitally defective as to be beyond correction by amendment. Code Civ.Proc. § 395.

6. Corporations ⇐206(2)

Where conduct complained of is the result of a conspiracy among a majority of directors of corporation and others, a demand upon corporation or its directors is not a prerequisite to maintenance by individual stockholder of a derivative action in behalf of corporation for wrongful disposition of corporate assets. Corporations Code, § 834 and subd. (a)(2).

7. Corporations ⇐206(4)

Where a demand upon directors for corporate action would be useless, a stockholder may bring a derivative action in behalf of corporation without making such demand. Corporations Code, § 834 and subd. (a)(2).

8. Venue ⇐72

On hearing of motion by defendants residing outside county in which action is pending for change of venue on ground of improper joinder of resident defendant, whether plaintiff in joining resident defendant had reasonable grounds for belief in good faith that plaintiff had a cause of action against him is a question for trial court to determine from the face of complaint and affidavits submitted by the parties, and mere fact that complaint states facts sufficient to impose a joint and several liability upon all defendants is not conclusive. Code Civ.Proc. § 395.

9. Appeal and Error ⇐1024(3)

On hearing of motion by defendants residing outside county in which action was pending for change of venue on ground of improper joinder of a resident of county as a party defendant in action by stockholder against corporation and its directors for allegedly wrongful disposition of corporate assets, dispute as to when resident defendant ceased to be a director of corporation was a question of fact for trial court. Code Civ.Proc. § 395.

10. Venue ⇐68

In affidavit in opposition to motion by defendants residing outside county for change of venue of action by stockholder against corporation and its directors for allegedly wrongful disposition of corporate assets, statement that defendant director residing in county in which action was pending "wrongfully" introduced resolutions complained of constituted a conclusion of law, and quoted word without statement of facts to support such conclusion constituted surplusage and added nothing to the statement. Code Civ.Proc. § 395.

11. Venue ⇐72

In determining whether plaintiff in good faith believed that a cause of action existed against the only one of several defendants who resided in county in which action was brought, court could consider

evasive character of allegations of complaint as to such defendant, fact that no relief was asked against him, that he was singled out of all of the defendants for an allegation in complaint as to residence, that he protested action upon which cause of action was in part based, and the evasive character of plaintiff's counter affidavit. Code Civ.Proc. § 395.

12. Fraud ⇐58(1)

Fraud or bad faith, like any other fact, may be inferred from circumstantial evidence.

13. Venue ⇐41

In action by stockholder against corporation and its directors for allegedly wrongful disposition of corporate assets for purpose of making stockholder's stock worthless, venue was properly changed to county of residence of all but one defendant on ground that plaintiff did not in good faith believe that a cause of action existed against defendant director who resided in county in which action was brought but joined him as a defendant for the sole purpose of retaining jurisdiction there. Code Civ.Proc. § 395.

Joseph A. Brown, San Francisco, Hutchinson & Quattrin, San Francisco, for appellant.

Neumiller, Ditz, Beardslee & Sheppard, Joseph W. Diehl, Stockton, for respondent W. G. Micke.

Leon E. Warmke, Malcolm A. MacKillop, Stockton, for respondents Richmaid Ice Cream Co., Henry Hansen, Karen Hansen, Fred Rosenvinge and Reuben Rott.

DOOLING, Justice.

Plaintiff appeals from an order granting a motion for change of venue from the City and County of San Francisco to the County of San Joaquin. It is undisputed that the defendant Montgomery is a resident of San Francisco and that all of the other defendants are residents of San Joaquin County. The question presented on this appeal therefore is whether on the showing made before the superior court that court was entitled to conclude that the defendant Montgomery "is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the * * * city and county * * * where he resides". Sec. 395, Code Civ.Proc.

[1] In determining this question there are certain settled rules which must be borne in mind. The question whether the resident defendant is improperly joined must be determined from an examination of the pleadings then before the court and "(i)f the allegations in question did no more than shadow forth the semblance of a cause of action, they would be proof against assault upon the ground that they were sham and frivolous. * * * It is enough * * * upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the * * * defendant was apparently pleaded in good faith, and is not, *prima facie,* so glaringly and vitally defective as to be beyond correction by amendment." McClung v. Watt, 190 Cal. 155, 160–161, 211 P. 17, 20; Mills v. Brown, 205 Cal. 38, 41, 269 P. 636; Freeman v. Dowling, 219 Cal. 213, 216, 25 P.2d 980; Independent Iron Wks. v. American President Lines, 35 Cal.2d 858, 860, 221 P.2d 939.

[2, 3] In determining the question whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his residence "the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant." California Collection Agency v. Fontana, 61 Cal. App.2d 648, 653–654, 143 P.2d 507, 510; White v. Kaiser-Frazer Corp., 100 Cal. App.2d 754, 758, 224 P.2d 833; Freedman v. Imperial Cattle Co., 112 Cal.App.2d 593, 597, 246 P.2d 986. It is also the rule "that upon the hearing of such motion, the court should not try, upon conflicting affidavits, the issues of fact going to merits of the cause of action stated against the resident defendant." California Collection Agency

v. Fontana, supra, 61 Cal.App.2d at page 653, 143 P.2d at page 510; White v. Kaiser-Frazer Corp., supra, 100 Cal.App.2d 758, 224 P.2d 833; Freedman v. Imperial Cattle Co., supra, 112 Cal.App.2d at page 596, 246 P.2d 986.

[4, 5] Upon the first question, while the complaint is decidedly a rambling document which does not state the theory of the pleader as to the cause of action asserted against the defendant Montgomery with the nicety or precision necessary to render it invulnerable to attack by demurrer we are nonetheless satisfied that it is sufficient to meet the test that it need do "no more than shadow forth the semblance of a cause of action", and "is not, *prima facie,* so glaringly and vitally defective as to be beyond correction by amendment."

The complaint is entitled: "Complaint—Declaratory Relief." It alleges: (Par. I) that Richmaid Ice Cream Company is a corporation with its principal place of business in Lodi, California and defendants Henry Hansen, Karen Hansen, Montgomery and Rosenvinge were during all the times mentioned and now are its directors; (Par. II) that Montgomery is a resident of San Francisco, is a stockholder and director of, and during some of the time was manager of, the corporate defendant; (Par. III) that plaintiff owns 1500 shares, approximately 10%, of the total stock issued by said corporation; (Par. IV) that defendants Micke in December 1944 leased to the Hansens and Rosenvinge the site on which is located the building now occupied by the corporation; (Par. V) that by said lease the lessees were given an option to purchase the leased property at any time within 20 years for $37,500 and that on August 6, 1946 this lease was assigned to the corporation; (Par. VI) that the corporation has expended in excess of $35,000 in the improvement of said leased property and that said property is now of the value of approximately $100,000; that defendants Micke have entered into a conspiracy with the two defendants Hansen and defendants Rosenvinge and the corporation to fraudulently and without consideration cause to be executed an assignment by the corporation of its interest in said lease and option for the purpose of reducing the assets of the corporation so as to reduce the value of plaintiff's stock and thereby cheat and defraud plaintiff and irreparably damage him, and this conspiracy was actually carried out and completed as follows: (Par. VIII) that on May 4, 1948 at a meeting of the board of directors of defendant corporation upon motion of defendant Montgomery the following resolutions were adopted: (1) $65,828.34 carried on the books of the corporation as good will was written off and charged against paid in capital stock; (2) an indebtedness to defendant Henry Hansen of $34,384.03 was acknowledged and the execution of a promissory note of the corporation to Hansen in that amount authorized; (3) an indebtedness to defendants Henry and Karen Hansen and Rosenvinge in the sum of $18,105.30 was acknowledged and the corporation authorized to execute three notes each for one-third of that amount to said three defendants; (Par. IX) that the purpose of writing off the good will was to fraudulently and wrongfully reduce the value of the assets of said corporation and of plaintiff's stock therein. That no money was in fact due any of said three defendants from the corporation and the issuance of said promissory notes to them was wrongful and fraudulent. (Par. XI) That on January 6, 1950 plaintiff addressed a letter to the corporation requesting that proof of the indebtedness of the corporation to defendants Henry Hansen, Karen Hansen and Rosenvinge be exhibited to him; (Par. XII) that on February 7, 1950 plaintiff addressed a letter to the corporation requesting that he be permitted to have a certified public accountant investigate the books and transactions of the corporation prior to the end of February 1950 and if that right was denied him he would take such legal steps as were necessary to protect his legal rights; that notwithstanding these demands the defendants refused to furnish detailed accounts of the corporation's business or to permit the plaintiff's accountant to examine its books; (Pars. XIII–XIV) that at a special meeting called for that purpose on September 28, 1950 and postponed to October 5, 1950 the lease on

the property occupied by the corporation and the option to purchase it was transferred to Henry Hansen over the objection of plaintiff and defendant Montgomery. That the sole purpose of this transfer was to carry out the conspiracy alleged in Par. VI; (Par. XVIII) that "all of the aforementioned acts on the part of all of the defendants * * * were unjust, fraudulent, wrongful, and unlawful; that said acts * * * were committed by the defendants, and each of them, with the direct purpose to reduce and make worthless the capital stock owned by plaintiff * * *" (Par. XX) that an actual controversy has arisen between plaintiff and defendants as follows: (Par. XXI) plaintiff contends (a) that the writing off of the goodwill was wrongful and fraudulent and for the purpose of reducing the value of the corporation's assets and the value of plaintiff's stock and was a fraud against plaintiff; (b) that the alleged indebtedness of $34,384.03 for which the corporation delivered its promissory note to Henry Hansen was unjust, wrongful, fraudulent and without consideration and said corporation did not owe to Henry Hansen said or any amount; (c) a similar statement with regard to the alleged indebtedness of $18,105.30; (d, e) the action in transferring the lease to Henry Hansen (which Montgomery protested); (f) that defendants have entered into a conspiracy to compel plaintiff to sell his stock at one-tenth of its value and have threatened to dissolve the corporation thereby making his stock valueless unless he does so; (g) that defendants have entered into a conspiracy by illegal force and threats to obtain plaintiff's stock at a fraction of its value; (Par. XIX) that defendants deny and dispute plaintiff's contentions. The prayer of the complaint is (1) that the sum $65,828.34 be restored as assets of the corporation; (2–3) that the alleged indebtednesses of $34,384.03 and $18,105.30 be cancelled and declared void; (4) that the assignment of the lease and option be set aside; (5) for the cancellation of another agreement with Henry Hansen and damages against the Hansens and Rosenvinge for their wrongful conduct of the business; (6) that there is due plaintiff from the defendants corporation, the Hansens and Rosenvinge $50,000; (7) for the appointment of a receiver.

In thus summarizing the complaint we have disregarded certain allegations that have no reference to defendant Montgomery. It will be noted of this complaint that it does not charge that Montgomery is a member of the conspiracy alleged in Paragraph VI; that while it alleges that Montgomery moved the adoption of the resolutions referred to in Paragraph VIII it is not there alleged that Montgomery did not act in good faith in doing so and the minutes of that meeting attached to the complaint as an exhibit show that the resolutions were recommended by the corporation's auditor (not made a party defendant) and checks of Henry Hansen for his advances to the corporation were exhibited at the meeting; that while the complaint is captioned as one for declaratory relief the prayer asks only for remedial relief and asks for no relief against defendant Montgomery; and that it is expressly alleged that Montgomery protested the assignment of the lease and option to purchase to Hansen.

Opposed to this is the allegation in the form of the pleader's conclusion of law in Paragraph XVIII that all of the aforementioned acts on the part of all of the defendants were unjust, fraudulent, wrongful and unlawful and done with the direct purpose to make worthless the plaintiff's stock; and the statement of the disputes entitling plaintiff to declaratory relief in Paragraph XXI (f) and (g). It is clear that no cause of action is sufficiently stated against defendant Montgomery to withstand demurrer. However the allegations of conclusions of law above referred to cannot be said not "to shadow forth the semblance of a cause of action" or to be "so glaringly and vitally defective as to be beyond correction by amendment." If facts were alleged to support the conclusions of law pleaded against Montgomery, showing that with knowledge of the falsity of claims against the corporation he moved and voted for the resolutions at the May 4 meet-

ing, such conduct would constitute a legal wrong of which the corporation at least could complain.

[6, 7] Respondents argue that no proper demand was made upon the corporation or its directors so as to qualify plaintiff to bring a derivative action on its behalf. Sec. 834, Corporations Code. But the complaint alleges that the conduct complained of was the result of a conspiracy among a majority of the directors with others and it is settled corporation law that where a demand upon the directors for corporate action would be useless a stockholder may bring a derivative action without making such demand. Stoll v. Selander, 81 Cal.App.2d 286, 293, 183 P.2d 935; 6a Cal.Jur., Corporations, secs. 458–459, pp. 811–813. This rule of law was doubtless in the minds of the members of the legislature when they included the words in sec. 834(a) (2), Corp.Code "or the reasons for not making such effort."

[8–10] However on the question whether the plaintiff in joining the resident defendant had reasonable grounds for the belief in good faith that plaintiff had a cause of action against him "the mere fact that a complaint states facts sufficient to impose a joint and several liability upon all defendants including the resident defendant is not conclusive upon the hearing for a motion for change of venue * * *." California Collection Agency v. Fontana, supra, 61 Cal.App.2d at page 653, 143 P.2d 507, 510, and cases there cited. This is a question for the trial court to determine from the face of the complaint and the affidavits submitted by the parties. The moving parties in their affidavit alleged that defendant Montgomery ceased to be a director of the corporation in November of 1948 and was not its manager after August 1, 1948. This was disputed in plaintiff's affidavit but the decision of that question was one of fact for the trial court. It was also asserted that the joinder of Montgomery was a sham, subterfuge and fraud on the court and that Montgomery is neither a necessary nor a proper party but was joined for the sole purpose of having the action tried in San Francisco. The weaknesses and inconsistencies of plaintiff's complaint in so far as defendant Montgomery is concerned were pointed up. Plaintiff in his counter affidavit stated no facts upon which he relied in joining Montgomery but contented himself with reasserting the conclusions of law pleaded in his complaint and asserting that defendant Montgomery "*wrongfully* introduced" the resolutions pleaded in the complaint, without the statement of any facts to support this conclusion of law. The word "wrongfully" without such supporting facts is surplusage and adds nothing to the statement. 21 Cal.Jur. 31–32.

[11–13] In determining whether plaintiff did in good faith believe that a cause of action existed against Montgomery the court was entitled to consider the evasive character of the allegations of the complaint in so far as Montgomery is concerned, the fact that no relief was in fact prayed for against Montgomery, the fact that plaintiff singled Montgomery out of all of the defendants and inserted in his complaint an allegation of Montgomery's residence in San Francisco, the fact that Montgomery protested the action which is alleged as the culmination of the conspiracy among the other defendants, and the evasive character of plaintiff's counter affidavit when the good faith of his joinder of Montgomery was called in question. Fraud or bad faith, like any other fact, may be inferred from circumstantial evidence. McNulty v. Copp, 91 Cal.App.2d 484, 490, 205 P.2d 438. On the whole case we are of the opinion that the trial court was justified in finding that even though the complaint may have shadowed forth the semblance of a cause of action against Montgomery the plaintiff did not in good faith believe that a cause of action existed against him but joined him as a defendant for the sole purpose of retaining jurisdiction in San Francisco.

The order is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

115 Cal.App.2d 525

In re RAPHAEL'S ESTATE.

RAPHAEL v. RAPHAEL.

Civ. 15282.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1953.

Estate proceeding. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered order settling administrator's final account and affirming, with some modifications, referee's report which found, contra to claim of decedent's widow, that certain property in possession of administrator, who was decedent's brother, was not part of the estate, and widow appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to sustain referee's conclusion that the property belonged to the administrator and not the estate, except for proceeds of sale of automobile in one-half of amount repaid on loan made jointly by administrator and decedent.

Order affirmed in part and reversed in part.

1. Husband and Wife ⇐276(7)

Upon appeal from the probate court's order settling the final account and affirming, with some modifications, referee's report which found, contra to wife's claim, that certain property in possession of husband's brother was not part of husband's estate, the wife who had taken position before the referee that property of husband and wife had been transmuted into community property by agreement between them would not be permitted to depart from such position.

2. Appeal and Error ⇐171(1)

A party cannot change his theory on appeal.

3. Appeal and Error ⇐294(1)

Appellant's failure to move for new trial did not foreclose him from raising, on appeal, question whether evidence supported the findings.

4. Courts ⇐202(5)

Appellant, having opposed adoption of referee's report by the probate court on sole ground that referee's recommendation was contrary to the evidence produced, was limited on appeal to such ground and could not object to referee's rulings which had excluded certain evidence.

5. Appeal and Error ⇐169

Questions not raised in the trial court will not be considered on appeal.

6. Appeal and Error ⇐220

It is proper in the orderly administration of justice that only such objections to a referee's report as are presented in the trial court may be urged against it on appeal.

7. Appeal and Error ⇐1010(1)

The sufficiency of evidence to establish a given fact, where the law requires proof thereof to be clear and convincing, is one for guidance of the trial court, and, if there is substantial evidence to support its finding, the finding is not open to review on appeal.

8. Executors and Administrators ⇐506(3)

In estate proceeding, administrator's uncorroborated testimony was sufficient to establish that he did not remove property belonging to his deceased brother's estate from a joint-entry safety deposit box the brothers had maintained.

9. Trusts ⇐262

Uncorroborated testimony of a fiduciary may be sufficient to rebut the presumption that he has taken unfair advantage of the beneficiary.

10. Executors and Administrators ⇐59

In estate proceeding, evidence was sufficient to sustain referee's finding that certain money and property in possession of one brother, who had had a joint bank account and joint-entry safety deposit box with other brother, were not part of estate of other brother.

11. United States ⇐91

Where husband, during his lifetime, had received United States bond from his mother which was in his name and payable on death to his brother, federal regulations controlled husband's disposition of the bond, and husband had no power, unilater-

ally, by transmutation agreement with his wife to divest the brother of his right of survivorship in the bond. Civ.Code, § 704.

12. Gifts ⇐49(1)

In estate proceeding, where brother, who had lived in home occupied by husband and his wife, testified that the furniture therein had been given to him by his mother before her death, but wife did not move to strike such testimony as conclusion of the witness, and the furniture had not been inventoried in mother's estate, such evidence was sufficient to sustain finding of a gift to the brother.

13. Gifts ⇐19(2)

Where gift of furniture was made between members of same family living in a common home, it was not necessary that the furniture given be removed from the common home before there could be a delivery, but only that dominion and control be given by the donor to the donee.

14. Executors and Administrators ⇐59

In estate proceeding, where lot which had been purchased for $10,000 and taken in names of husband and his brother as joint tenants was sold for $12,500, brother's testimony that he had deposited $10,000 of his own money in a joint bank account between himself and husband and paid for the lot from such account and, after the sale, had made a gift of the profit to husband and his wife was sufficient to support referee's finding that husband's estate had no interest in the $10,000 kept by the brother after the sale.

15. Trusts ⇐72

Where one person pays the purchase price for property, but title thereto is taken in the name of another, a resulting trust arises in favor of person paying the purchase price in the absence of evidence of a gift, and such trust may result where person paying purchase price and another take title in joint tenancy.

16. Husband and Wife ⇐266

Where husband held only naked legal title in joint tenancy as trustee for his brother, husband did not have a substantial property interest which could become community property of himself and his wife under their transmutation agreement.

17. Evidence ⇐265(8)

Where home was conveyed to husband and decedent, as joint tenants, wife's admission in answer in unlawful detainer action by brother against her that the home was owned by brother and husband as joint tenants but that she had executed a joint tenancy deed to the property to such persons upon condition that, should her husband predecease her, brother would acquire title and provide widow with living accommodations therein was sufficient to support conclusion, in estate proceeding, that the property was held in joint tenancy.

18. Gifts ⇐15

Where husband had transferred title to automobile to his wife, wife's delivery of the title certificate, which she had endorsed in blank, to husband's brother for brother to put in a joint-entry safe deposit box which brother maintained with husband was not sufficient to show, but actually negatived, donative intent on part of wife to make a gift of the automobile to the brother.

19. Husband and Wife ⇐266

In estate proceeding, automobile, whose title was originally in husband but had been transferred to wife because of husband's difficulty in obtaining insurance, was in fact community property under agreement made between decedent and his wife, and therefore the probate court had jurisdiction over proceeds of sale of the automobile.

20. Husband and Wife ⇐266

Where husband, who had made an agreement with his wife which transmuted their property into community property, and his brother made joint loan to a third person, and money paid on loan was deposited by brother in joint account of husband and brother on day husband died, one-half of the amount of the loan was community property of husband and wife, and brother did not succeed to this share as survivor of the joint tenancy account.

21. Joint Tenancy ⇐6

Where husband's brother, by his unilateral act and without knowledge or consent of husband and wife, deposited, in joint bank account of husband and brother, money paid on loan jointly made by husband and brother, allowing brother to acquire title to the money as survivor of joint bank account would be to allow brother to work a fraud upon the husband and wife, which fraud would destroy the statutory presumption of intention to vest title in brother as survivor of the joint bank account. Gen. Laws, Act 652, § 15a.

Holbrook & Tarr, W. Sumner Holbrook, Jr., Los Angeles, J. Albert Hutchinson, San Francisco, for appellant.

Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht, Philip S. Ehrlich, Jr., Irving Rovens, San Francisco, for respondent.

DOOLING, Justice.

Appellant Bertha Rado Raphael is the widow of Raymond Theodore Raphael and respondent Harry Raphael is the surviving brother of Raymond and the administrator of his estate. These persons will hereafter be referred to by their first names: Bertha, Raymond and Harry. Upon the death of their mother Raymond and Harry inherited her estate. Raymond was severely crippled with arthritis, never engaged in any lucrative occupation and the whole of his estate upon his death on February 20, 1946 consisted of the property inherited from his mother and its earnings and accretions. Harry had other interests and property and from one corporation in which Raymond had no interest Harry received income in the years 1943, 1944 and 1945 totaling in round figures $167,000. The brothers always lived together both before and after Raymond's marriage to Bertha and while Harry testified that he consulted Raymond about his loans and investments Harry was the "leg man" and attended to most of Raymond's business interests.

[1, 2] The present appeal is from an order of the probate court confirming, with some modifications, the report of a referee finding, against Bertha's claim, that certain money and property in the possession of Harry are not a part of Raymond's estate and from the order settling the final account. As to the several items hereinafter discussed, all of which were found by the referee and the court to belong to Harry, appellant claims that the evidence is insufficient to support the findings. In asserting this claim appellant relies heavily upon a prior adjudication of the probate court, affirmed in 91 Cal.App.2d 931, 206 P.2d 391, 392 "that all of the estate of Raymond Theodore Raphael, both real and personal, on the date of the death of said deceased was the community property of Raymond Theodore Raphael and his widow, Bertha Rado Raphael." This adjudication was based upon a finding that "Raymond Theodore Raphael transmuted all of his property * * * from its previous separate character to * * * community property * * * by an oral agreement which was fully executed * * *." 91 Cal.App.2d at page 935, 206 P.2d at page 393. At the time of this adjudication none of the property or money involved in this appeal was before the probate court and the parties are in disagreement as to the legal effect, if any, of this prior adjudication. At the hearing before the referee counsel for appellant was questioning her about this agreement when Mr. Axelrod, counsel for respondent, stated: "The court found, based upon certain testimony which was introduced in the Probate proceedings, that the property was community * * * she testified on certain matters on which the Appellate Court sustained a finding of the Probate Court that transmuted separate property into community property. We will be here another week if we go into that.

"The Referee: I think it is a matter of record what that agreement was.

* * * * * *

"Mr. Axelrod: There are findings on file, the Appellate Court's decision."

It is clear from this colloquy that counsel and the referee assumed that the transmutation agreement as found by the probate court and affirmed in 91 Cal.App.2d 931, 206 P.2d 391, was a binding adjudication that all property acquired by Raymond, insofar

as the agreement could be legally operative thereon, was transmuted by that agreement into the community property of the spouses. Under the settled rule that a party cannot change his theory on appeal counsel for respondent having taken that position before the referee will not be permitted on appeal to depart from it. 3 Cal.Jur.2d 607.

[3–6] Before proceeding to a consideration of the several items on their merits two other propositions may be stated. 1. Respondent claims that because no motion for new trial was made appellant is foreclosed from raising the question on appeal that the evidence does not support the findings, citing In re Riccardi, 80 Cal.App. 66, 251 P. 650. This case is out of line with the long settled rule that "the question of the sufficiency of the evidence to support a finding * * * may be brought up on appeal from a judgment without having presented a motion for new trial." 3 Cal.Jur.2d 613; Smith v. Lightson, 182 Cal. 41, 186 P. 769. 2. Appellant raises some objections on appeal to rulings of the referee excluding certain evidence. These questions are not open to appellant on the record presented. The sole objection made in the trial court in support of appellant's motion for an order rejecting the referee's report was: "Said motion will be made and based on the ground that the recommendation of the referee is contrary to the evidence produced." Having opposed the adoption of the referee's report by the probate court on the sole ground that "the recommendation of the referee is contrary to the evidence produced" appellant is limited on her appeal to the ground there stated. No rule is better settled than the one that "questions not raised in the trial court will not be considered on appeal." 3 Cal.Jur.2d 604. It is obvious that if appellant was dissatisfied with the referee's rulings in the rejection of evidence and had made that a ground of objection before the court the judge might have re-referred the matter to the referee to correct any errors in his previous rulings or might have taken the additional testimony himself. It is proper in the orderly administration of justice that only such objections to a referee's report as are presented in the trial court may be urged against it on appeal. 22 Cal.Jur. 703–704.

[7–9] Raymond and Harry had a joint bank account and a joint-entry safe deposit box. Harry testified that in the safe deposit box at the time of Raymond's death there were securities belonging to Raymond, securities and money belonging to Harry and some property and documents belonging to third persons. He entered the box after Raymond's death without informing the bank that Raymond had died and removed the property of the third persons therefrom. Thereafter in the presence of a representative of the State Inheritance Tax Department the box was again opened. Harry took his own property and money which was separately labeled with his name and accounted to the estate for all property belonging to Raymond, which was similarly labeled with Raymond's name. There is no claim that Raymond had any interest in Harry's separate property simply because it was deposited in the joint-entry box. The claim appears to be that because Harry occupied a fiduciary relation the burden was on him to establish by clear and convincing evidence that no property of Raymond's was taken from the box and appropriated by him. The "clear and convincing evidence" rule is one for the guidance of the trial court and all that is required on appeal is that the finding finds substantial support in the evidence. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732. Appellant's contention that the uncorroborated testimony of the fiduciary is not sufficient to rebut the presumption of unfair advantage is not supported by the citation of any controlling authority. Our courts have held to the contrary. Helbing v. Helbing, 89 Cal.App.2d 224 and cases cited on pages 230–231, 200 P.2d 560.

[10] Harry testified that as to the joint tenancy bank account some money belonging to Raymond and some money belonging to both was deposited therein, but that most of the money deposited was Harry's separate funds; that it was his practice to withdraw the money belonging to Raymond and pay it to Raymond in cash or by check

and to withdraw his own funds for his own use as occasion or convenience dictated. Appellant claims that the money deposited in the joint account became the common property of Raymond and Harry and the transmutation agreement between the spouses converted Raymond's interest to community property. For this contention appellant relies upon Yeoman v. Sawyer, 99 Cal.App.2d 43, 221 P.2d 225. That case announced the rule that where a husband invested community funds in property acquired by a deed to the husband and his paramour as joint tenants, the joint tenancy character of the property was destroyed by the community property interest of the wife and a tenancy in common of the paramour and the community resulted. The case is not applicable to the facts presented by this joint tenancy bank account. It is clear from Harry's testimony that he did not intend a gift of his separate funds deposited in the joint account and as to all of his own funds withdrawn therefrom during Raymond's lifetime the presumption of equality of interest in the funds deposited by Harry could be rebutted. Paterson v. Comastri, Cal. Sup., 244 P.2d 902. On the evidence produced, since appellant did not establish that any of Raymond's funds which were deposited in that account were not afterwards withdrawn and repaid to Raymond (with the single exception of the Fallis loan hereafter discussed) and Harry testified that they were, we cannot find that the referee's conclusion adopted by the court that such funds were Harry's is not supported by the evidence.

[11] The brothers received a U. S. bond from their mother. It stood, according to the record made by the representative of the Inheritance Tax Department when the box was opened in his presence, in the name of Raymond payable on death to Harry. The referee found that on Raymond's death this bond became Harry's. Appellant argues that under the authority of Yeoman v. Sawyer, supra, 99 Cal.App.2d 43, 221 P.2d 225, by virtue of the transmutation agreement Raymond's interest therein became community property and the joint tenancy character of the bond was destroyed. This argument ignores the federal regulations governing such bonds referred to in Davies v. Beach, 74 Cal.App.2d 304, 306–307, 168 P.2d 452, 455, and Civ.Code sec. 704. Specifically: "A bond registered in the name of one person payable on death to another may not be reissued during the latter's lifetime to eliminate his name * * *.

"If the registered owner dies without having presented and surrendered the bond * * * and is survived by the beneficiary, upon proof of such death and survivorship, the beneficiary will be recognized as the sole and absolute owner of the bond * * *."

It is clear that the federal regulation is controlling and Raymond had no power unilaterally by the transmutation agreement with Bertha to divest Harry of his right of survivorship in the bond.

[12, 13] The furniture in the home occupied by the parties had belonged to the mother of Raymond and Harry. Harry testified that the mother gave it to him before her death. He could not remember the language used but no motion to strike his testimony on the ground that it was the conclusion of the witness was made. We are satisfied that the evidence is sufficient to support the finding of a gift to Harry. It is urged that no delivery was shown, but as between members of the same family living in a common home it is not necessary that bulky articles given be removed from the common home to constitute delivery, but only that dominion and control be given by the donor to the donee. Robinson v. Hoalton, 213 Cal. 370, 2 P.2d 344; Graham v. Griffin, 66 Cal.App.2d 116, 151 P.2d 879; Wiley B. Allen Co. v. Edwards, 29 Cal.App. 184, 154 P. 1066; 38 C.J.S., Gifts, § 24, p. 803. In this connection the fact that the furniture was not inventoried in the mother's estate of which Raymond and Harry were joint executors has some significance.

[14–16] In 1943 a parcel of real property referred to as the "Marina lot" was purchased for $10,000 and the deed taken in the names of Raymond and Harry as joint tenants. In 1945 the lot was sold for $12,500. The profit went to Raymond and Bertha and Harry kept the $10,000. Harry testified that he deposited $10,000 of his own money in the joint bank account and paid

for the lot with a check for that amount drawn on the joint account and that after the sale he made a gift of the profit to Raymond and Bertha. This evidence sufficiently supports the finding of the referee that the estate has no interest in this $10,000. Where one person pays the purchase price for property and it is taken in the name of another a resulting trust arises in favor of the person paying the purchase price, in the absence of evidence of a gift. Civ.Code sec. 853; 25 Cal.Jur. 178. Such trust may result where the person paying the purchase price and the other take title in joint tenancy. Rowland v. Clark, 91 Cal.App.2d 880, 206 P.2d 59; 3 Scott on Trusts, sec. 454.6, p. 2293. Since the referee was entitled to conclude that Raymond held only the naked legal title in joint tenancy as trustee for Harry there was no substantial property interest in Raymond which could become the community property of Raymond and Bertha under their transmutation agreement.

[17] The home in which the parties lived until Raymond's death was held in joint tenancy under a deed conveying title to "Harry Raphael, a single man, and Raymond T. Raphael, as husband of Bertha Raphael" as joint tenants. Bertha, although she had no interest in the property so conveyed joined in the deed as a grantor. It is her claim now that since community funds went into the purchase and the deed ran to Raymond *as her husband* no true joint tenancy resulted but rather a tenancy in common of the community and Harry. It was stipulated before the referee "that Bertha Rado Raphael consented to Harry Raphael and Raymond Raphael taking the title as joint tenants." Particularly significant of the true intention of the parties is an answer filed by Bertha in an unlawful detainer action brought by Harry against her in the Municipal Court. That answer contained the following admission: "defendant admits that the property (referring to the home) * * * was owned by plaintiff and the deceased husband of defendant as joint tenants, but she alleges * * * that * * * with one Angela M. Prendergast, as grantors, she executed a joint tenancy deed to said property to plaintiff and her husband with the sole and express condition that should her husband predecease her that plaintiff would acquire the title * * * and provide defendant with living accommodations in the dwelling house thereon; that her said husband did predecease her and by virtue of the joint tenancy deed plaintiff did acquire the title to said real property * * *." The suit resulted in a judgment for Harry. It is argued that this judgment is res judicata of the title in Harry. We need not decide this question. The admissions in the answer above quoted which was verified by Bertha long before the present claim was asserted support the conclusion that the property was held in true joint tenancy and that the parties so intended.

[18] During the lifetime of Raymond he purchased a Pontiac automobile. He transferred title to Bertha because, being a cripple, he could not secure public liability insurance. Bertha endorsed the pink certificate in blank and handed it to Harry who put it in the joint-entry safe deposit box. Raymond and Bertha continued to use the automobile until Raymond's death. After Raymond's death Harry sold the car for $1,875 and kept the money.

The referee found that Raymond gave the car to Bertha as her separate property and that Bertha in turn gave the car to Harry. Neither finding is supported by the evidence. Harry testified:

"Q. And she endorsed a certificate, the so-called pink slip, on the automobile, and gave it to you to put in the safe deposit box, is that correct? A. Yes sir.

"Q. That car continued to be used by her and by her husband until his death? A. By her husband."

Bertha testified:

"Harry gave me the slips and told me to sign, like he did everything else. Raymond gave me the car—Harry never owned that car."

The delivery of the pink slip to Harry, even though endorsed in blank, "to put in the safe deposit box" fails to show the essential element of donative intent and indeed actually negatives it. Intent on the part of the donor to make a gift is the pri-

mary essential. 13 Cal.Jur. 32, 36; Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 503, 238 P. 1034; Mutual Benefit Life Ins. Co. v. Clark, 81 Cal.App. 546, 551, 254 P. 306.

[19] However because Bertha testified that Raymond gave her the car as a Christmas present and the referee found that it was her separate property respondent urges that the probate court has no jurisdiction over its proceeds. This argument overlooks the agreement found by the court as affirmed in 91 Cal.App.2d 935, 206 P.2d 391, and reiterated by Bertha in her testimony before the referee about this particular automobile "that everything he had was mine, and everything I had was his; that we were partners in everything, and everything was fifty-fifty." 91 Cal.App.2d 936, 206 P.2d 394. The court said of the effect of this and similar testimony: "The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done." 91 Cal. App.2d 939, 206 P.2d 395. The fact that title to her "Christmas present" was originally taken in Raymond's name and only transferred to her later because of the difficulty with insurance further reinforces the conclusion that although standing in Bertha's name it was in fact community property under the agreement of the spouses.

[20, 21] Before Raymond's death the brothers lent $1,000 to one Fallis. The money was repaid on the very day of Raymond's death and on that date deposited in the joint account by Harry. Harry testified of this loan:

"Q. Mr. Raphael, at one time you and your brother jointly made a loan to an individual by the name of Fallis, is that correct? A. Yes sir. * * *

"Q. Is that loan still in operation, or has it been paid off? A. No sir, it has been paid off.

* * * * * *

"Q. Do you recall when that loan was repaid? A. He repaid $1,000 on February 20, 1946."

The evidence is express that this particular loan was made by the *two* brothers to Fallis. Although the money to make it came from the joint account, money of both was deposited therein, and Harry did not testify in this instance as he did with regard to other transactions that his money alone went into this loan but instead he expressly stated that the two brothers made it together. The only rational conclusion is that one-half the amount of the loan was the community property of Raymond and Bertha. Harry's claim that he succeeded to this money as survivor of the joint tenancy account cannot be sustained. The particular deposit in the joint account was obviously made by Harry without either spouse's knowledge since it was made on the very day that Raymond died, whether before or after his death does not appear. Under sec. 15a of the Bank Act as it then read, the conclusive presumption of intention to vest title in the survivor of a joint bank account existed only "in the absence of fraud or undue influence". Stats.1929, p. 445, Gen.Laws, Act 652. To permit Harry because of his unilateral act in making this deposit of Raymond's and Bertha's community funds in the joint account without their knowledge or consent to invoke this conclusive presumption would be to work a fraud on them.

Insofar as they adopted the referee's report with regard to the Pontiac automobile and the Fallis loan the order confirming the referee's report and the order settling the administrator's final account are reversed and the court is directed to require the respondent administrator to account for the $1,875 received on the sale of the automobile and for $500 of the $1,000 received in payment of the Fallis loan. In all other respects the order confirming the referee's report and the order settling the final account are affirmed.

GOODELL, Acting P. J., and JONES, Justice pro tem., concur.

115 Cal.App.2d 758

PETERSEN v. RIESCHEL.

Civ. 15092.

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1953.

Rehearing Denied March 6, 1953.

Personal injury action by pedestrian who was struck by motorist while pedestrian was approaching street car with intent to board it. The Superior Court of the State of California, in and for the City and County of San Francisco, Melvyn I. Cronin, J., entered judgment on verdict for motorist, and pedestrian appealed. The District Court of Appeal, Goodell, Acting P. J., held that evidence was sufficient to warrant giving of instruction, which was worded to apply to either party, on imminent peril.

Judgment affirmed.

1. Appeal and Error ⇐1046(5)

In personal injury action by pedestrian who was struck by motorist while pedestrian was approaching street car with intent to board it, where jury was instructed to ignore any of court's statements which might indicate opinion respecting credibility of witnesses, court's statement, in presence of jurors, that motorist's sickness would cause continuance and further inquiry concerning motorist's health was not prejudicial to motorist.

2. Appeal and Error ⇐1046(5)

In personal injury action, where jury had been excused, court's subsequent explanation to a tardy juror that one of the parties became sick and that the recess was called because the sickness interfered with plan of one of the attorneys to proceed in a certain way, was harmless since it told juror something she and the other jurors were entitled to know.

3. Automobiles ⇐246(14)

In personal injury action by pedestrian who was struck by motorist, where court gave instructions based on nine sections of the Vehicle Code, further instruction that conduct which was violation of those sections, with the exception of section 510, constitutes negligence per se was not confusing. Vehicle Code, §§ 81, 83, 85, 86, 88, 475, 476, 476(c)3, 510, 571, 571(b).

4. Appeal and Error ⇐1064(1)
Automobiles ⇐246(14)

In personal injury action by pedestrian who was struck by motorist while pedestrian was approaching street car with intent to board it, giving of instruction that violation of the basic speed law was negligence and, later, that conduct in violation of designated sections of the Vehicle Code, except provision as to basic speed law, constituted negligence per se was error but was not prejudicial, in view of fact that violation of speed law could not have been a turning point in case. Vehicle Code, § 510.

5. Trial ⇐203(1)

A litigant who so requests is entitled to proper instructions presenting his theory of the case based upon the pleadings and the proofs and, if the parties to an action rely upon different theories, instructions, when requested, should be given as to each theory.

6. Appeal and Error ⇐930(4)

It is to be presumed that the jury reached its verdict on a theory that is supported by the evidence.

7. Automobiles ⇐245(76)

In personal injury action by pedestrian who was struck by defendant motorist while pedestrian was approaching street car with intent to board it, question of pedestrian's contributory negligence in crossing roadway on way to safety zone against red signal was for jury. Vehicle Code, §§ 81, 83, 85, 86, 88, 475, 476, 476(c)3, 510, 571, 571(b).

8. Trial ⇐243

In personal injury action by pedestrian who was struck by defendant motorist while pedestrian was approaching street car with intent to board it, instructions pertaining to passing of street cars where safety zone has been established or intersectional traffic is controlled by signal and to path pedestrian shall follow from curb to street car were not contradictory and inconsistent but were proper since jury could have found motorist negligent and pedestrian contributorily negligent. Vehicle Code, §§ 476, 571(b).

9. Automobiles ⇐246(32)

In personal injury action by pedestrian who was struck by defendant motorist while pedestrian was approaching street car with intent to board it, refusal to instruct jury that a pedestrian going from curb to streetcar safety zone is not required to approach safety zone by way of crosswalk but may go from curb to zone using ordinary care for his own safety was not error in view of fact that statute pertaining thereto forbids pedestrians to walk on roadway to safety zone against a stop signal. Vehicle Code, § 476.

10. Automobiles ⇐246(58)

In personal injury action by pedestrian who was struck by defendant motorist while pedestrian was approaching streetcar with intent to board it, evidence was sufficient to warrant giving of instruction, which was worded to apply to either party, on imminent peril.

Delany, Werchick, Fishgold & Minudri, Jack H. Werchick and Franklyn K. Brann, San Francisco, for appellant.

Belcher & Koller, Oakland, Clark & Heafey, Oakland, Gerald P. Martin, San Francisco, of counsel, for respondent.

GOODELL, Acting Presiding Justice.

This appeal is from a judgment entered on a verdict for defendant in a personal injury action. A new trial was denied.

At about 6:30 a. m. on January 13, 1950 appellant, a widow, was struck and severely injured by an automobile driven by respondent. She had walked, on her way to work, from her home on Kansas Street in San Francisco to Potrero Avenue and 22nd Street, and was struck while approaching a northbound Potrero Avenue streetcar, intending to board it.

Potrero Avenue runs approximately northerly and southerly and 22nd Street approximately easterly and westerly. There is a safety zone 55 feet long and 3 feet wide at the intersection, delineated by a white stripe painted on the pavement with 3 metal buttons at its north end and 4 at its south end. The distance from the easterly edge of the white stripe to the easterly curb of Potrero Avenue is 27 feet 3½ inches, divided by painted lines into three lanes. It was dark and the streets were dry.

At the intersection there is an electric signal with red, yellow and green lights to control traffic, and from the time the streetcar and respondent's automobile approached the zone until after the impact the green light giving clearance to northbound traffic was on and the red light holding up east-west traffic was on.

At the time of the accident a northbound streetcar was practically stopped, with its front end at or approaching the north end of the zone (and the south line of the southerly east-west crosswalk).

Just before the accident respondent was driving his 1939 Plymouth, with headlights on, in the middle northbound lane and in the general flow of traffic. He testified that he saw a streetcar ahead of him slowing down as he neared the zone and continued on, with the green light, at about 20 miles and hour.

Appellant, who had been standing on the easterly curb of Potrero, at a point somewhere between 25 and 50 feet south of the south line of the crosswalk, waited for northbound traffic, including a truck, to pass, and then started across the traffic lanes at an angle southerly, headed for the rear end of the streetcar.

The conductor of the car, a witness for plaintiff, testified on cross-examination that she was "hasting" and "rushing", also that "she hurried right around the back of the truck toward the street car". A passenger on the car, a witness for defendant, testified on direct examination that "she dashed across the street" and "she made a run across the street". The same witness recalled that he had seen her "stepping off and on the curb a couple of times."

When the front of respondent's automobile was about 10 feet north of the rear end of the streetcar he saw appellant in the middle of his lane and about 5 feet directly in front of his car. He immediately applied his brakes and swerved to his right, but struck her with his left front

bumper and fender. The impact threw her into the safety zone about opposite the front steps of the street car. He came to a stop within 5 or 6 feet. In swerving, the right front end of his car crossed the white line to his right, and his car was pointing in a general northeasterly direction partly in the lane to his right when it came to rest.

[1] Appellant's first contention is that the court erred in commenting on the physical condition of defendant in such a manner as to support his credibility.

The trial opened on a Friday and the jury was impaneled and sworn that morning and a recess was taken until 2 o'clock, at which time 11 jurors were present. While waiting for the absentee the court said: "I was going to announce before this happened, they have sickness in the home of one of the parties to the case that forces us to continue the trial until Monday. I was advised that the gentleman was sick and would not be able to continue here this afternoon." While still waiting, this occurred:

"The Court: How is your man? Are you going to bring him to the hospital?

"Mr. Heafey: I think when his nerves calm down he will feel a little bit better.

"The Court: What has he got, the 'flu'?

"Mr. Heafey: No. I don't know, it is just like shell shock. A combination, I guess, of stomach and nerves.

"The Court: Well, there is no need of us waiting. We are going to recess anyway."

Counsel then stipulated to an adjournment and the court said: "Ladies and gentlemen, you will now be excused then until Monday morning at 10:00 o'clock, due to the fact the defendant became sick * * *."

A few minutes later the tardy juror came in and the following ensued:

"The Court: What happened to you?

"Mrs. Grey: There was a fire in the building. I didn't know whether to come in or not.

"The Court: Somebody set fire to the dome. * * * One of the parties got sick. * * * And in fact he is in my chambers on the couch now. And I had known he was sick. Mr. Heafey told me before noon. Mr. Werchick had planned to proceed in his case in a certain way, and by reason of that it interfered with his proceeding. So as a result we recessed until 10:00 o'clock Monday morning. * * *"

The other 11 had left, hence only this juror heard this last statement.

It appears from the affidavit of appellant's counsel on motion for new trial: "That, at the opening of the trial * * * defendant, in the presence of the jury, broke down and was removed from the court room * * *." There is nothing in the record to show how his breakdown was manifested or how much attention, if any, it attracted.

The trial went forward the following Monday and toward noon, during a discussion concerning the trial's progress the court said to appellant's counsel in the presence of the jury "It is not your fault, I will say, that you had planned to use the defendant, and the defendant has become so ill, according to his statement and the doctor's statement at least, he will be unable to be present." This had reference to a letter from respondent's doctor to the judge stating that in his opinion "further court appearances will worsen his condition", but it was not read to the jury.

On the second day of the trial proper, the court made the following statement in the presence of the jury:

"* * * The Court has before it a doctor's certificate. * * * There is no use making anything out of it. The man is sick, apparently, and that's that * * *."

Thereupon defendant's deposition, taken some months before under § 2055, Code Civ.Proc., was read into evidence.

Appellant argues "that the combination of defendant's 'collapse' and the Court's comments, in the presence of the jury, tended to impress the jury with sympathy for defendant and to indicate that the Court believed that defendant was ill and unable to be present at trial. In effect, it was a comment on the credibility of the defendant which, very likely, could and did affect the jury when it considered the testimony of defendant (given by deposition)." We agree that the judge indicated that he "believed that defendant was ill and unable to be present at trial" since his language "and that's that" showed that he accepted at full face value the doctor's certificate which stated inter alia that defendant had been under his care "for several months for a nervous breakdown". The court had to pass upon the question whether defendant was well enough to attend court, and the jury, in fairness to everyone concerned, was entitled to know why he, a litigant, was not present.

It is not unusual for witnesses, jurors, litigants or attorneys to be taken sick during a trial. Indeed, one of plaintiff's witnesses had the "flu" and defendant's counsel expressed apprehension lest he "get it" from the witness. And still another witness (for defendant) was unable to attend court because of illness, and his deposition was taken at his home during the trial and read to the jury. At one point during the trial counsel for plaintiff in examining his sick witness said: "Well, we are concerned with your health now * * * everybody seems to be sick in this case * * *." And the witness said: "I got out of bed to come down here."

[2] In the court's inquiry: "How is your man? Are you going to bring him to the hospital?" there was nothing beyond the expression of a natural and humane interest in the condition of a person apparently ill. Such solicitude in these circumstances (which we have related in considerable detail) could hardly have been interpreted by the jurors as "a comment on the credibility of the defendant" when it came to a consideration of his testimony. Counsel's reply "stomach and nerves" did not exaggerate or magnify his client's condition, and appellant does not so argue. The court's explanation of the continuance to the tardy juror was harmless and simply told her something she was as much entitled to know as were the other 11.

Appellant cites McMinn v. Whelan, 27 Cal. 300; People v. MacDonald, 167 Cal. 545, 550, 140 P. 256; Berguin v. Pacific Electric Ry. Co., 203 Cal. 116, 121, 263 P. 220 and Anderson v. Mothershead, 19 Cal.App.2d 97, 101, 64 P.2d 995.

In McMinn v. Whelan the court, 27 Cal. at page 319, speaks of the authoritative position of a trial judge and the influence of his comments on the jury, which of course cannot be gainsaid. There the judge in ruling remarked that plaintiff's witness was one of the most respectable women in his neighborhood—a woman of respectability. While this irregularity was disapproved, the judgment was not reversed.

In Anderson v. Mothershead [19 Cal.App. 2d 97, 64 P.2d 998], the language of the McMinn case is quoted in connection with "the court's remarks which tended to discredit defendant's counsel with the jury" and which also indicated that he looked with disfavor on defendant's testimony respecting the circumstances of the accident. The judgment had to be reversed, however, primarily for prejudicial error in an instruction on speed which shifted the burden of proof onto the defendant. See Akers v. Cowan, 26 Cal.App.2d 694, 697-698, 80 P.2d 143 and Westberg v. Willde, 14 Cal.2d 360, 369–370, 94 P.2d 590. The court in another instruction used the words "a terrible and a sad thing" in connection with the plaintiff's injuries, which was held improper.

In People v. MacDonald [167 Cal. 545, 140 P. 258], the judge commented that the prosecutrix in a rape case was "courteous and kind and modest". He was criticized for this but the judgment of conviction was not disturbed.

The trial judge's remarks in the Berguin case, found at 203 Cal. 118–119, 263 P. 221, 222, speak for themselves. At page 120, of 203 Cal., at page 222 of 263 P., the Supreme Court said that the judge

"doubtless regretted the hasty act on his part, but the jury were not adequately or at all apprized of this fact. In fact, throughout the trial plaintiffs' counsel were repeatedly subjected to the severest strictures by the court, many of which seem unwarranted."

None of these cases has any similarity to the case at bar. Moreover, the usual instruction was given which cautioned the jury to disregard any of the Court's statements which might seem to indicate an expression of opinion respecting credibility. See Loper v. Morrison, 23 Cal.2d 600, 610, 145 P.2d 1. Finally, appellant's counsel at no time made any assignment of error or misconduct.

[3] Appellant's second contention is that the court erred in instructing the jury that the violation of § 510, Vehicle Code, did not constitute negligence per se.

The court gave a group of nine instructions based on the vehicle code, in the following order: §§ 510, 81, 571, 86, 85, 475, 476, 83, 88. The instruction on § 510 reads:

> "Now * * * The basic speed law * * * as provided by Section 510 of the Motor Vehicle Code, is as follows: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.' And a violation of this basic rule is negligence."

After the nine instructions were read the court instructed as follows: "Now, conduct which is in violation of those sections * * * with the exception of Section 510, constitute negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he or she was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

Appellant argues that such a statement "following the reading of eight different sections of the Vehicle Code * * * could only confuse the jury and raise doubt in their minds as to which one was '510' and which one was excepted from the rule that would make its violator negligent per se. Also included in the list of Vehicle Code sections were the instructions on the duty of defendant under 571(b). Unless the jury kept in mind the numbers of the sections as read by the judge, is it unlikely to suppose that at least one juror felt that violation by defendant of 571(b) (admitted by his own testimony) would be the exception referred to by the judge."

That argument asks us to assume that the jury did not keep "in mind the numbers of the sections as read by the judge" and also to speculate, whether at least one juror might not have confused the general and simple terms of § 510 with the specific terms of § 571(b). There is no reason why we should do either. Although nine sections were read in sequence they presented no baffling or complicated problem since five of them dealt merely with definitions, i. e., § 81, streets and highways; § 83, roadway; § 85, cross-walk; § 86, intersection; § 88, safety zone. This left but three dealing with substantive rules, namely § 475, "Obedience to Official Traffic Signals"; § 476, "Official Traffic Signals", and § 571, "Overtaking and Passing Standing Street Car" in addition to § 510.

It would seem improbable that the jury with § 571(b) before it, dealing with the specific subject of a 10-mile limit while passing a standing street car, should confuse such instruction with one which specified no speed whatever in miles-per-hour. Appellant's argument is not convincing on this point.

[4] It is true the court first instructed that "a violation of this basic rule", § 510, is negligence, and later on said that conduct in violation of those (nine) sections (which, as already appears, included five mere definitions) *with the exception of § 510* constituted negligence per se. Such conflicting instructions were erroneous but the error in our opinion was not prejudicial. As already indicated, a violation of the basic speed law could not have been by any means a turning point in this case since § 571(b) dealt with a specific, 10-miles-per-hour limit at the point of impact and obviously it was upon § 571(b), and not § 510, that appellant relied.

[5–8] Appellant's third point is that the court erred in giving contradictory and inconsistent instructions on material points.

The court read to the jury § 571, Veh. Code, including the following: "(b) Where a safety zone has been established or at an intersection where traffic is controlled by an officer or a traffic control signal device, a vehicle need not be brought to a stop before passing any such * * * street car but may proceed past such car at a speed not greater than ten miles per hour and with due caution for the safety of pedestrians."

Appellant claimed that respondent violated that section by driving in excess of 10 miles an hour while beside the zone, and that such conduct was negligence per se. Her case was based largely on that theory.

The court also read to the jury § 476, Veh.Code, including the following: "(c) * * * 3. No pedestrian shall enter the roadway or cross any part of the roadway or from or to a safety zone against a red or 'Stop' signal. * * *"

The jury was instructed as to each section that its violation was negligence per se.

Respondent claimed that appellant violated that provision and that her conduct was negligence per se which constituted contributory negligence.

"A litigant requesting it is entitled to proper instructions presenting his theory of the case, based upon the pleadings and proofs. And if the parties to an action rely upon different theories, instructions should be given, when requested, as to each * * *." 24 Cal.Jur., p. 826, § 92. The court apparently obeyed this settled rule, as it was bound to do regardless of consequences.

This court had a somewhat similar situation before it in Murero v. Reinhart Lumber Co., 85 Cal.App. 385, 387, 259 P. 494, 495, where the instruction in question was based on § 134 of the old Motor Vehicle Act dealing with a 10-mile limit while beside a street car while passengers were boarding or alighting. We said: "Just as it was the duty of the trial court to instruct the jury giving all proper instructions supporting the theory of the plantiff, it was equally the duty of the trial court to give to the jury all proper instructions supporting the theory of the defendants."

In Brown v. Yocum, 113 Cal.App. 621, 622, 623, 298 P. 845, 846, it was said: "It is an elemental rule that the court may instruct the jury upon all issues pleaded or otherwise established by the evidence. Inconsistent causes of action or defenses may be alleged and set up, and instructions covering them must necessarily be based upon conflicting and contradictory hypotheses."

The same was said in Baugh v. Beatty, 91 Cal.App.2d 786, 791, 205 P.2d 671. In Matsumoto v. Renner, 90 Cal.App.2d 406, 410, 202 P.2d 1051, 1053, the court said: "Negligence and contributory negligence were issues raised by the pleadings and defendants were entitled to have the jury instructed as to their theory of the case. [Citations.]" So here, the instruction under § 571 was based on plaintiff's theory of defendant's negligence, while that under § 476 was based on defendant's theory of plaintiff's contributory negligence. See, also, Raymond v. Hill, 168 Cal. 473, 479, 143 P. 743; Burge v. Albany Nurseries, Inc., 176 Cal. 313, 319, 168 P. 343; Bickford v. Pacific Electric Ry. Co., 120 Cal.App. 542, 549, 8 P.2d 186, and Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 216, 89 P.2d 453.

It is to be "presumed that the jury reached its verdict on a theory that is supported by the evidence." Clement v.

State Reclamation Board, 35 Cal.2d 628, 643, 220 P.2d 897, 906. There is ample evidence to support a finding of appellant's contributory negligence based on her violation of § 476. If so, it cannot be said that there was any inconsistency in the instructions since the jury with perfect consistency could have found the defendant negligent based on his violation of § 571 and at the same time found the plaintiff contributorily negligent based on her violation of § 476.

Appellant in arguing that there was no basis for the instruction under § 476 relies on the case of Croxall v. Broadway Department Store, 127 Cal.App. 153, 156, 15 P.2d 546, which held that a pedestrian going from a safety zone to the curb did not come within the strict letter of a city ordinance relating to pedestrians crossing the roadway from curb to curb. However, that case was decided in 1932 while the provision of § 476 quoted above was added in 1945. Conceivably it might have been added because of that decision and to clarify and settle for the future the problem which it presented.

[9] Appellant's fourth point is that the court erred in refusing the following instruction: "You are instructed that a pedestrian going from the curb to a streetcar safety zone is not required by law to approach the safety zone by way of the cross walk, but may go from the curb to the streetcar safety zone using ordinary care for her own safety." The record shows that it was based on the Croxall case, discussed under the preceding heading. The 1945 amendment of § 476, which covered with precision the subject of pedestrians stepping into the roadway *at any part* thereof, or *going to or from a safety zone, against a stop signal,* was the last word on the subject and that provision of course precluded the giving of any such instruction as that tendered.

In respondent's brief the points and authorities just discussed under appellant's third and fourth headings were fully developed and argued. Appellant has not seen fit to file any closing brief, and such failure leaves this court without the benefit of any answers which appellant might have been able to suggest.

[10] Appellant's fifth point is that it was error to instruct in the usual form on imminent peril.

No objection is made to the form or language of the instruction but the complaint is that none at all should have been given on that subject.

It is apparent that the theory on which it was given was the emergency which presented itself when respondent discovered appellant as close as 5 feet in front of his automobile. The testimony that appellant was "hasting" and "rushing"; that "she hurried right around the back of the truck toward the streetcar"; that "she dashed across the street"; that "she made a run across the street", all shows sudden action on her part. Respondent testified that he swerved to the right in trying to avoid hitting her and that in doing so he got 5 or 6 feet into the right-hand lane. He was cross-examined closely and incisively in an attempt to force an admission that he did not see appellant until he hit her, hence that he did nothing at all after seeing her. Certainly respondent's testimony on direct and cross-examination and all the other evidence in the case justified respondent in urging, and the court in giving, an instruction on imminent peril; there was substantial evidence to support it, 24 Cal.Jur. p. 826, supra.

A further reason why the imminent peril instruction could not have been error is that it was impersonal and bilateral. Appellant found herself confronted with a sudden peril at the same time respondent was so confronted. Four times in the course of the instruction the court used both the masculine and feminine genders.

We find no merit in any of appellant's contentions.

The judgment is affirmed.

DOOLING, J., and JONES, J. pro tem., concur.

115 Cal.App.2d 781

MALLARINO et al. v. SUPERIOR COURT OF STATE IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15570.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1953.

Rehearing Denied March 7, 1953.

Proceeding to prohibit trial of executrix' proceeding for instructions as an unnecessary duplication of petitioners' proceeding for determination of interests. The District Court of Appeal, Nourse, P. J., held that where proceeding by executrix for instructions as to clause in will was remanded by Supreme Court to Superior Court for taking of evidence, and petitioners' request for jury trial in that case was refused by Superior Court, and thereafter petitioners filed petition for determination for interests and asked for jury trial, petitioners were entitled to prohibit continuance of former proceeding.

Peremptory writ granted.

1. Jury ⇐11(2)

The right to jury trial in probate matters when there is no specific provision granting the right expressly for that special proceeding, depends on whether there is statutory authority for formation of triable issues of fact in the particular proceeding.

2. Jury ⇐19(7)

In proceeding by executrix for instructions and directions there was no right to jury trial. Probate Code, § 588.

3. Descent and Distribution ⇐71(3)

Procedure under statute to determine interests in estate can only be initiated by a person claiming to be entitled to distribution. Probate Code, § 1080.

4. Jury ⇐19(7)

Where proceeding by executrix for instructions as to clause in will was remanded by the Supreme Court to the Superior Court for taking of evidence, and thereafter alleged beneficiaries under will filed petition for determination of interests, they were entitled to jury trial in proceeding to determine interests. Probate Code, §§ 588, 1080.

5. Jury ⇐34(1)

When a party is given statutory right to a trial by jury on an issue of fact determining his right to participate in the estate, that right should not be defeated by a proceeding before court sitting without jury designed solely to prejudge the issue of fact which jury must thereafter determine.

6. Prohibition ⇐17

Where proceeding by executrix for instructions was remanded by the Supreme Court to the Superior Court for taking of evidence, and thereafter alleged beneficiaries under will filed petition for determination of interests, their demand for jury trial was an adequate challenge to court's jurisdiction to proceed with hearing in instruction proceeding before court alone, as basis for subsequent prohibition proceeding. Probate Code, §§ 588, 1080.

7. Prohibition ⇐3(5)

Where executrix brought proceeding for instructions, and, on appeal, Supreme Court remanded case for taking of evidence, and thereafter alleged beneficiaries under will filed petition for determination of interests and asked for jury trial, but instruction proceeding was set for trial without notice to alleged beneficiaries, remedy by appeal from refusal of jury trial was not adequate, and did not preclude prohibition of instruction proceeding. Code Civ.Proc. § 1103; Probate Code, §§ 588, 1080.

8. Prohibition ⇐34

The question whether a petitioner has an adequate remedy by appeal is one for court entertaining the application primarily to decide. Code Civ.Proc. § 1103.

9. Prohibition ⇐3(2)

Where further proceedings would merely subject parties to further vexation and useless expense, the court should not, on ground of remedy by appeal alone, refuse to prohibit useless proceeding. Code Civ.Proc. § 1103.

Delany, Fishgold & Minudri, San Francisco, for petitioners.

Marshall E. Leahy, John F. O'Dea and Philip S. Ehrlich, San Francisco, for respondent.

NOURSE, Presiding Justice.

Petitioners allege they are beneficiaries under the will of George Anthony Kearns, who left all his estate to his fiancee Emma Traung Hammersmith and made her executrix of his will, but in a separate provision directed her to provide for the petitioners, his nieces. The executrix petitioned the superior court for instructions as to the interpretation of this provision. That court held that the words were precatory. On appeal this court held them to be mandatory. The Supreme Court took over and held that the clause was of uncertain meaning and that the superior court had erred in refusing to hear extrinsic evidence of circumstances which could clarify testator's intention. In re Estate of Kearns, 36 Cal.2d 531, 225 P.2d 218.

When the case went back to the superior court petitioners moved to set it on the jury calendar, which motion was denied on July 23, 1952. On September 11, 1952, petitioners filed a petition to Determine Interest in Estate, and asked a jury trial to which they were entitled under the express provision of section 1081, Probate Code. On September 25, 1952, the attorney for the executrix applied for the placing of the original matter, remanded by the Supreme Court, for trial on October 2, 1952, without notifying petitioners. The matter was placed on the calendar for said date.

Petitioners wish to have this trial prohibited as an unnecessary duplication of the trial of their petition to determine their interest in the estate, which petition, they contend, has made the petition for instruction of the executrix moot, and because the court has no jurisdiction to set the case for trial and to proceed without notification of petitioners.

[1, 2] Petitioners contend that also in the remanded proceeding for instruction they were entitled to a jury trial because triable issues of fact were presented. The right to jury trial in probate matters when there is no specific provision granting the right expressly for that special proceeding, depends on whether there is statutory authority for the formation of triable issues of fact in the particular proceeding. Budde v. Superior Court, 97 Cal.App.2d 615, 621, 218 P.2d 103. In re Estate of Van Deusen, 30 Cal.2d 285, 292, 182 P.2d 565, it was held that there was no right to a jury trial as to a petition for directions to a testamentary trustee as to substantial rights of the beneficiaries under the trust because section 1120, Probate Code, providing for the instructions makes no provision for such issues of fact. Section 588, Probate Code, as to instructions and directions to the executor does not contain any more provision for issues of fact than section 1120, so that on the authority of In re Estate of Van Deusen there does not seem to be a right to jury trial in the instruction procedure.

[3, 4] Petitioners however contend that the proceedings on the petition for instruction were superseded by the filing of their petition to determine heirship. Some cases seem to go further than that. In Re Estate of Thramm, 67 Cal.App.2d 657, 659, 155 P.2d 119, and In re Estate of Clippinger, 75 Cal.App.2d 426, 435, 171 P.2d 567, it was held that section 588, Probate Code, gives power only to decide by instruction to the executor matters for which no other procedure is provided; that for the determination of heirship and interest in estates the proceedings which follow the filing of a petition for partial or final distribution or the special procedure to determine heirship are provided and that therefore a determination by way of instruction is void. However in Re Estate of Howe, 31 Cal.2d 395, 397, 189 P.2d 5, 1 A.L.R.2d 1171, later in date than the two preceding cases, it was held that the subsidiary character of section 588, Probate Code, did not prevent instructions as to an issue of ownership between the estate and a third party as there was no express statutory procedure for such question; the fact that such matter could be tried on objection to the settlement of the executor's account did not prevent the applicability of section 588. Following this case it was held in Re Estate of Munson, 86 Cal.App.

2d 67, 71, 194 P.2d 70, that the fact that a substantial question (charging of a note against a certain interest in the estate) could be litigated at the end of the trust did not prevent its determination by instruction under section 1120, Probate Code. Possibly the conclusion could be made from the last mentioned case that the subsidiary character of section 588, Probate Code, does not prevent its applicability at a time when no other special proceeding is available although such a procedure might become available at a later time. At the time the executor petitioned for instructions distribution proceedings were not yet available. The procedure of section 1080, Probate Code, to determine interest, which is certainly an express statutory procedure for the matter in dispute in this case, can only be initiated by a person claiming to be entitled to distribution and was therefore not available to the executrix, so long as the beneficiaries under the will did not act. It would seem however that now that the beneficiaries have instituted the special procedure provided for this purpose, which expressly requires a jury trial, there is no reason for continuing a subsidiary trial, without jury, of dubious validity and that such proceeding should be prohibited as prayed.

[5] Though we have been unable to find any authority directly in point the reasoning of the cases seems to be that when a party is given the statutory right to a trial by jury on an issue of fact determining his right to participate in the estate, that right should not be defeated by a predatory proceeding before the court sitting without a jury designed solely to prejudge the very issue of fact which the jury must thereafter determine.

Enforcement for this line of reasoning is found in the recent case of Swift v. Superior Court, 39 Cal.2d 358, 247 P.2d 6. That case involved the question of the proper procedure in probate when one party had filed a petition for probate of the will and the other had filed a contest with a demand for a jury trial. In support of its writ of prohibition restraining the court proceeding prior to the contest before the jury the Supreme Court said, 39 Cal.2d at pages 363, 364, 247 P.2d at page 9: "If the trial court, in its discretion, is allowed to proceed with the hearing of the preliminary proof in support of the petition for probate in the absence of a jury, two separate proceedings will necessarily result. It will then frequently happen that evidence introduced by the proponents upon the hearing of the preliminary proof before the court alone will have to be repeated before the jury, as such evidence is often material in the consideration of the issues raised by the contest." And again, 39 Cal.2d at page 364, 247 P.2d at page 10: "In the interest of establishing a definite rule of procedure to be followed under such circumstances, we believe that it is appropriate for this court to declare that when a will is contested before probate and either party demands a jury trial of any issue as to which the right to a jury trial exists, Prob.Code, § 371, the trial court cannot proceed with any phase of the hearing in the absence of a jury but must impanel a jury at the outset."

[6] Respondents contend that prohibition should not be granted because it does not appear that petitioners made appropriate demand in the superior court that their demand for a jury trial should first be granted; also that it does not appear that they have not an adequate remedy by appeal. On the first point Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8, is related. There the court said, 28 Cal.2d at page 465, 171 P.2d at page 12: "The petition should affirmatively allege that the challenge to jurisdiction was raised in the lower court." But here the demand for a jury trial (which as we have said suspends the right of the court to proceed independently) is an adequate challenge to the court's jurisdiction to proceed with a prior hearing before the court alone.

[7–9] It is obvious that the remedy by appeal is not adequate under the circumstances of the case. One appeal has already been had, resulting in a reversal of the same court on the same issues. Petitioners have no assurance that they would fare better in a second hearing. The question whether a petitioner has an "adequate

remedy", section 1103, Code Civ.Proc., is one for the court entertaining the application primarily to decide. Where further proceedings would merely subject the parties "to further vexation and useless expense", Davis v. Superior Court, 184 Cal. 691, 696, 195 P. 390, 393, the court would be reluctant in its duty if it refused, on the ground of the remedy by appeal alone, to prohibit such useless proceeding.

Let a peremptory writ issue as prayed.

GOODELL and DOOLING, JJ., concur.



115 Cal.App.2d 827

In re FREEMAN'S ESTATE.

BANK OF AMERICA v. FREEMAN.

Civ. 19357.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1953.

Proceeding in the matter of a decedent's estate wherein the Superior Court of Los Angeles County, Ralph K. Pierson, J., decreed that certain realty standing in name of decedent was her sole and separate property, and her husband appealed. The District, Court of Appeal, McComb, J., held that evidence to effect that decedent had received deed to realty from third person conveying it to her as her separate property sustained finding that realty was her separate property at her death, notwithstanding evidence that consideration therefor was paid with money which husband had prior to his marriage to decedent and with earnings acquired by husband and decedent during their married life.

Affirmed.

1. Husband and Wife ⊂=264

Evidence to effect that married woman received deed conveying realty to her as her separate property sustained finding that such realty was her separate property at death, notwithstanding evidence that realty was paid for with money which husband had prior to marriage and with earnings of the marital community. Probate Code, § 1080.

2. Husband and Wife ⊂=262(1)

Presumption arising when property is deeded to wife by an instrument in writing will support finding that property is wife's separate property, even though there is evidence that consideration paid for the conveyance was the separate property of the husband, or the community property of husband and wife.

Austin, Austin & Jones, Compton, for appellant.

McLaughlin & Casey, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by Victor L. Freeman from a decree determining heirship pursuant to Section 1080 of the Probate Code in connection with the estate of his deceased wife, Dorothy S. Freeman, wherein the court decreed that certain real property standing in the name of deceased was her sole and separate property. It was thereupon decreed that appellant was entitled to succeed to a one-half interest in such property, and that Helen Louise Freeman, the minor child of the appellant and deceased was entitled to succeed to the remaining one half.

[1] The sole question for our determination is:

Was there substantial evidence to sustain the probate court's finding that the real property in question was the separate property of decedent at the time of her death?

This question must be answered in the affirmative. The evidence disclosed that on May 1, 1944, decedent received a deed to the property from one Henry W. Walker as grantor conveying it to her as her separate property. There was also evidence that the consideration for the property was paid with money which appellant

had prior to his marriage to decedent and the earnings of appellant and decedent during their married life.

[2] This rule is controlling, and governs the instant case:

Regardless of the source or character of the consideration, property deeded to a wife by an instrument in writing is presumed to be her separate property, and such presumption will support a finding that the property was the separate property of the wife even though there be evidence that the consideration paid for the conveyance was the separate property of the husband or the community property of the husband and wife. Such testimony merely creates a conflict in the evidence for the determination of the trier of fact. In re Estate of Durham, 108 Cal.App.2d 148, 150 [1] et seq., 238 P.2d 1057.

Affirmed.

MOORE, P. J., and FOX, J., concur.



115 Cal.App.2d 801

HAZELETT et al. v. MILLER.
TEUBE et al. v. MILLER.

Civ. 4481, 4482.

District Court of Appeal, Fourth District, California.

Feb. 5, 1953.

Hearing Denied April 2, 1953.

Action by passengers in northbound automobile for injuries received in intersectional collision with defendant's westbound automobile after the host had failed to make a boulevard stop. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgments on verdicts for defendant, and passengers appealed, and the appeals were consolidated. The District Court of Appeal, Griffin, J., held that evidence was not sufficient to warrant giving of instruction on doctrine of last clear chance.

Judgments affirmed.

1. Automobiles ⇐246(54, 58)

In action by automobile passengers for injuries received in intersectional collision with defendant's automobile while host, who paid trip expenses, and passengers were returning from lodge meeting over route directed by one passenger, who did not warn host of stop sign that host drove through at scene of collision, although passenger knew of its existence, evidence warranted giving of general instruction on contributory negligence and positive instruction pertaining to passengers' claimed status as guests.

2. Appeal and Error ⇐882(12)

Plaintiffs would not be heard to complain about giving of defendant's general instruction on contributory negligence where plaintiffs' instruction on the same subject had been given.

3. Automobiles ⇐246(58)

In action by passengers in automobile for injuries received in intersectional collision with defendant's automobile after host motorist had failed to make a boulevard stop, evidence, which indicated that neither party had clear chance or opportunity to avoid the accident by exercising ordinary care after discovery of perilous situation, was not sufficient to warrant giving of instruction on doctrine of last clear chance.

4. Trial ⇐296(3)

In action by passengers in northbound automobile for injuries received in intersectional collision with defendant's westbound automobile after host motorist had failed to make a boulevard stop, giving of instruction that prima facie speed limit upon westbound highway was 55 miles per hour and that defendant's operation of his automobile at speed not in excess thereof would be lawful was not error, in view of given instruction properly setting forth the basic speed law. Vehicle Code, §§ 510, 511, 513.

5. Appeal and Error ⇐1067

In action by passengers in northbound automobile for injuries received in intersectional collision with defendant's westbound automobile after host motorist had

failed to make a boulevard stop, refusal to give defendant's proffered instruction setting forth rule concerning burden of proof in civil cases was not prejudicial to passengers. Vehicle Code, §§ 510, 511, 513.

Taylor F. Peterson, San Bernardino, for appellants.

Wilson & Wilson, San Bernardino, for respondent.

GRIFFIN, Justice.

These consolidated appeals are from judgments entered upon jury verdicts in favor of defendant. Plaintiffs were guests in an automobile owned and operated by Teube, Sr., guardian of plaintiff Teube, Jr. It was being driven north on Sierra Avenue near its intersection with Highland Avenue, in Fontana. Highland Avenue is a through highway running east and west and is protected with stop signs with reflector buttons. Defendant Miller was driving his car west on Highland Avenue. Teube, Sr. failed to make a boulevard stop, and his car collided with the Miller car in the intersection.

Teube, Sr., testified he was driving about 45 miles per hour as he approached the intersection; that he was not familiar with the road; that he did not notice a white, but mostly obliterated lettering on the highway or the sign-post indicating that Highland Avenue was a boulevard stop street; that he did notice the lights of a car to his right as he was driving through the intersection and that an accident happened instantly thereafter; that he had "no time to watch anything"; that he and the occupants were thrown out of his car and that he did not see Miller until a few days later when they were both in the hospital. He testified that Miller then said to him: "I wish I had seen you coming, I seen your lights and knew you were not going to stop so I tried to beat you to the corner; * *" that Miller's wife came in about that time and told him not to say anything more and that Miller said to her: "The man didn't deliberately run into me, I could have stopped if I wanted to, I thought I could beat him to the corner". Miller denied having such a conversation. Teube, Sr. admitted consuming one bottle of beer and a "Coke-Hi" earlier in the evening.

Plaintiff Heard testified he was familiar with the route taken by Teube, Sr., and had recommended it as a short-cut; that he knew there was a stop sign somewhere in that vicinity but did not tell Teube, Sr. about it; that he did not see the Miller car before the accident. He admitted drinking one bottle of beer with Teube, Sr. Apparently the other plaintiffs were not familiar with the route and did not remember any facts concerning the cause of the accident.

The highway patrol officer testified that he made measurements at the scene of the accident and talked to Miller in the hospital; that Miller said he had been traveling about 50 miles per hour in approaching the intersection; that he saw Teube's car was not going to stop so he attempted to stop his vehicle but was unable to do so before the Teube car hit him. He testified the Teube car's damage was at its front end and as to the Miller car there was damage to the center of its left side near the door.

Defendant Miller, who received serious injuries in the accident, testified he was traveling about 49 or 50 miles per hour; that when about 50 or 60 feet from the intersection he first noticed the lights of the Teube car approaching the intersection from the south at a distance slightly over 60 feet from the intersection; that he blew his horn; that he knew there was a boulevard stop sign requiring cars going north on Sierra Avenue to stop; that the Teube car did not stop; that when he was almost at the point of impact, traveling between 45 and 50 miles per hour, he tried to avoid the collision by stepping on the accelerator; that he was knocked unconscious and did not clearly remember anything for about two weeks; that all he remembered was that an officer called and asked if he could talk; that he told him he could not and the officer left and never came back.

Mrs. Miller testified she was dozing as they approached the intersection; that she heard the horn sound on defendant's car;

that she immediately arose and observed the lights of the Teube car only a few feet from them. She testified her husband was in a semi-conscious condition in the hospital for several days and that he made no statement that she ever heard regarding Miller's ability to stop or of his "trying to beat" Teube, Sr. across the intersection.

[1, 2] Plaintiffs' claim is that the court erred in giving and refusing to give certain instructions to the jury. Defendant, in each case, by his answer, raised the issue of contributory negligence of plaintiffs, and proximate cause. Plaintiffs proffered two proposed instructions to the court on that subject, before witnesses were sworn. Defendant offered a general instruction on that subject in the language of B.A.J.I. 133, p. 157, and all were given. As we understand plaintiffs' argument, the claim is that these instructions were given by the court under the mistaken theory that the evidence showed a joint venture on behalf of plaintiffs, which evidence, it is claimed, was inadmissible as hearsay.

There was proper evidence admitted showing that Teube, Sr. and the other plaintiffs were going to Colton to attend some lodge activities in which Teube, Jr., and some of the other plaintiffs were to be initiated; that no money was paid Teube, Sr., and no gasoline, oil, etc. was furnished by plaintiffs for the trip; that plaintiff Heard, on the return trip to Barstow, did suggest the route to be taken and directed Teube, Sr. in this respect; that Heard did inform him of one previous stop-sign, but as to this particular intersection he did not remember on which street the boulevard stop was located but knew it was "somewhere through there"; and that he did not mention this fact to Teube, Sr.

One of plaintiffs' proffered instructions was a general instruction on contributory negligence, and applied to no particular plaintiff. The other was a positive instruction that all plaintiffs were guests and that none of them had a right of control over the conduct of the driver and that the question was whether defendant Miller was negligent in the operation of his vehicle and whether such negligence was a proximate cause of the collision. No prejudicial error resulted. Plaintiffs may not now be heard to complain about the giving of a general instruction offered by defendant in reference to contributory negligence of one or more of plaintiffs, under the evidence here produced, particularly where plaintiffs offered and the court gave plaintiffs' instruction offered by them on the same subject. Matsumoto v. Renner, 90 Cal.App.2d 406, 202 P.2d 1051; Lee v. Hackney, 110 Cal.App.2d 444, 242 P.2d 933.

[3] The other complaint is that the trial court refused to give plaintiffs' proffered instruction on the doctrine of last clear chance, citing such cases as Sills v. Los Angeles Transit Lines, Cal.App., 246 P.2d 65; Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977; Daniels v. City and County of San Francisco, Cal.App., 246 P.2d 125; Girdner v. Union Oil Company, 216 Cal. 197, 13 P.2d 915; and Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645. This argument is mainly based on the claimed uncorroborated extrajudicial and equivocal statement of defendant claimed to have been made to his wife in the presence of Teube, Sr. after he stated: "I wish I had seen you coming * * *." He said: "I could have stopped if I wanted to, I thought I could beat him to the corner."

Many of the cases cited by plaintiff in support of his argument are discussed in the late case of Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663. The physical facts clearly indicate that plaintiff could not have stopped in the distance indicated, had he endeavored to do so. All of the substantial evidence indicates that both cars were approaching this intersection at a fast rate of speed; that the true situation was suddenly ascertained and appreciated; that the parties' reactions were instantaneous and that after a discovery of plaintiffs' perilous situation, neither party had a clear chance or opportunity to avoid the accident by exercising ordinary care. The factual background in the instant case is quite similar to that of the Rodabaugh case. There both cars were approaching the intersection at approximately the same time and at approximately the same speed. The decedent did not reach the point of danger

from which he could not extract himself until he was within sixty feet of the path of defendant's car. When defendant first observed decedent both of the automobiles were approximately 500 feet from the intersection. Decedent subsequently failed to heed the stop warnings, and continued into the intersection to the point of impact without slackening his speed. The defendant there testified that he continued to watch decedent's car; that when defendant was some 75 to 100 feet from the intersection he saw that decedent was not slowing down; that he started to apply his brakes gently, thinking that decedent would probably stop; that as decedent approached, he appeared to be looking straight ahead and did not slacken his speed at any time before the impact occurred; that when decedent did not slow down, defendant applied his brakes harder at about 75 feet from the intersection, and at a distance of 35 feet he slammed them on, leaving skid marks on the pavement. There was evidence there that traveling at 40 miles per hour, he could have stopped his car in approximately 60 feet; that defendant did not turn to the right or left before the impact, and his car struck decedent's car on the right side at the rear door and wheel. The court held that the mere fact that evidence in a given case may be sufficient to sustain a finding of negligence on the part of a defendant does not justify the conclusion that such evidence is sufficient to permit application of the last clear chance doctrine; that there must, in addition, be substantial evidence to show that defendant had a last clear chance to avoid the accident. It also held that the doctrine of last clear chance should not be applied in a case involving the collision of moving vehicles where the act creating the peril occurs practically simultaneously with the happening of the accident and where neither party can be said to have had a last clear chance thereafter to avoid the consequences; that to relieve a plaintiff of his own negligence it is not enough that defendant may have had a chance to avoid the accident, but defendant must have had the last chance and also had a clear chance to do so by the exercise of ordinary care; that this implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person; and that he must have had more than a bare possible chance to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party. See, also, Jobe v. Harold Livestock Comm. Co., 113 Cal.App.2d 269, 247 P.2d 951; Dalley v. Williams, 73 Cal.App.2d 427, 166 P.2d 595; Warwick v. Maneely, 40 Cal.App.2d 235, 104 P.2d 831.

We conclude that the court properly refused the proffered instruction in reference to the doctrine of last clear chance under the evidence here presented.

[4] The last instruction involves one offered by defendant and given, instructing the jury to the effect that the *prima facie* speed limit upon Highland Avenue, at the time and place, was 55 miles per hour, and that unless Mr. Miller's speed was clearly proven to have been in violation of the basic speed law "just read to you", the operation by Miller of his automobile at a speed not in excess of 55 miles per hour on Highland Avenue was lawful. This instruction followed one admittedly proper, given in the language of B.A.J.I. 144, setting forth the basic speed law as provided in section 510 of the Vehicle Code.

It is plaintiffs' claim that the court erred in telling the jury that the *prima facie* speed limit at the time and place was 55 miles per hour; that section 511 of the Vehicle Code, establishing speed limits at 55 miles per hour under certain conditions, is applicable only to criminal cases; that since section 513 of the Vehicle Code declares the proper rule in civil cases, and since an instruction in the language of that section was offered by defendant, the court committed error in refusing to give it, and accordingly, the jury was improperly instructed, citing Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995; and Westberg v. Willde, 14 Cal.2d 360, 369, 94 P.2d 590.

It should be here noted that the court did not give the second paragraph of section 511, as was done in the Akers case, and the

Anderson case involved the same paragraph in reference to the burden of proof. The Westberg decision held that it was error to give an instruction in the language of section 511, in reference to burden of proof since it was only applicable to criminal actions; that section 513 declares the rule as to the burden of proof in civil cases and that as a consequence the giving of an instruction in the language of section 510 of the Vehicle Code constituted the giving of conflicting instructions on the subject of burden of proof. In the instant case the court properly instructed the jury as to the *prima facie* speed limit set forth in section 511, subject to the basic speed law set forth in section 510. No mention was made in these instructions as to the burden of proof. In Burch v. Valley Motors Lines, Inc., 78 Cal.App.2d 834, 179 P.2d 47, it was expressly held error to refuse to give an instruction based in part on section 511, setting forth the *prima facie* limit of 55 miles an hour, particularly where the jury was instructed in the language of section 510 and section 513. The cases here relied upon by plaintiffs were therein discussed and it was there held that only the second paragraph of section 511 is banned in civil cases.

[5] The proffered instruction setting forth the provisions of section 513 was offered by defendant and might well have been given. The refusal to give such instruction was not prejudicial to plaintiffs' case. In the first place, it was not requested by plaintiffs and plaintiffs made no request for such an instruction. Ornales v. Wigger, 35 Cal.2d 474, 478, 218 P.2d 531; Peckham v. Warner Bros. Pictures, 42 Cal.App.2d 187, 108 P.2d 699. Defendant's proffered instruction provided that proof of speed in excess of the *prima facie* limit declared by the court did not establish negligence as a matter of law, and it was necessary for plaintiffs to establish as a fact that the operation of the vehicle at such excess speed constituted negligence. The refusal to give the proffered instruction was more harmful to defendant than it was to plaintiffs. It does not appear from the evidence that there was a miscarriage of justice or that any different verdict would have been rendered had the proffered instruction of defendant been given. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238; Service v. Bedros, 180 Cal. 519, 182 P. 26; 2 Cal.Jur. pp. 1006–1007, secs. 597 and 598.

Judgments affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



115 Cal.App.2d 786

NOBLE v. NOBLE.

Civ. 19195.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1953.

A wife brought an action against her husband for separate maintenance and the husband filed a cross-complaint for divorce. The Superior Court of Los Angeles County, Kurtz Kauffman, J., entered an interlocutory judgment of divorce in favor of the husband and the wife appealed. The District Court of Appeal, White, P. J., held that evidence justified finding that husband was not guilty of extreme cruelty and had not deserted wife, that wife had continually inflicted bodily harm on husband over specified period of years, that after wife's release from hospital wife visited home of parties and abused husband by shouting at and quarrelling with husband in presence of children of parties although children had expressed their desire to, and did desire to, reside with husband.

Judgment affirmed.

1. Appeal and Error ⇐989, 994(3), 996
Divorce ⇐184(6)

With respect to conflicts in testimony in wife's action for separate maintenance wherein husband filed cross-complaint for divorce, or conflicting inferences which might be drawn therefrom, power of District Court of Appeal began and ended with determination as to whether there was any

substantial evidence which would support conclusion of trial court as trier of fact.

2. Divorce ⇐184(6)

In wife's action for separate maintenance wherein husband filed cross-complaint for divorce, whether acts of cruelty husband alleged were committed by wife were condoned by husband by reason of an unreasonable lapse of time, was for trial court to determine, considering circumstances. Civ.Code, §§ 124–126.

3. Divorce ⇐55

Trial court has duty to determine whether showing of cause of action for divorce by way of recrimination is to be regarded as in bar of opposing party's cause of divorce.

4. Divorce ⇐130

Husband and Wife ⇐297

In wife's action for separate maintenance wherein husband filed cross-complaint for divorce, evidence justified finding that husband was not guilty of extreme cruelty and had not deserted wife, that wife had continually inflicted bodily harm on husband over specified period of years, that after wife's release from hospital wife visited home of parties and abused husband by shouting at and quarrelling with husband in presence of children of parties, although children had expressed their desire to and did desire to reside with husband.

Robert Wanamaker, Pasadena, for appellant.

Poole & Mardian, Pasadena, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from an interlocutory judgment of divorce granted to the defendant husband upon his cross-complaint.

The parties were married in 1932 and separated in 1944. There are two children of the marriage, both boys, born respectively in 1933 and 1938. By her complaint for separate maintenance plaintiff charged that during the year 1943 defendant treated her cruelly, causing her to become physically and mentally sick and requiring her to be placed in a sanitarium and in a state hospital; that upon her recovery in 1948 she attempted to return to the family home, but defendant refused to admit her and failed to provide for her support. In his cross-complaint defendant alleged that since the marriage of the parties the plaintiff had treated him with extreme cruelty by striking him about the head and face on many occasions; that in 1941 she left the home of defendant with the children and remained away for a year; that upon her return she continued her course of slapping and physically abusing the defendant, ridiculing him, and quarrelling without provocation; that when plaintiff refused to undergo medical treatment she was in February, 1944, adjudged incompetent and confined in Mission Lodge Sanitarium and subsequently in Camarillo State Hospital; that she was released from Camarillo in 1947 on a probationary status; that following her release defendant refused to allow plaintiff the custody of the children because of the advice of plaintiff's physician that she might harm them; that following her release, "on occasions too numerous to mention, plaintiff quarrelled violently with defendant, insisting upon the custody of said children although said minor children did not and do not now desire to reside with her."

The trial court made findings in accordance with the allegations of the husband's cross-complaint, and further found that the defendant had not treated plaintiff cruelly and had not deserted her, but that plaintiff had continually inflicted bodily harm on defendant from 1932 to 1944, and after her release from the state hospital, she visited the home of the parties "and upon such occasions did abuse the defendant and cross-complainant by shouting at him and quarreling with him in the presence of the children although the children had expressed their desire to and did desire to reside with defendant and cross-complainant."

Appellant urges, first, that the trial court erred prejudicially "in refusing to consider the evidence of the husband's adultery under the general allegations of cruelty"

contained in the wife's complaint for separate maintenance. Testimony concerning the alleged adultery was admitted without objection, although it had not been mentioned in the plaintiff's complaint. Examination of the reporter's transcript discloses, however, that while the trial court did decline to permit an amendment to the complaint "to conform to the proof" by charging adultery with an unidentified person as extreme cruelty, the court further was of the view that no cause of action for adultery had been "proved". Further, the trial judge stated that it was his view that the alleged adultery had been condoned. The trial court's views in these respects were carried into his findings of fact and conclusions of law.

Appellant further contends that the evidence was insufficient to support the finding that respondent husband was not guilty of extreme cruelty; that the husband's adultery constituted recrimination for the alleged previous acts of cruelty on the part of the wife; and that the wife's acts of cruelty between 1932 and 1943 were condoned by the husband, and her alleged acts of cruelty after her release from the sanitarium were too trivial to constitute cruelty.

[1–3] All of the questions raised by the appellant present problems addressed to the judgment and discretion of the trial court, and in the absence of a showing that such discretion was abused, or that there is no substantial evidence to support a finding, the judgment must be affirmed. With respect to conflicts in the testimony or conflicting inferences which might be drawn therefrom, the power of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact, In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Price v. Price, 114 Cal. App.2d 176, 249 P.2d 841. Whether there has been condonation by reason of an unreasonable lapse of time, Civ.Code, secs. 124, 125, 126, was a question for the trial court to determine taking into consideration the circumstances of the particular case, Price v. Price, supra, 114 Cal.App.2d 176, 249 P.2d 842; Hansen v. Hansen, 86 Cal. App. 744, 751, 261 P. 503. So also, it was the duty of the trial judge to determine from all the circumstances whether a showing of a cause of action for divorce by way of recrimination is to be regarded as "in bar" of the opposing party's cause of divorce. See De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598.

[4] The trial judge saw and heard the parties and their witnesses. It was for him, sitting as a trier of fact, and not the court of appeal, to determine the value and effect of their testimony. The record discloses substantial evidence to support the conclusions of the trial court and no abuse of discretion.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



116 Cal.App.2d 1

BREVOORT HOTEL v. ROSE et al.

Civ. 19137.

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1953.

Rehearing Denied March 3, 1953.

Hearing Denied April 8, 1953.

Action for damages for wrongful attachment. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment for plaintiff and denied defendants' motion for new trial, and defendants appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained findings that attachment was wrongful, and that findings consequently would not be disturbed.

Judgment affirmed.

1. Attachment ⇨374

In action by assignees of lease against lessors for damages for wrongful attachment, wherein it appeared that attachment had been made after prior unsuccessful suit by lessors to reform lease to include

clause forbidding assignment of lease without consent of the lessors, evidence was sufficient to support finding that attachment was wrongful.

2. Appeal and Error ⇐1010(1)

Where findings of trial judge, as trier of facts, are supported by substantial evidence, they will not be disturbed on appeal.

A. Brigham Rose, Los Angeles, for appellants.

Benjamin J. Goodman, Los Angeles, for respondent.

DRAPEAU, Justice.

Lori, Ltd., a corporation, and Zelletta M. Rose own the Brevoort Hotel in North Hollywood. They leased the property to E. E. Wolfe and his wife. The lease did not contain a clause forbidding assignment without consent of the lessors. The lease was prepared in the office of A. Brigham Rose, Esq., husband of Zelletta M. Rose, and a member of the State Bar of California.

Mr. Rose said that the lease had been typewritten by an employee in his office; that he had told her to type such a clause into the lease; that he always supposed she had done so; and that it came as a great shock to him when he found that the clause had been omitted from the document subscribed to by the parties.

The Wolfes advised Mr. Rose that they were going to assign the lease to Ben Hecht and J. G. Salomon. Mr. Rose, thinking the omitted clause was in the lease, told them that they couldn't do that. They told Mr. Rose that the lease would be assigned, whether he liked it or not. And so it was assigned, first to Hecht and Salomon, and, later on, by them to Brevoort Hotel, a corporation. Hecht and Salomon caused this corporation to be organized, owned all of its stock, and managed and controlled it.

Litigation and bad feeling among all the parties have been manifest ever since. See Rose v. Hecht, 94 Cal.App.2d 662, 211 P.2d 347; Lori, Ltd., Inc. v. Wolfe, 85 Cal.App. 2d 54, 192 P.2d 112; Lori, Ltd., Inc. v. Wolfe, 80 Cal.App.2d 557, 180 P.2d 21.

In Lori v. Wolfe, supra, 85 Cal.App.2d 54, 192 P.2d 112, the Roses sought to reform the lease. That action was decided against them in the Superior Court, and the judgment was affirmed by the District Court of Appeal.

The facts in the instant case may be briefly stated: In an action in the Superior Court (No. 532,896), the Roses sued Brevoort Hotel, a corporation, together with other named defendants. In that action they secured an attachment on bank accounts of the Brevoort corporation, and put a keeper in the hotel. At that time the Brevoort corporation owned by assignment the leasehold interest in the property.

The case went off by way of nonsuit and judgment against the plaintiffs as to the hotel corporation.

Brevoort corporation then brought this action for damages for wrongful attachment. The case was tried for several days in the Superior Court. Findings were against the Roses and their sureties on attachment bonds, and for Brevoort corporation, with damages fixed at $4,500.

Zelletta M. Rose, Lori, Ltd., Inc., and the sureties appeal from the judgment which followed.

[1, 2] In this action, as in the one to reform the lease, Lori v. Wolfe, supra, this court of review is bound by California's substantial-evidence rule. It was the province of the trial judge who heard the evidence to decide the facts in controversy. The findings receive support from the evidence, and that is all there is to the case. See text and cases in 3 Cal.Jur.2d 407.

Defendants in their briefs present the following points:

"1. Where the alleged assignee of the lease without consent of the lessors was in possession of the leased premises and the issue of assignability of the lease, the performance of the covenants of the lease, the rights to have the lease declared forfeited for various breaches, and where the amount of rentals due remain in a state of undetermination by reason of pending appeals, may the interlopers, Hecht and Salomon, through the process of metamorphosis, utilizing the stenographic force of their coun-

sel staff by forming a so-called corporation, of which they were the sole and solitary stockholders, by reason of an undisclosed transfer or assignment of the lease, claim to be victims of an unwarranted attachment, when the trial court in the particular case in which the attachment had been run, definitely declared that he was going to permit the lessors to protect themselves by way of an attachment to secure them in the amount accruing by reason of their occupancy under the provisions of the lease for the full amount due?

"2. May, as a matter of law, the respondent herein contend that they are entitled to damages where they voluntarily appeared without service having been made upon them, in an action in which judgment was ultimately rendered after checks allegedly tendered by the true parties in interest, purporting to claim that they were a corporation, had been dishonored by the bank, and they were in occupancy of the premises under a disputed issue of whether they were legal assignees and whether they had not forfeited their rights to continue in possession after a plea in abatement interjected by them?

"3. Can the respondent, as a matter of law, claim damages against sureties who had filed a confessedly void undertaking?

"4. Can the respondent claim damages against sureties who filed a bond but never qualified, which bond in the first instance was not as a matter of law required and which endured for only a matter of several days in contra-distinction to the period during which the respondent claims they were damaged?

"5. Can the undisputed actor involving all of the proceedings, who had initiated the alleged improper attachment as the attorney for the lessors, who is named as a defendant and against whom no judgment is rendered, saddle upon his clients, who were not shown to have directed or instructed him respecting these attachments or to have any knowledge thereof, held to be answerable in damages?"

Each of these points was argued at length to the trial judge. Each of them has to do with the weight, or the value, or the effect of the evidence—questions to be determined solely by the trier of fact.

In a document filed by appellants in this court on the day of the argument, entitled "Replication to Respondents' Brief", the further point is made that the findings are not "in rapport with the pleadings or the issues framed or determined in accordance with any legal precedents."

The record has been reviewed with this contention in mind. Applying the rules set forth in Richter v. Walker, 36 Cal.2d 634, 226 P.2d 593, the evidence supports the findings, and the findings support the judgment.

The judgment is affirmed; the appeal from the order denying motion for a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.



115 Cal.App.2d 834

MOORE et al. v. CALIFORNIA MINERALS PRODUCTS CORP.

Civ. 19191.

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1953.

Action for balance allegedly due. The Superior Court of Los Angeles County, Irvin Taplin, Judge assigned, ordered judgment for plaintiffs on the pleadings and defendant appealed. The District Court of Appeal, Shinn, P. J., held that defendant was deprived of due process.

Judgment reversed with directions.

1. Constitutional Law ⇐314

Where trial court, at conclusion of opening statements in action for balance allegedly due stated answer raised no issue and that judgment would be for plaintiffs in specified amount, and defendant was given no opportunity to defend answer or to request privilege of amending answer, such action deprived defendant of due process.

2. Judgment ⇐138(1)

The law favors trial of causes on merits.

3. Constitutional Law ⇐305

Right of a party to be heard does not run to every step or ruling of court during trial and is subject to all reasonable limitations.

4. Constitutional Law ⇐305

If, during trial, court, sua sponte, unearths a point of law which it deems to be decisive of cause, party against whom decision impends has same right under principles of due process to be heard before decision is announced that he has to produce evidence upon issues of fact.

Marcus, Rabwin, Nash & Naiditch and F. J. Schuhl, Los Angeles, for appellant.

Donald E. Dunbar, Compton, for respondents.

SHINN, Presiding Justice.

Plaintiffs, attorneys at law, brought suit against California Mineral Products Corp. for $8,594.32, balance claimed to be due for legal services rendered and costs expended at the special instance and request of defendant. The suit was on an implied contract, the services were alleged to be of the value of $8,800, $44.32 the amount of money expended, and it was acknowledged that $250 had been paid on account. The first cause of action alleged the employment of plaintiffs, described the services rendered, and alleged the value thereof. The second cause of action was in the form of a common count for services rendered and the third cause of action alleged an account stated. The corporation answered, admitting the employment of plaintiffs through one Colonel Pettric, "one of the promoters, director and President of said defendant" and alleged that "the fee for said plaintiffs as such assistant counsel had been fixed between Colonel Pettric and the plaintiffs at One thousand ($1,000.00) dollars." The answer read, in part: "Defendant acknowledges the agreed fee for employment of plaintiffs to work with said Hiram McTavish, Esquire, for the sum of One thousand ($1,000.00) dollars; agree to pay the costs expended by plaintiffs of forty-four dollars and thirty-two cents ($44.32); total charge One thousand forty-four ($1,044.32) dollars and thirty-two cents." The answer admitted an indebtedness of $594.32 and alleged defendant's willingness to pay the same. It denied "that there is due and unpaid as alleged the sum of Eight thousand Five hundred ninety-four dollars and thirty-two cents ($8,594.32)." It admitted that plaintiffs submitted "attorneys statement of account with defendant," but denied that an account was stated in the amount of $8,-594.32.

When the action came on for trial counsel for plaintiffs made an opening statement of the services performed by plaintiffs. Mr. Mayes, counsel for defendant at the trial, in his statement admitted the services were rendered, but asserted that plaintiffs were employed for a fee of $1,000 and no more, $250 down and the balance upon the release of certain funds held in escrow under order of the Commissioner of Corporations. He stated that the board of directors had not assumed any obligation for attorney's fees in excess of $1,000 and insisted that if anything more was earned it was a debt of the promoter and not the corporation.

At the conclusion of the opening statements the court made the following statement: "This Court is ready to rule on the case right now. The answer doesn't deny the allegations of the complaint. It raises no issue as a matter of law. The only issue it raises is as to whether or not the sum of $8,594.32 is due. It denies that much is due, but it doesn't deny that $8,593.32 is due, and the judgment will be for the plaintiff in that amount, and costs. Plaintiff is to prepare the findings and judgment." No motion was made for judgment on the pleadings. Nothing was said with respect to the sufficiency of the answer to raise a triable issue of fact. Although the denials of the answer to which the court called attention, standing alone, would have been insufficient, the answer alleged a special contract of employment of plaintiffs for an agreed fee of $1,000. At most, the answer was uncertain and the objection was purely technical. Moreover, it appeared from the

opening statement of defense counsel that defendant expected to prove it had incurred no obligation in excess of $1,000, of which $250 had been paid. The answer was directed to the complaint as a whole and to each cause of action. The allegation of the special contract should have been considered with the insufficient denials. The court overlooked the allegation that plaintiffs were employed by a special contract. The ruling came as a surprise to defense counsel, who had no opportunity to point out the sufficiency of the answer to raise an issue as to whether the amount of the fee had been fixed by agreement at $1,000. The parties were prepared to go to trial, and but for the precipitate and unexpected action of the court would have done so.

[1, 2] Not only was it error to order judgment on the pleadings but the manner in which it was done deprived defendant of due process, namely, a right to be heard. The law favors the trial of causes on the merits. It hears before it condemns, and even though a litigant be present, to deny him the right to speak is no better than to judge him in absentia. When the court summarily disposed of the case, defense counsel was given no opportunity to defend his pleading nor even a chance to request the privilege of amending, if that appeared to be desirable. It is true that he could have asked the court to recall its decision and listen to argument, but this opportunity, as every lawyer knows, is a poor substitute for the right to be heard before the decision is announced.

[3] It is accepted and unexceptionable practice for judgment to be rendered upon points of law, as when a demurrer is sustained to the complaint or answer without leave to amend, or a motion to exclude evidence is granted. A right to be heard is afforded in such cases, although, of course, the right does not run to every step or ruling of the court during the trial and is subject to all reasonable limitations. Manifestly, such summary proceedings differ in fundamental respects from those here under review.

[4] In our research we have not discovered another case in which judgment was rendered upon a point of law raised by the court with no warning of counsel and no opportunity given to ward off the blow. Elementary principles of due process support our conclusion that if, during a trial, the court, sua sponte, unearths a point of law which it deems to be decisive of the cause, the party against whom the decision impends has the same right to be heard before the decision is announced that he has to produce evidence upon the issues of fact. Denial of that opportunity deprived defendant of a substantial right to which it was entitled by virtue of the guarantee of due process. Universal Consolidated Oil Co. v. Byram, 25 Cal.2d 353, 361, 153 P.2d 746; McClatchy v. Superior Court, 119 Cal. 413, 421, 51 P. 696, 39 L.R.A. 691; 16 C.J.S., Constitutional Law, § 622, p. 1265; 12 Am. Jur. 327; 5 Cal.Jur. 876.

The judgment is reversed with directions to permit defendant to amend its answer if it be so advised.

PARKER WOOD and VALLÉE, JJ., concur.



116 Cal.App.2d 65

PEOPLE v. HARDING.

Cr. 773.

District Court of Appeal, Fourth District, California.

Feb. 13, 1953.

Proceeding for writ of error coram nobis to have judgment convicting defendant of murder in second degree set aside on ground that court was without jurisdiction. The Superior Court of Imperial County, Elmer W. Heald, J., entered order denying the application, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that, where evidence upon issue whether public defender unduly influenced and improperly persuaded defendant to enter a plea of guilty was conflicting, the trial court's finding thereon was conclusive.

Order affirmed.

1. Criminal Law ⇐245

Where justice's docket stated that defendant was informed of his legal rights at the preliminary hearing, and defendant's delay of four years in asserting alleged failure of the court to inform him of his right to counsel at the preliminary hearing was unexplained, judgment of conviction of murder in second degree, which was entered upon defendant's plea of guilty, would not be held to be void, since any such deficiency could have been raised by moving to set aside the information or other appropriate and timely action.

2. Criminal Law ⇐997

Application for writ of error coram nobis must be seasonably made.

3. Criminal Law ⇐980(2)

Even if, upon defendant's plea of guilty to murder in second degree, the court should have taken evidence upon the degree of the offense, failure to do so was a mere irregularity which would not invalidate the judgment of conviction.

4. Criminal Law ⇐981(1)

Court's statement in judgment of conviction of murder in second degree, that, should the adult authority deem fit, the defendant should be placed under care of prison doctors and psychiatrists was not sufficient to show that the court entertained a doubt concerning defendant's sanity in the legal sense and, therefore, the court was not without jurisdiction to pronounce judgment. Pen.Code, § 1368.

5. Criminal Law ⇐1158(1)

Upon appeal from order denying application for writ of error coram nobis to set aside judgment convicting defendant of murder in second degree, where evidence upon issue whether defendant was unduly influenced and improperly persuaded by the public defender to enter a plea of guilty was conflicting, the trial court's finding thereon was conclusive.

William N. Byrd, Brawley, for appellant.

Edmund G. Brown, Atty. Gen. and Frank Richards Asst. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying an application for a writ of error coram nobis.

In July, 1947, the defendant pleaded guilty to a charge of murder in the second degree, being represented by the public defender. At the time judgment was pronounced it was brought out that during 1943 he had spent three months in a mental institution in Texas, and that during the intervening years he had served a term in Folsom prison. The court included in the judgment a statement which reads: "Should the adult authority deem fit, it is the recommendation of the court that the defendant be placed under the care and supervision of the prison doctors and psychiatrists."

In June, 1951, the defendant sought by this writ to have the judgment set aside on the ground that the court was without jurisdiction to enter it, contending that he had been denied the aid of counsel at his preliminary examination; that the court had failed to take evidence as to the degree of the offense; that the court had doubt as to his sanity at the time he pleaded guilty; and that the public defender had unduly and improperly influenced him to enter a plea of guilty. The court appointed another attorney to represent the defendant on his application for this writ, the matter was submitted on affidavits and arguments of counsel, and the application was denied. His attorney on this appeal has acted at the request of this court.

[1, 2] There is no merit in the contention that the judgment is void because the defendant was not informed of his right to counsel at the preliminary hearing. It appears that the justice's docket stated that at that time the defendant was informed of his legal rights. If any deficiency existed, the matter could have been raised by moving to set aside the information or by other appropriate and timely action. People v. Knight, 106 Cal.App.2d 312, 234 P.2d 992; People v. Gilliam, 39 Cal.2d 235, 246 P.2d 31. Moreover, an application for this writ must be seasonably made, People v.

Smith, 108 Cal.App.2d 696, 239 P.2d 466, and no explanation is offered for the delay of four years which here occurred.

[3] The defendant pleaded guilty to murder in the second degree. If it be assumed that the court should also have taken evidence on the degree of the offense, its failure to do so was a mere irregularity which would not invalidate the judgment. In re Stroff, 132 Cal.App. 351, 22 P.2d 770; People v. Kerr, 113 Cal.App.2d 90, 247 P.2d 927.

[4] It is also contended that the court was without jurisdiction to pronounce judgment, since the court had serious doubts as to the defendant's sanity at that time. It is argued that such doubt is disclosed by the fact that the court included in its judgment a recommendation that the defendant be placed in the care of psychiatrists; and that under section 1368 of the Penal Code it was the court's duty to have ordered a trial on the question of his sanity. Nothing appears other than that it had been argued to the court that the defendant had spent three months in a mental institution some four years before. Subsequently, he had served a prison term in this state. At the time sentence was pronounced he intelligently answered the questions asked of him. The court's recommendation for psychiatric treatment, in the event the adult authority should deem this to be fit, was not sufficient to show that the court entertained a doubt as to the defendant's sanity, in a legal sense, and there is nothing in the record which would in any way indicate that such a situation existed.

[5] It is suggested, but not argued, that the defendant was unduly influenced and improperly persuaded by the public defender to enter a plea of guilty. The only thing that appears in the record is that the defendant's counsel admitted at the hearing that the evidence on this matter was conflicting. Under such circumstances, the trial court's finding is conclusive on this court. People v. Parry, 105 Cal.App.2d 319, 232 P.2d 899.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

COUGHLIN et ux. v. BLAIR et al.*

Civ. 19205.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1953.

Hearing Granted April 8, 1953.

Action by purchasers against vendor and her husband, who had signed purchase agreement on behalf of his wife opposite word "agent," for breach of agreement to install certain facilities. The Superior Court, Los Angeles County, Warne, Judge assigned, entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that judgment awarding damages for loss in market value and awarding damages for loss of use of property because of such breach was objectionable in that it allowed double recovery.

Reversed.

1. Damages ⇐108

Where injury to realty has occurred through a condition which is easily subject to correction, depreciation in market value is not a proper measure of damage.

2. Vendor and Purchaser ⇐351(7)

In action by purchasers against vendor for breach of agreement to install utilities and pave road to property involved, in absence of finding that the condition complained of which affected value of the property was a permanent one, depreciation in market value was not a proper basis for award of damages.

3. Vendor and Purchaser ⇐351(7)

Judgment awarding purchasers damages for loss in market value caused by vendor's failure to install utilities and pave road as agreed upon and awarding damages for loss of use was objectionable in that it allowed double recovery.

4. Vendor and Purchaser ⇐351(7)

Purchasers of land had election to sue for damages on theory that their property had been permanently injured by vendor's failure to install utilities and pave road as agreed upon or to bring one or perhaps more actions for damages treating the injury to be of a temporary character but they could not do both.

* Subsequent opinion 262 P.2d 305.

5. Damages ⇐23

Compensation may be recovered for detriment due to special circumstances which were known to contracting parties, if it appears that at time of contract it was within reasonable contemplation of the parties that such detriment would probably result from a breach of the contract. Civ. Code, § 3300.

6. Vendor and Purchaser ⇐351(7)

Before award of damages could be made for increased cost of construction of house on lot purchased, it would have to appear that it was within the reasonable contemplation of the parties that such detriment would probably result from vendor's breach of agreement to install utilities and pave road to the lot in question.

7. Husband and Wife ⇐232(3)

In action by purchasers against lot owner and her husband, who had signed purchase agreement on her behalf opposite the word "agent", for breach of agreement to install certain facilities, evidence supported finding that the husband and the purchasers understood that the husband in signing the contract was pledging himself to fulfill the obligations of the vendor.

8. Vendor and Purchaser ⇐348

Where person who signed realty purchaser agreement on behalf of owner of the property opposite the word "agent" was in fact a principal in the transaction, purchasers' joining such person as a defendant in action against vendor for breach of agreement to install certain facilities did not release vendor and her successor from liability.

Charles Reagh, San Francisco, for appellants.

Krystal & Paradise, Robert E. Paradise, Los Angeles, for respondent.

SHINN, Presiding Justice.

On May 30, 1948, Louise Blair was the owner of a building lot of irregular shape containing one and a fraction acres on a hilltop in the Hollywood hills. The lot was a portion of a much larger tract owned by Louise Blair which she intended to subdivide into lots, to be known as Tract 15175, in which the parcel in question would be known as lot 7. On that day she agreed to sell plaintiffs the lot, together with a nonexclusive easement for ingress and egress over lands lying between the lot and a public road (Nichols Canyon Road) a distance of about 3725 feet. The agreement of sale disclosed on its face that Louise Blair was the seller and it was signed on her behalf by John H. Blair who subscribed his name opposite the word "Agent." Plaintiffs subscribed their respective names upon separate lines opposite which appeared the word "Purchaser." Mrs. Blair did not sign the agreement. The writing read, in part, as follows: "Gas & pavement & elec. to be put at no cost to buyer within 1 yr. from above date. Also to be surveyed by John H. Blair at once." Plaintiffs paid $1,000 down and $13,000 through escrow with Mrs. Blair, to which Mr. Blair was not a party, and they received a deed from Mrs. Blair. Mrs. Blair died March 10, 1951. In the preceding December she had deeded to Marion Blair Conger real property of which lot 7 was a part, and Mrs. Conger agreed in writing to assume Mrs. Blair's obligations to plaintiffs arising out of the agreement of sale. Mrs. Conger was substituted as a party defendant as the successor in interest of Mrs. Blair. One year after the date of the agreement the paving had not been done and neither gas nor electricity had been brought to lot 7. The present action is for damages for breach of the agreement to pave the road and install the utilities. On the date of the agreement there was an unpaved dirt road leading from Nichols Canyon Road to the lot and it was over this road that the easement extended. On May 30, 1949, gas and electric utilities had not been installed over any part of this dirt road, nor had any part of the road been paved. Plaintiffs instituted this action May 24, 1950. By the time of trial, April, 1951, about 1200 feet of the road commencing at Nichols Canyon Road had been paved but there remained approximately 2525 feet of the road leading to the lot which had only temporary pavement consisting of gravel

rolled in hot oil. A gas line had been brought one-third of the way to lot 7. Electric service had been brought to the lot. In addition to the facts above related the complaint alleged that Mr. and Mrs. Blair, then named as defendants, knew that plaintiffs intended to build a residence on the lot within one year, provided the paving was installed and the utilities brought to the lot. It was alleged that plaintiffs became indebted to an architect in the sum of $1,600 for preparation of plans and specifications for construction of a $40,000 residence and that plaintiffs were living in a home which they owned in Beverly Hills, which they contemplated selling to help finance the new residence. By their complaint they sought damages of $31,800. They alleged that the lot without the improvements was worth $2,500 and with the improvements $14,000 and on this theory of recovery they claimed damages of $11,500. They alleged that the reasonable rental value of their new home would have been $600 per month and upon this account they claimed $7,200 as damages for the year immediately following the breach of the agreement, namely, to May 30, 1950. They alleged that their residence in Beverly Hills had decreased in value during the same period in the amount of $7,500, that the cost of building a $40,000 residence had increased $4,000, and for these two items they sought $11,500 as damages. The defendants were not accused of having wilfully breached their contract and no punitive damages were sought.

The court found that both John H. Blair and Louise Blair were the sellers of the property and agreed to do the paving and install the utilities. It was also found that Marion Blair Conger, by stipulation filed in the case, had assumed the obligations to plaintiffs of Louise Blair. Judgment was rendered against John H. Blair and Marion Blair Conger for the sum of $15,550.37 with interest from November 9, 1951. This total was made up of the following items of damage, namely: $9,500 as the difference between the market value of the lot without paving or utilities and its value with the paving and utilities *as of May 30, 1949;* $3,750 as the increase in the cost at the time of trial of building a house of 1,500 square feet above the cost of such a house on May 30, 1949; $2,300.37 as the value of the loss of use of $14,000 from and after May 30, 1949 to the date of trial.

We cannot discern in the findings the theory upon which the award of $9,500 was made, nor any factual basis for it. No invariable rule can be formulated which will determine whether diminution of market value is a proper basis for the award of damages. There are too many and too widely different situations to permit of such a rule. The essential facts of each case must be established before it can be known whether loss in market value, or some other consideration is the proper measure of damage. It is clear, however, that whenever loss in market value is used it must appear that the condition which caused the injury is, in a practical view, a permanent one. No facts were found which would meet this test.

As we understand the theory of plaintiffs it is immaterial whether the improvements will probably be installed by defendants, and the full value of the lot restored thereby. This theory has no support in authority nor can we subscribe to it. The complaint did not allege, nor did the court find, that defendants could not or would not install the paving and the utilities. Water had already been brought to the property. As the time of the trial temporary pavement was in, electricity had been brought to the lot, a gas line had been laid part way and was then being extended. Mr. Blair testified without contradiction that he was financially able to complete the improvements and there was much evidence that he, and Clarence W. Coughlin as well, had been dealing with utility companies to hasten the installations. All that remained to be done was to bring the gas line the remainder of the way and to add permanent paving to the temporary paving.

Mr. and Mrs. Blair acquired a large tract of hill land in 1923. Much of it has been subdivided and a considerable part of it remains to be disposed of. A map of a proposed subdivision in which lot 7 is located had been prepared before the sale

to plaintiffs. We have been referred to no evidence, and find none, which indicates that the condition of which plaintiffs complain is a permanent one or that their property has suffered a permanent depreciation in value. Neither the record nor the brief of respondent discloses any claim made that the improvements contracted for will not be installed. Upon the contrary, plaintiffs say in their brief: "Any further installation of utilities or pavement which might be performed by appellants after the Judgment, promoted by their self-interest in the sale of other lots in the area or for other reasons, would be entirely voluntary on their part." It thus appears that plaintiffs do not see that they would gain unduly by having both the improvements and full damages on the theory that they would never get them. We cannot agree.

[1, 2] Where injury to real property has occurred through a condition which is easily subject to correction, depreciation in the market value is not a proper measure of damage unless the condition is found to be a permanent one. A finding on that issue was imperative. In Spaulding v. Cameron, 38 Cal.2d 265, 239 P.2d 625, the damaging condition was the existence of a dirt fill which had to some extent invaded plaintiff's property and threatened further damage unless it was removed or confined. The trial court had not determined that the condition could not or would not be corrected but nevertheless granted large damages consisting of the depreciation in market value which would be suffered if the condition should not be corrected. It also ordered defendant to remedy the condition. In reversing the judgment the court held, (1) unless the condition which affected the value of plaintiff's property was a permanent one depreciation in market value was not a proper basis for an award of damages, and (2) the judgment for damages in the amount of the claimed depreciation in market value *and* an injunction requiring the defendant to correct the condition in order to prevent permanent injury allowed a double recovery. Such is the case here. As in the Spaulding case something could be done by defendants to correct a condition that will permanently depreciate the market value of plaintiffs' property if it is not corrected. The trial court did not find, and it does not appear as a matter of law, that the property of plaintiffs will not be supplied with the facilities which defendants agreed to provide. Plaintiffs' claim of damage consisting of loss in market value cannot be adjudicated until it is determined whether the condition which affects the market value at present is a permanent one. It is a factual question whether the depreciation in value is permanent.

[3] In another respect the holding in Spaulding v. Cameron is applicable. The present judgment allows a double recovery. When plaintiffs sued for the loss in market value they thereby accepted the absence of the paving, gas and electricity as a permanent condition, and when damages were allowed as of the date of the breach of defendants' obligation, the award was a substitute for performance by defendants. They were under no duty to pay damages on the theory they would never put in the improvements and also a duty to put them in at some future time. Plaintiffs say that if they should be installed by defendants after the date of the judgment the action would be "entirely voluntary on their part." In other words, defendants would not be required to install them if they should pay the damages of $9,500. We agree. But the judgment does not follow that pattern. It awards damages upon conflicting and inconsistent theories. Notwithstanding the allowance of full compensation as damage for failure to make the improvements, the judgment holds defendants to a continuing duty to make them, in that it also awards damages to the time of trial for loss of use due to the absence of the facilities. Thus, if defendants should satisfy the judgment of $9,500 for loss in market value, they would still be under a continuing duty to pay for loss of use of the property until they did what was necessary to make it usable. This type of compulsion would operate upon them as effectively as would an injunction which required them to furnish the facilities.

[4] For the reasons stated in Spaulding v. Cameron, supra, plaintiffs had an election to sue for damages on the theory that

their property had been permanently injured or to bring one or perhaps more actions for damages, treating the injury to be of a temporary character. They could not do both, as they have attempted to do. Their position cannot be justified by merely calling the award for loss in market value general damages, and for loss of use special damages.

We cannot agree with defendants that their sole liability is for loss of use of the land while plaintiffs are deprived of the facilities. Under proper circumstances increased building cost above the cost at the time of the breach would be recoverable as damages proximately resulting from the breach.

[5, 6] Plaintiffs were entitled to recover an amount which would compensate them for all the detriment proximately caused by defendants' breach, or which, in the ordinary course of things, would be likely to result therefrom. Civ.Code, § 3300. Compensation may be recovered for detriment due to special circumstances which were known to the parties, if it appears that at the time of the contract it was within the reasonable contemplation of the parties that such detriment would probably result from a breach of the contract. Williston on Contracts [Rev.Ed.] § 1356, p. 3805; 25 C.J.S. Damages, § 24, p. 484; Overstreet v. Merritt, 186 Cal. 494, 200 P. 11. The court allowed $3,750 as the increased cost of a house having 1,500 square feet upon the theory that this would be a "minimum" house under defendants' proposed building restrictions. The correctness of this theory is not here in question. Defendants complain only of any allowance for increased cost. Before any such award may be made facts would have to be established which would call for the application of the rule of special damages above stated. Plaintiffs, not having appealed, accept the "minimum" house theory.

The allowance for loss of use was in the amount of interest at seven per cent upon plaintiffs' investment in the lot. Since neither party questions loss of use of the money as a proper measure of damages for loss of use of the property, we express no opinion on that point.

[7] Defendants assign error in awarding judgment against Mr. Blair for the reason that he acted only as agent for his wife and assumed no personal responsibility. We think there was no error. It was a question of fact for the trial court whether in signing the agreement Mr. Blair made himself a party to the contract. It was a question of the intention of the parties to be derived not alone from the writing itself, but also from the express and implied representation of Mr. Blair considered with the other circumstances surrounding the transaction. There was ample evidence to support the finding that both Mr. Blair and the plaintiffs understood that the former in signing the contract of sale was pledging himself to fulfill the obligations of the seller. He was the subdivider and conducted all the business. He signed the agreement; Mrs. Blair did not. He was not a broker nor did he execute the contract as attorney in fact for his wife. It cannot be held as a matter of law that Mr. Blair did not assume an obligation to have the road paved and the utilities installed.

[8] During the trial Mrs. Conger entered into a stipulation with plaintiffs under which she was substituted for Mrs. Blair as a defendant and assumed the latter's obligations under the contract. It is contended on her behalf that judgment should not have been entered against her for the reason that she only assumed to pay and discharge "any and all liabilities or obligations claimed or asserted by plaintiffs against defendants in the above entitled action, if and as adjudicated in this action." Her point seems to be that Mr. Blair acted merely as agent and when plaintiffs joined him as a defendant they thereby released Mrs. Blair, and consequently appellant Conger, as her successor. Therefore, it is argued, the judgment should have been against Mr. Blair alone. One difficulty with the argument is that the court has found that Mr. Blair was a principal in the transaction, which eliminates the question of election. As we have seen, this finding has support in the evidence.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

115 Cal.App.2d 771

METZENBAUM v. METZENBAUM et al.
(three cases).
Civ. 19349.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1953.

Rehearing Denied March 2, 1953.

Hearing Denied April 2, 1953.

Three actions, consolidated for trial, to set aside, as fraudulent, a defendant's conveyance of his interest in partnership property to a third person. The Superior Court, Los Angeles County, J. A. Smith, J., rendered judgment for plaintiff and such defendant appealed. Plaintiff moved to dismiss appeal. The District Court of Appeal, Patrosso, J. pro tem., held that defendant's letter to bank stating that judgment of court voided his transfer to third person and directing that property be set up in defendant's name was not waiver of right of appeal by acceptance of benefits of judgment where judgment merely voided transfer with respect to plaintiff.

Motion to dismiss denied.

1. Appeal and Error ⇐161

Defendant's letter to bank stating that judgment of court voided his assignment of his interest in property to third person and directing that property be set up in defendant's name was not waiver of right of appeal by acceptance of benefits of judgment where judgment merely voided transfer with respect to plaintiff.

2. Fraudulent Conveyances ⇐315(1)

Although judgment determined that defendant's purported assignment to third person of his interest in mineral royalty was fraudulent as to creditor, it did not affect validity of assignment as between parties.

3. Attorney and Client ⇐76(1)

Even if defendant's letter to bank written before defendant's counsel obtained extension of time for payment of reporter's fees for preparation of transcript for use on appeal expressed intent to discharge the attorney, it could not effectuate such intent and did not terminate attorney's authority to perfect appeal. Code Civ.Proc. §§ 284, 285.

Newell & Chester, Los Angeles, for appellants.

Milton A. Krug, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Motion by respondent to dismiss appeal of defendant Walter Metzenbaum.

This is but another chapter in the prolonged and bitter litigation between these parties. See Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 195 P.2d 492; Metzenbaum v. Metzenbaum, 96 Cal.App.2d 197, 214 P.2d 603; and Metzenbaum v. Metzenbaum, Cal.App., 252 P.2d 31.

The present appeal which is sought to be dismissed is from the judgment rendered in three separate actions instituted by the plaintiff which were consolidated for trial and which were disposed of by a single set of findings and judgment.

In the first of these, Walter Metzenbaum and Fanchon Metzenbaum were named as defendants and plaintiff thereby sought recovery of damages for the malicious prosecution of a civil action. The second action against the same defendants was for the malicious prosecution of a different civil action, and the third was directed against Walter Metzenbaum and Rose Metzenbaum to set aside as fraudulent a conveyance by Walter to Rose of all of the former's right, title and interest in and to a partnership formerly existing between plaintiff and Walter then in the process of liquidation, including Walter's interest as such former partner in two certain oil royalties known as the Oulton and Surfluh or Rozier royalties. The trial court found the facts generally as alleged in plaintiff's complaints; that the actions in question were maliciously prosecuted; that as a result thereof plaintiff had sustained damage in the sum of $20,000, and that the conveyance in question by Walter to Rose was fraudulent and void as "against plaintiff and as against the plaintiff's claims against Walter Metzenbaum in the sum of $20,000.00", being the amount of the judgment appealed from.

On March 6, 1952, notice of appeal from the judgment was filed on behalf of defend-

ant Walter and Rose by the firm of Newell and Chester who at all times during the pendency of the litigation in the court below were attorneys of record for said defendants and who appear for them here. On March 7, said defendants, through the same counsel, filed a notice requesting preparation of reporter's and clerk's transcripts for use upon the appeal. Thereafter, on April 15, upon an ex parte application therefor by the same counsel, an order was obtained extending the time for the payment of the reporter's fees for the preparation of the transcript for a period of 30 days, and on May 16, 1952, pursuant to a motion made by the same attorneys on behalf of the defendants, a further extension of 30 days was obtained for the payment of the reporter's fees. Thereafter, the reporter's transcript, which is in three volumes containing in excess of 800 pages, was prepared, duly certified and filed in this court.

The motion to dismiss is based upon two grounds: (1) that prior to the time that counsel obtained the two orders above mentioned extending the time for the payment of the fees of the reporter their authority to act for the defendant Walter Metzenbaum had been terminated, and (2) that defendant Walter Metzenbaum waived or renounced his right to appeal by reason of the fact that he "has sought to enforce a portion of the said judgment pending this appeal." We shall consider these contentions in their inverse order.

[1] The Bank of America at Fresno, California, was the escrow agent appointed to receive and disburse monthly to various parties, in proportion to their respective interests, royalties accruing to the lessors and those claiming under them from oil and gas produced and sold from the Surfluh property which has heretofore been referred to as the Surfluh or Rozier royalty. The interest therein of the former partnership of plaintiff and defendant Walter stood in the name of plaintiff alone and his one-half interest therein had been distributed to him. The remaining one-half of the partnership interest, however, was subject to a pending action in interpleader instituted by the plaintiff herein as liquidating partner against various persons who asserted an interest therein or thereto. Following the entry of the judgment in the instant action, the defendant Walter addressed a letter to the bank to which reference will hereinafter be made and it is the statements contained in this letter which plaintiff asserts constitute an attempt by Walter to enforce the judgment herein or an "acceptance of the benefits" thereof. The letter in question, dated April 3, 1952, insofar as material here, reads as follows:

"Recently a decision was rendered in the Superior Court of Los Angeles County—Judge Smith presiding—in which it was held that my conveyance of Rozier Royalty was null and void and the conveyance was set aside.

"This only refers to that portion of the Rozier Royalty set up on your books in the name of Rose Metzenbaum and to no other portion of the Rozier Royalty. It specifically does not refer to the Rozier Royalty owned by Murray Metzenbaum or by Victor Metzenbaum—it is confined to the Rozier Royalty that are heretofore conveyed to Rose Metzenbaum.

"You will therefore set up this interest and no other in your books in my name instead of in the name of Rose Metzenbaum. I am cognizant of the fact that all receipts by the partnership of myself and Murray Metzenbaum are now and have for some time been going to Murray Metzenbaum as liquidating partner.

"Legal steps will now be taken to close the estate so that further distributions of receipts will be made to myself and others entitled."

At the outset we observe that we see nothing in this letter which suggests, much less states, that Walter thereby manifested his intention to waive or abandon his right to appeal from the judgment rendered against him in the instant case. We likewise fail to read therein an acceptance of any "benefits" of the judgment by Walter, and are at a complete loss to understand how it can be construed as attempt upon his part to enforce the judgment appealed from.

[2] The letter merely purports to set forth his understanding of the judgment rendered against him, and it is apparent

that he was under a misconception as to the legal effect thereof. Although the judgment decreed that Walter's purported assignment to Rose of his interest in the Surfluh or Rozier royalty was fraudulent as to the plaintiff, this did not affect the validity of the assignment as between the parties thereto. 12 Cal.Jur. p. 1022, sec. 63. Therefore, despite the judgment, whatever interest in the royalty in question originally belonged to Walter was as effectively vested in Rose as though the judgment had not been rendered. How then can it be said that by requesting the bank to change the entry upon its books so as to show that Walter was the owner of the royalty rather than Rose constitutes an acceptance of any benefits under the judgment appealed from. Not only is it made to appear that Rose did not appear on the books of the bank as the owner of any interest in the royalty in question, but it is manifest that no benefits under a judgment accrue to one who makes an unfounded claim thereunder.

[3] The other ground of the motion to dismiss is even less meritorious. It is predicated in its entirety upon the letter to the bank previously referred to. In addition to the matter previously quoted therefrom, the letter proceeds to criticize counsel of record for the defendants herein by reason of their failure to successfully defend the action, and contains language which respondent construes as expressing an intent upon the part of the defendant to discharge them and appear in his own behalf. Assuming, without undertaking to decide, that the language of the letter is subject to the construction suggested, there is absolutely no showing that Walter ever made his intentions in this regard known to his attorneys. Moreover, whatever may have been his intention in this regard at the time of the addressing of the letter to the bank, he was at complete liberty thereafter to change his mind if he so desired. We hardly believe that anyone would undertake to assert that because a client addresses a letter to a third person in which he complains of the manner in which his counsel represented him in a particular case and states that he has or intends to discharge him, thereby the discharge becomes effective and the authority of the attorney terminates in the absence of any communication to this effect from the client to the attorney. Assuming, as respondent asserts, that the communication to the bank was tantamount to notice to the plaintiff because the bank as escrow holder "was agent for both parties," we do not apprehend that because a party to pending litigation states to his adversary that he intends to discharge his attorney of record therein that this without more operates as a discharge of such attorney. Section 284, Code of Civil Procedure, prescribes the method by which a party may change his attorney of record in a pending action or proceeding, and section 285 of the same code reads as follows: "When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney."

Here there is no claim that the attorneys of record for the defendants were substituted out of the case in the manner prescribed by section 284. The letter to the bank therefore was wholly ineffectual to accomplish this result.

If nothing more were made to appear we would have no difficulty in concluding that the letter in question did not operate as a discharge of defendants' counsel of record herein. In addition, however, there has been filed in this court an affidavit by the defendant Walter wherein he deposes that at all times since he authorized the taking of the appeal, Newell & Chester have been and still are his attorneys and authorized to prosecute said appeal upon his behalf.

The motion to dismiss is denied.

DORAN, Acting P. J., and DRAPEAU, J., concur.

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